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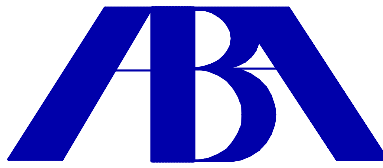
**EVALUATING FAIRNESS AND ACCURACY IN
STATE DEATH PENALTY SYSTEMS:
The Ohio Death Penalty Assessment Report**

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

"A system that takes life must first give justice."
John J. Curtin, Jr., Former ABA President

September 2007

AMERICAN BAR ASSOCIATION



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The American Bar Association Death Penalty Moratorium Implementation Project (the Project) is pleased to present this publication, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report*.

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

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EXECUTIVE SUMMARY

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

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court 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 provides a fair and accurate system for every person who faces the death penalty.

Over the course of 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 moratorium on 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 autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; 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 decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Ohio assessment, the Project has released state assessments of Alabama, Arizona, Florida, Georgia, Indiana, and Tennessee. In the future, it plans to release an additional report in Pennsylvania. 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.

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols 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: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been or is being conducted by a state-based assessment team. The teams are comprised or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) law enforcement tools and techniques; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services during trial, appeal, and state post-conviction and clemency proceedings; (6) direct appeal and the unitary appeal process; (7) state post-conviction relief proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.

The assessment findings of each team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. 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 summary of the findings and proposals of the Ohio Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Ohio Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Ohio death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

Despite the diversity of backgrounds and perspectives among the members of the Ohio Death Penalty Assessment Team, and although some members disagree with particular recommendations contained in the assessment report, the team believes that the body of recommendations as a whole would, if implemented, significantly improve Ohio's capital punishment system.

II. HIGHLIGHTS OF THE REPORT

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

To assess fairness and accuracy in Ohio's death penalty system, the Ohio Death Penalty Assessment Team¹ 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: (1) collection, preservation, and testing of DNA and other types of evidence; (2) law enforcement identifications and interrogations; (3) crime laboratories and medical examiner offices; (4) prosecutorial professionalism; (5) defense services; (6) the direct appeal process; (7) state post-conviction proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.² The Ohio Death Penalty Assessment Report devotes a chapter to each of these issues, which follow a preliminary chapter on Ohio death penalty law (for a total of 13 chapters). Each of the issue chapters begins with a discussion of the relevant law and then reaches conclusions about the extent to which the State of Ohio complies with the ABA Recommendations.

The Ohio Death Penalty Assessment Team notes that many of the problems discussed in this executive summary and in more detail throughout this report transcend the death penalty system. Additionally, it appears that the cost of a capital case far exceeds the cost of a case seeking a life sentence. The Ohio Death Penalty Assessment Team is concerned that the necessary expenditure of resources on capital cases affects the system's ability to render justice in non-capital cases and recommends that a study be conducted on this issue.

The Team has concluded that the State of Ohio fails to comply or is only in partial compliance with many of these recommendations and that many of these shortcomings are substantial. More specifically, the Team is convinced that there is a need to improve the fairness and accuracy in Ohio's death penalty system. The next section highlights the most pertinent findings of the Team and is followed by a summary of its recommendations and observations.

B. *Areas for Reform*

The Ohio Death Penalty Assessment Team has identified a number of areas in which Ohio's death penalty system falls short in the effort to afford every capital defendant fair and accurate procedures. While we have identified a series of individual problems within Ohio's death penalty system, we caution that their harms are cumulative. The capital system has many interconnected moving parts; problems in one area can undermine

¹ The membership of the Ohio Death Penalty Assessment Team is included *infra* on pp. 3-5 of the Ohio Death Penalty Assessment Report.

² This report is not intended to cover all aspects of Ohio's capital punishment system and, as a result, it does not address a number of important issues.

sound procedures in others. With that in mind, the Ohio Death Penalty Assessment Team views the following problem areas as most in need of reform:³

- ***Inadequate Procedures to Protect the Innocent*** (see Chapters 2, 3, and 4) – Since 1973, the State of Ohio has exonerated five death row inmates and at least one additional person with strong claims of innocence remains on death row. Despite these exonerations, the State of Ohio has not implemented a number of requirements that would make the conviction of an innocent person much less likely, including requiring the preservation of biological evidence for as long as the defendant remains incarcerated, requiring that crime laboratories and law enforcement agencies be certified by nationally recognized certification organizations, requiring the audio or videotaping of all interrogations in potentially capital cases, and implementing lineup procedures that protect against incorrect eyewitness identifications.
- ***Inadequate Access to Experts and Investigators*** (see Chapter 6) – Access to proper expert and investigative resources is crucial in capital cases, but many capital defendants in Ohio are denied these necessary resources.
- ***Inadequate Qualification Standards for Defense Counsel*** (see Chapter 6 and 8) – Although the State of Ohio provides indigent defendants with counsel at trial, on direct appeal, and in state post-conviction proceedings, the State falls short of the requirements set out in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* for trial and appellate attorneys. In fact, while the State of Ohio requires counsel to be certified to represent indigent death row inmates in post-conviction proceedings, it does not set forth any requirements that are specific to post-conviction representation or any other related proceedings.
- ***Insufficient Compensation for Defense Counsel Representing Indigent Capital Defendants and Death-Row Inmates*** (see Chapters 6 and 8) – In at least some instances, attorneys handling capital cases and appeals are not fully compensated at a rate and for all of the necessary services commensurate with the provision of high quality legal representation. The Office of the Ohio Public Defender sets the statewide maximum hourly rate and case fee cap, but each county is authorized to and does set its own reimbursement amounts and requirements. These limits have the potential to dissuade the most experienced and qualified attorneys from taking capital cases and may preclude those attorneys who do take these cases from having the funds necessary to present a vigorous defense.
- ***Inadequate Appellate Review of Claims of Error*** (see Chapter 7) – Appellate review of claims of error are vital to a properly functioning capital system, yet the State of Ohio maintains an overly strict application of waiver standards, overuses the harmless error standard of review, and engages in summary review of issues presented to the court.
- ***Lack of Meaningful Proportionality Review of Death Sentences*** (see Chapter 7) – Death sentences should be reserved for the very worst offenses and

³ The ordering of this list follows the progression of the report and is not a ranking in terms of importance.

offenders; however, the Ohio Supreme Court does not engage in a meaningful comparison of death-eligible and death-imposed cases to ensure that similar defendants who commit similar crimes are receiving proportional sentences.

- ***Virtually Nonexistent Discovery Provisions in State Post-conviction*** (see Chapter 8) –Despite the fact that prior to obtaining an evidentiary hearing in state post-conviction a death-sentenced inmate must allege all available grounds for relief and state the specific facts that support those grounds for relief, the State of Ohio denies petitioners access to the discovery procedures necessary to develop those claims. This is exacerbated by the fact that Ohio statutes and case law prohibit a petitioner from using the public records laws to obtain materials in support of post-conviction claims in spite of the fact that anyone else, including reporters, can and do obtain these documents. The impact of the lack of discovery in state post-conviction proceedings is exacerbated by the limited discovery often provided at trial.
- ***Racial Disparities in Ohio’s Capital Sentencing*** (see Chapter 12) – The Ohio Commission on Racial Fairness recognized that “[a] perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black. The implication of race in this gross disparity is not simply explained away and demands thorough examination, analysis and study until a satisfactory explanation emerges which eliminates race as the cause for these widely divergent numbers.”⁴ Despite these statements, the State of Ohio has not further studied the issue of racial bias in capital sentencing or implemented reforms designed to help eliminate the impact of race on capital sentencing. The racial and geographic disparity study conducted as part of this assessment confirms the existence of racial bias in the State of Ohio’s capital system, finding that those who kill Whites are 3.8 times more likely to receive a death sentence than those who kill Blacks.
- ***Geographic Disparities in Ohio’s Capital Sentencing*** (see Chapter 12) – The Associated Press reported that 8% of people charged with a capital crime were sentenced to death in Cuyahoga County, but 43% of those charged in Hamilton County received a death sentence. The racial and geographic disparity study conducted as part of this assessment confirms the existence of geographic bias in the State of Ohio’s capital system, finding that the chances of a death sentence in Hamilton County are 2.7 times higher than in the rest of the state, 3.7 times higher than in Cuyahoga County, and 6.2 times higher than in Franklin County.
- ***Death Sentences Imposed and Carried Out on People with Severe Mental Disability*** (see Chapter 13) – The State of Ohio has a significant number of people with severe mental disabilities on death row, some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence.

C. Ohio Death Penalty Assessment Team Recommendations

⁴ OHIO COMMISSION ON RACIAL FAIRNESS, THE REPORT OF THE OHIO COMMISSION ON RACIAL FAIRNESS 37-38 (1999), available at <http://www.sconet.state.oh.us/publications/fairness/fairness.pdf> (last visited Sept. 13, 2007).

Although a perfect system is unfortunately not possible, the following recommendations would improve Ohio's death penalty proceedings significantly. Our recommendations seek to ensure fairness at all stages, while emphasizing the importance of resolving important issues during the earliest possible stage of the process. In addition to endorsing the recommendations found throughout this report, the Ohio Death Penalty Assessment Team makes the following recommendations:⁵

- (1) The State of Ohio should require that all biological evidence be preserved in all potentially capital cases for as long as the defendant remains incarcerated.
- (2) The State of Ohio should require all law enforcement agencies to videotape the entirety of custodial interrogations in homicide cases at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of the custodial interrogation.
- (3) The State of Ohio should implement mandatory lineup procedures, utilizing national best practices, to protect against incorrect eyewitness identifications.
- (4) The Governor of Ohio should create a commission, with the power to conduct investigations, hold hearings, and test evidence, to review claims of factual innocence in capital cases. This sort of commission, which would supplement the clemency process, is necessary, in large part because current procedural defaults and inadequate lawyering have prevented claims of factual innocence from receiving full judicial consideration and the clemency process currently is not equipped to handle them.
- (5) The State of Ohio should adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal and qualification standards for capital attorneys in state post-conviction and any other related proceedings so that they are consistent with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines).
- (6) In order to protect against arbitrariness in capital sentencing, the State of Ohio should ensure proportionality in capital cases. Presently, that protection is lacking, as evidenced by the documented racial and geographic disparities in Ohio's capital system. Because proportionality is better achieved at the front end rather than the back end, the State of Ohio should develop laws and procedures to eliminate these disparities and to ensure proportionality.
- (7) The courts in the State of Ohio should more vigorously enforce the rule requiring prosecutors to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates punishment.

⁵ The ordering of this list follows the progression of the report and is not a ranking in terms of importance.

- (8) The State of Ohio should amend its statutes and rules to require the appointment of separate counsel for direct appeal and state post-conviction proceedings immediately after a judgment and sentence of death.
- (9) The State of Ohio should engage in a more thorough review of the issues presented to the court(s) in capital appeals, relax the application of waiver standards, and decrease the use of the harmless error standard of review.
- (10) The State of Ohio should amend its rules and statutes to allow a defendant to engage in discovery and develop the factual basis of his/her claims prior to filing his/her post-conviction petition. In addition, the State of Ohio should amend its laws to allow petitioners to use the public records laws to obtain materials in support of post-conviction claims.
- (11) The State of Ohio should create a publicly accessible database on all potentially death-eligible murder cases. Relevant information on all death-eligible cases should be included in the database and specifically provided to prosecutors to assist them in making informed charging decisions and the Ohio Supreme Court for use in ensuring proportionality.
- (12) To ensure that death is imposed only for the very worst offenses and upon the very worst offenders, the Ohio Supreme Court should employ a more searching sentencing review in capital cases. This review should consider not only other death penalty cases, but also those cases in which the death penalty could have been sought or was sought and not imposed.
- (13) In light of the limited study conducted as a part of this Assessment that shows these problems exist, the State of Ohio should conduct and release a comprehensive study to determine the existence or non-existence of unacceptable disparities- racial, socio-economic, geographic, or otherwise - in its death penalty system and provide a mechanism for ongoing study of these factors.
- (14) The State of Ohio should adopt a law or rule excluding individuals with serious mental disorders other than mental retardation from being sentenced to death and/or executed.

Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Ohio, our research establishes that at this point in time, the State of Ohio cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Basic notions of fairness require that all participants in the criminal justice system ensure that the ultimate penalty of death is reserved for only the very worst offenses and defendants. It is therefore the conclusion of the members of the Ohio Death Penalty Assessment Team⁶ that the State of Ohio should impose a temporary suspension of executions until such time as the State is able to appropriately address the issues and recommendations throughout this Report, and in particular the Executive Summary.

III. SUMMARY OF THE REPORT

⁶ Judge Michael Merz and Geoffrey Mearns abstained from voting on whether a temporary suspension of executions should be imposed or not.

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

In this chapter, we examined the demographics of Ohio’s death row, the statutory evolution of Ohio’s death penalty scheme, and the progression of an ordinary death penalty case through Ohio’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, we examined Ohio’s laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence, and we assessed whether Ohio complies with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence.

A summary of Ohio’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.⁷

⁷ 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.

Collection, Preservation, and Testing of DNA and Other Types of Evidence						
Compliance		<i>In Compliance</i>	<i>Partially in Compliance</i> ⁸	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i> ⁹	<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			
Recommendation #4: Law enforcement agencies should provide training and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.			X			
Recommendation #5: The state should ensure that adequate opportunity exists for citizens and investigative personnel to report misconduct in investigations.					X	
Recommendation #6: The state should provide adequate funding to ensure the proper preservation and testing of biological evidence.					X	

The State of Ohio does not statutorily require the preservation of biological evidence, except in the limited circumstance that a post-conviction DNA test has been requested and granted. In that situation, the samples must be preserved during the death-sentenced inmate’s incarceration and for at least twenty-four months after his/her execution. Despite this limited exception, biological evidence could be destroyed before a post-conviction motion requesting DNA testing has been filed and granted or after such a motion requesting testing has been denied.

While the State of Ohio does not require the preservation of all physical evidence for the entire period of incarceration, it does allow defendants to (1) obtain physical evidence for DNA testing during pre-trial discovery; and (2) seek post-conviction DNA testing. However, strict procedural requirements and various restrictions have the potential to

⁸ Given that a majority of the ABA’s recommendations are composed of several parts, we used the term “partially in compliance” to refer to instances in which the State of Ohio meets a portion, but not all, of the recommendation. This definition applies to all subsequent charts contained in this Executive Summary.

⁹ In this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Ohio 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.

preclude inmates from successfully filing and obtaining a hearing on a post-conviction motion for DNA testing and from receiving post-conviction DNA testing. For example, the court may reject an application for testing if it finds that the applicant does not meet one or more of the requirements for accepting an application, including if the court finds that there is not a scientifically sufficient amount of biological material or the biological material is so degraded as to make DNA testing impracticable or the biological sample is so minute that performing DNA testing would create a risk of consuming the whole sample.

Even in cases in which DNA testing is granted, the forensic services offered by Ohio's Bureau of Criminal Identification and Investigation (BCI) are somewhat limited. For example, BCI crime laboratories do not perform the more discriminating and exacting methods of DNA testing, such as Mitochondrial DNA testing of hair without roots or Y-Chromosome STR testing, both of which are especially effective for obtaining conclusive DNA profiles from old, degraded biological samples.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vi of the Executive Summary, that a law be passed requiring that all biological evidence be preserved in all potentially capital cases for as long as the defendant remains incarcerated.

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, we reviewed Ohio'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 Ohio's overall compliance with the ABA's policies on law enforcement identifications and interrogations is illustrated in the following chart.

Law Enforcement Identifications and Interrogations					
<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in 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 ABA's Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures.				X	
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, and training on non-suggestive techniques for interviewing witnesses.				X	
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.				X	
Recommendation #4: Law enforcement agencies should videotape the entirety of custodial interrogations at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations		X			
Recommendation #5: The state should ensure adequate funding to ensure 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 pre-trial 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			

We commend the State of Ohio for taking certain measures that likely reduce the risk of inaccurate eyewitness identifications and false confessions. For example, law enforcement officers in Ohio are required to complete a basic training course of 558 hours, which includes instruction on interviews and interrogations, as well as on line-ups. Furthermore, courts have the discretion to admit expert testimony regarding the accuracy of eyewitness identifications.

In addition to these statewide measures, at least nineteen law enforcement agencies in Ohio regularly record some or all custodial interrogations in an effort to protect against false or coerced confessions.

Despite these measures, the State of Ohio does not require law enforcement agencies to adopt procedures governing identifications and interrogations. Although modern technology makes recording these important events easy and inexpensive, many police agencies do not record them.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vi of the Executive Summary, that all law enforcement agencies be required to videotape the entirety of custodial interrogation in homicide cases at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, to audiotape the entirety of the custodial interrogation. The State of Ohio should also implement mandatory lineup procedures, utilizing national best practices, to protect against incorrect eyewitness identifications.

Chapter Four: Crime Laboratories and Medical Examiner Offices

With courts' increased reliance on forensic evidence and the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the nation, the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of these laboratories and offices cannot be overstated. In this chapter, we examined these issues as they pertain to Ohio and assessed whether Ohio's laws, procedures, and practices comply with the ABA's policies on crime laboratories and medical examiner offices.

A summary of Ohio'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>Partially in 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	

Ohio law does not require crime laboratories to be accredited, but the Ohio Bureau of Criminal Identification and Investigation (BCI) and some local crime laboratories voluntarily have obtained accreditation. As a prerequisite for accreditation, the accreditation program requires laboratories to take certain measures to ensure the validity, reliability, and timely analysis of forensic evidence.

Despite these measures, however, problems have been discovered in at least one Ohio crime laboratory. Joseph Serowik, a forensic analyst at the Cleveland Police Department, was fired from the police department after it was revealed that he testified falsely about hair analysis that he performed in a criminal case which led to a rape conviction and the thirteen-year sentence of an innocent defendant. In addition to false testimony provided by Serowik, he “was allowed to conduct hair examinations without proper education, training, supervision, or protocols,” and Serowik’s supervisor had no expertise in hair analysis or serology.

Serowik’s flawed techniques raised questions about the validity of his testimony in over 100 cases in which he testified since 1987. As a condition of the lawsuit settlement brought by Michael Green, who was wrongfully convicted due to Serowik’s testimony, the City of Cleveland agreed to review the work performed by Serowik and his colleagues from 1987 through 2004. As of September 2007, the audit of the Cleveland Police Department’s practices has resulted in a request for two new murder trials for defendants whose convictions were based on faulty testimony. Furthermore, the police laboratory now sends items for DNA testing to the BCI, rather than conducting such testing in-house. The full report of the audit, which began in 2004, has not yet been released. The fact that the Cleveland Police forensic laboratory is not accredited by any nationally recognized accreditation organization underscores the need for accreditation and procedural transparency by crime laboratories in the State.

Like crime laboratories, the State of Ohio does not require county coroner’s offices to receive accreditation, although the Montgomery County Coroner Office in Dayton, Ohio; the Hamilton County Coroner Office in Cincinnati, Ohio; and the Summit County

Medical Examiner's Office in Akron, Ohio all have received voluntary accreditation through the National Association of Medical Examiners (NAME) and the Office of the Cuyahoga County Coroner is accredited through the American Board of Forensic Toxicology (ABFT). In addition, all newly-elected coroners are required to receive sixteen hours of continuing education prior to commencing office and all coroners, once in office, are required to complete thirty-two hours of continuing education over the course of his/her four-year term of office.

Chapter Five: Prosecutorial Professionalism

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole 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, we examined Ohio's laws, procedures, and practices relevant to prosecutorial professionalism and assessed whether they comply with the ABA's policies on prosecutorial professionalism.

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

Prosecutorial Professionalism					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
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.				X	
Recommendation #2: Each prosecutor's office should establish procedures and policies for evaluating cases that rely on eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.				X	
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 State of Ohio does not require prosecuting attorneys' offices to establish policies on the exercise of prosecutorial discretion. We recognize, however, the State of Ohio has taken certain measures to promote the fair, efficient, and effective enforcement of criminal law, such as:

- The Ohio Supreme Court has adopted the Ohio Rules of Professional Conduct, which requires prosecutors to, among other things, disclose to the defense 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 information known to the prosecutor;

- The Ohio Supreme Court holds prosecutors responsible for disclosing not only evidence of which he/she is aware, but also favorable evidence known to others acting on the government's behalf;
- A Prosecuting Attorneys Association exists in Ohio to serve the needs of prosecutors by promoting "the study of law, the diffusion of knowledge, and the continuing education of its members."

Based on this information, the State of Ohio should, at a minimum, adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vi-vii of the Executive Summary, that the courts in the State of Ohio more vigorously enforce the rule requiring prosecutors to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates punishment.

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, as well as full and fair compensation to the lawyers who undertake capital cases and 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, we examined Ohio'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 Ohio's overall compliance with the ABA's policies on defense services is illustrated in the following chart.

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

Ohio’s indigent trial and appellate legal representation system consists of the Office of the Ohio Public Defender, single county public defender offices, joint county public defender offices, non-profit corporations, and court-appointed counsel. The work of these offices and attorneys is supported and/or overseen by the Ohio Public Defender Commission, county public defender commissions, and joint county public defender commissions. The indigent defense system used in each county is determined by the local Board of County Commissioners, although in all counties, judges have sole or primary authority to appoint counsel. State post-conviction counsel generally is provided by the statewide Ohio Public Defender’s Office. 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 the State of Ohio does not provide for counsel to be appointed in clemency proceedings, however, 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:

- The State of Ohio does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent individuals charged with or convicted of a capital felony;
- Ohio law does not contain any specific qualification or training requirements for attorneys representing death row inmates in state post-conviction or related proceedings; and

- The State of Ohio requires only twelve hours of training, professional development, and continuing legal education every two years to be eligible for appointment as a defense attorney and no training for other members of the defense team involved in capital cases; and

Based on this information, the State of Ohio should, at a minimum, adopt the Ohio Death Penalty Assessment Team's recommendations, previously discussed on page vi-vii of the Executive Summary, to:

- (1) Adopt increased attorney qualification and monitoring procedures for capital attorneys at trial and on appeal and qualification standards for capital attorneys in state post-conviction and any related proceedings so that they are consistent with the *ABA Guidelines*.
- (2) Amend its statutes and rules to require the appointment of separate counsel for direct appeal and state post-conviction proceedings immediately after a judgment and sentence of death.

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 law and to determine whether the trial court's actions during the guilt/innocence and penalty phases of the trial were improper. 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 prime method to prevent arbitrariness and bias at sentencing. In this chapter, we examined Ohio'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 Ohio's overall compliance with the ABA's policies on the direct appeal process is illustrated in the following chart.

Direct Appeal Process						
Compliance		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation				X		
<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 appeals 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 but was not.</p>				X		

The Ohio Revised Code requires the court(s) on direct appeal to “review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate.”¹⁰ In determining whether the sentence of death is appropriate, the court(s) “shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.”¹¹

Given that the State of Ohio generally limits its proportionality review to cases in which the death penalty was actually imposed, the meaningfulness of the Ohio Supreme Court’s review is questionable. While the Ohio Supreme Court has reviewed over 250 death-imposed cases since proportionality review was required, it has never vacated a death sentence on this ground.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team’s recommendation, previously discussed on page vii of the Executive Summary, to:

- (1) Ensure proportionality in capital cases. Presently, that protection is lacking, as evidenced by the documented racial and geographic disparities in Ohio’s capital system. Because proportionality is better achieved at the front end rather than the back end, the State of Ohio should develop laws and procedures to eliminate these disparities and to ensure proportionality;
- (2) Employ a more searching sentencing review in capital cases. This review should consider not only other death penalty cases, but also those cases in

¹⁰ OHIO REV. CODE § 2929.05(A) (West 2007).

¹¹ *Id.*

- which the death penalty could have been sought or was sought and not imposed;
- (3) Create a publicly accessible database on all potentially death-eligible murder cases. Relevant information on all death-eligible cases should be included in the database and specifically provided to prosecutors to assist them in making informed charging decisions and the Ohio Supreme Court for use in ensuring proportionality; and
 - (4) Engage in a more thorough review of the issues presented to the court(s) in capital appeals, relax the application of waiver standards, and decrease the use of the harmless error standard of 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 many capital defendants receive inadequate counsel at trial and on appeal, discovery in criminal trials is rather limited, and some constitutional violations are unknown or cannot be litigated at trial or on direct appeal, so that state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For this reason, 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, we examined Ohio'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.

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

State Post-Conviction Proceedings						
Recommendation	<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
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 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 de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.			X			
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			

State Post-Conviction Proceedings (Con't.)					
Compliance	In Compliance	Partially in Compliance	Not in Compliance	Insufficient Information to Determine Statewide Compliance	Not Applicable
Recommendation					
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 Ohio has adopted some laws and procedures that facilitate the adequate development and judicial consideration of post-conviction claims—for example, Ohio law requires an automatic stay of execution throughout any initial post-conviction proceedings and Ohio law provides a right to counsel for all indigent post-conviction petitioners. But some laws and procedures have the opposite effect. The State of Ohio:

- Makes appointments for post-conviction counsel only when an attorney requests that counsel be appointed. Because appointments are made only upon request, the petitioner sometimes will receive counsel before the filing of the petition or upon the granting of an evidentiary hearing and sometimes will not. Consequently, while counsel and petitioner often have an opportunity to work together to fully develop all available claims for relief and amend the petition to include all such claims, it does not appear that this happens as a matter of course;
- Provides death-sentenced inmates only 180 days to file a post-conviction motion after 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. While the inmate may amend his/her petition as a matter of right before the prosecuting attorney answers, after the state's answer is filed, the inmate may amend the petition only with leave of the court;
- Permits the post-conviction judge to simply adopt the findings of fact and conclusions of law proposed by one party to the post-conviction proceeding as its

own, which could undermine the judge's duty to exercise independent judgment in deciding cases;

- Has in place a problematic discovery process. While death-sentenced inmates are required to successfully obtain an evidentiary hearing in order to partake in post-conviction discovery, their ability to assert the well-founded post-conviction claims necessary for an evidentiary hearing is thwarted because petitioners are denied access to the discovery procedures necessary to develop those claims. This is exacerbated by the fact that Ohio statutes and case law prohibit a petitioner from using the public records laws to obtain materials in support of post-conviction claims and, if the petitioner does somehow obtain evidence in support of such claims through the public records process, these records cannot be offered as attachments in support of his/her post-conviction petition.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team's recommendation previously discussed on pages vii of the Executive Summary, that the State of Ohio amend its rules and statutes to allow a defendant to engage in discovery and develop the factual basis of his/her claims prior to submission of his/her post-conviction petition. In addition, the State should amend its law to allow petitioners to use the public records laws to obtain materials in support of post-conviction claims.

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, we reviewed Ohio's laws, procedures, and practices concerning the clemency process, including, but not limited to, the Ohio Parole Board's rules for considering and deciding petitions and inmates' access to counsel, and assessed whether they comply with the ABA's policies on clemency.

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

Clemency						
Recommendation	<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
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			
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 Ohio Constitution gives the Governor the exclusive authority to grant reprieves, commutations, and pardons for all offenses, including capital crimes, except treason and impeachment. Additionally, the Ohio Parole Board (Board) assists the Governor by making pardon, clemency, reprieve, and remission recommendations. While the Board has a set of procedures to be followed in death penalty cases, the process the Board and the Governor follow in considering clemency for death row inmates is 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 in the Ohio Rev. Code or the Department of Rehabilitation and Correction’s Death Penalty Clemency Procedure;
- Neither the Ohio Rev. Code nor the Death Penalty Clemency Procedure require or recommend that the Board consider any specific factors when assessing a death-sentenced inmate’s eligibility for clemency; and
- Nothing requires the Governor to consider the Board’s clemency recommendation and accompanying report or to consider any specific factors when assessing a death-sentenced inmate’s clemency petition.

Not only is the clemency process largely undefined, but parts of the clemency application process also are problematic. For example, the State of Ohio does not provide for the appointment of counsel to indigent inmates petitioning for clemency.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team’s recommendation previously discussed on page vi of the Executive Summary, that the Governor of Ohio create a commission, with the power to conduct investigations, hold hearings, and test evidence to review claims of factual innocence in capital cases. This sort of commission, which would supplement the clemency process, is necessary, in large part because current procedural defaults and inadequate lawyering have prevented claims of factual innocence from receiving full judicial consideration and the clemency process currently is not equipped to handle them.

Chapter Ten: Capital Jury Instructions

Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed and the “awesome responsibility” of deciding whether another person will live or die. Often, however, jury instructions are poorly written and poorly conveyed, which confuses the jury about the applicable law and the extent of their responsibilities. In this chapter, we reviewed Ohio’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 Ohio’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>Partially in 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			
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 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 #6: Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Jurisdictions should implement Model Penal Code section 210.3(1)(f), under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.			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 State of Ohio has suggested pattern jury instructions covering the sentencing phase of a capital trial. These instructions are informative: they include, for example, definitions of mitigating and aggravating circumstances. Despite this, there are still problems. For example:

- While a myriad of studies have found that jurors provided with written court instructions pose fewer questions during deliberations, express less confusion about the instructions, use less time trying to decipher the meaning of the instructions, and spend less time inappropriately applying the law, and while some sort of audio, electronic, written, or other recording of the jury instructions must be made, the State of Ohio is required to reduce jury instructions to writing only when requested by a party to the case;
- Ohio law does not require, nor do the *Ohio Criminal Jury Instructions* recommend, that the court provide to the jury an explanation of the terms, “life imprisonment without the possibility of parole,” “life imprisonment,” or “parole;”
- The State of Ohio does not require an instruction stating that the jury may impose a life sentence if the juror does not believe that the defendant should receive the death penalty, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt; and
- The Ohio Supreme Court has held that “residual” or “lingering doubt” is not a mitigating circumstance and trial courts may not instruct on it.

Chapter Eleven: Judicial Independence

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 selected, 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, we reviewed Ohio’s laws, procedures, and practices on the judicial election/appointment and decision-making processes and assessed whether they comply with the ABA’s policies on judicial independence.

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

Judicial Independence					
Compliance	<i>In Compliance</i>	<i>Partially in 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		
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; bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases; bar associations and community leaders should publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases; and purported views on the death penalty or on habeas corpus should 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 defendant receives a proper defense.				X	
Recommendation #5: A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.				X	
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases.				X	

Ohio's partially-partisan, partially-nonpartisan judicial election format for judges, combined with the high cost and increasingly political nature of judicial campaigns, has called into question the fairness of the judicial election process in Ohio for several reasons:

- The nature of the judicial election and reelection process has the potential to influence judges' decisions in death penalty cases. For example, numerous judges and judicial candidates have run advertisements touting their experience in death penalty cases, their support for the death penalty, and their being "tough on crime;" and
- The influx of money into Ohio judicial elections from parties that may come before the judicial candidate has the potential to undermine the impartiality of the judiciary. An examination of the Ohio Supreme Court by *The New York Times* found that "its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time."¹²

Chapter Twelve: Racial and Ethnic Minorities

To eliminate the impact of race in the administration of the death penalty, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices. In this chapter, we examined Ohio'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 Ohio'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						
Compliance		<i>In Compliance</i>	<i>Partially in 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 (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.			X			

¹² Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006.

Racial and Ethnic Minorities (Con't.)							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in 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 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 <i>prima facie</i> cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a <i>prima facie</i> 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 death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.				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 <i>voir dire</i> .					X		

Racial and Ethnic Minorities (Con't.)							
		<i>Compliance</i>	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation							
Recommendation #8: Jurisdictions should require jury instructions indicating that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.					X		
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		

The State of Ohio has taken some steps to explore the impact of race on Ohio's criminal justice system, but has not yet done so in a comprehensive manner.

In 1993, the Ohio Supreme Court and the Ohio Bar Association established the Ohio Commission on Racial Fairness (Commission) to (1) study "every aspect of the state court system and the legal profession to ascertain the manner in which African-Americans, Hispanics, Native Americans, and Asian-Americans are perceived and treated as parties, victims, lawyers, judges, and employees;" (2) determine "public perception of fairness or lack of fairness in the judicial system and legal profession;" and (3) make "recommendations on needed reforms and remedial programs."¹³ The Commission found that "many of Ohio's citizens, particularly its minority citizens, harbor serious reservations about the ability of Ohio's current legal system to be fair and even-handed in its treatment of all of the state's residents regardless of race"¹⁴ and was convinced that regardless of the findings contained in any empirical data it collected, recommendations were needed to address the perceptions of Ohio's citizens.

Furthermore, the Commission recognized that "[a] perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black. The

¹³ RACIAL FAIRNESS IMPLEMENTATION TASK FORCE, ACTION PLAN (2002), available at <http://www.sconet.state.oh.us/publications/fairness/Action-Plan-dev.pdf> (last visited Sept. 13, 2007).

¹⁴ *Id.* at 3.

implication of race in this gross disparity is not simply explained away and demands thorough examination, analysis and study until a satisfactory explanation emerges which eliminates race as the cause for these widely divergent numbers.”¹⁵ “Intended or not, disparate end results suggest that, when laws are drafted in such a way that they target certain minority communities for enforcement, and combine with arrest policies focusing on those same communities, and are then joined with sentencing guidelines, practices and policies that have devastating impacts on those exact same minority groups, a legitimate grievance is identified which demands redress, if fundamental fairness is to be obtained.”¹⁶

The Commission made a series of recommendations covering the entire justice system, including, but not limited to, the following:

- (1) The Supreme Court should establish an implementation task force on racial bias in the legal profession;
- (2) The implementation task force should develop an anti-racism workshop curriculum to be implemented by the Ohio Judicial College, the Ohio State Bar Association, and the Ohio Continuing Legal Education Institute as an annual workshop offered to attorneys, judges, and courthouse personnel;
- (3) The Ohio Supreme Court should require racial diversity education for jurors and for lawyers;
- (4) All groups and organizations involved in the criminal justice system should engage in a continuing process of study and discussion with the objective of identifying and eradicating race based attitudes and practices;
- (5) Statistical data as to race should be maintained in connection with sentences in all criminal cases;
- (6) Law enforcement agencies should maintain statistical data as to race in connection with all arrests;
- (7) The public defenders’ offices should be expanded and upgraded to ensure equity between the prosecutorial function and defense function; and
- (8) A Sentencing Commission should be established, as recommended by the Governor’s Committee on Prison and Jail Crowding, to research and review sentencing patterns in Ohio courts.

In 2000, the Ohio Supreme Court created the Racial Fairness Implementation Task Force (Task Force) to develop a plan to implement the recommendations of the Ohio Commission on Racial Fairness. In its 2002 final report, the Task Force noted the importance of addressing the fundamental and perceived fairness in the criminal justice system, recognizing that “[i]n order to maximize the effectiveness of the criminal justice system, it is vitally important that all participants continue to work on continuous quality improvement – to make improvements in both the fairness and the perception of fairness of the system.”¹⁷ The Task Force’s plan to implement the Commission’s recommendations included, but was not limited to, the following:

¹⁵ *Id.* at 37-38 (footnotes omitted).

¹⁶ *Id.* at 43-44 (footnotes omitted).

¹⁷ *Id.*

- (1) Two hours of anti-racism/diversity training be added to the continuing legal education requirement for judges and attorneys for each reporting cycle;
- (2) The Supreme Court facilitate research to determine whether and to what extent there is minority under-representation in Ohio state courts;
- (3) The Supreme Court of Ohio offer continuing legal education courses for lawyers and judges with the aim of eradicating race-based attitudes and practices through the justice system;
- (4) The Supreme Court of Ohio ensure that statistical data regarding race is maintained in connection with sentences in all criminal cases;
- (5) Law enforcement agencies should be encouraged to continue or begin to implement the collection of statistical data about race in connection with all arrests and stops; and
- (6) The Supreme Court of Ohio should engage a person/entity with the necessary skill and experience to design methodologies for collecting data on race at all relevant stages of the criminal justice system, and to monitor its compilation.

To date, these recommendations have not been implemented.

Neither of the State's efforts have studied the administration of the death penalty or resulted in the implementation of any remedial or preventative changes to alleviate perceived or actual racial and ethnic bias in death penalty proceedings.

Because the State of Ohio has not conducted a study designed to determine whether racial bias exists in Ohio's capital punishment system, the full extent of the issue cannot be known, nor can steps to develop new strategies to eliminate the role of race in capital sentencing be fully implemented.

Based on this information, the State of Ohio should at a minimum adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vii of the Executive Summary, to conduct and release a comprehensive study to determine the existence or non-existence of unacceptable disparities--racial, socio-economic, geographic, or otherwise--in its death penalty system, and provide a mechanism for ongoing study of these factors.

Chapter Thirteen: Mental Retardation and Mental Illness

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States 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, we reviewed Ohio'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 Ohio’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>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #1: Jurisdiction should bar the execution of individuals who have mental retardation, as defined by the American Association on Mental Retardation. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.		X			
Recommendation #2: All actors in the criminal justice system should be trained to recognize mental retardation 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 client’s mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients’ ability to assist with their defense, on the validity of their “confessions” (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skill deficiencies of a defendant who counsel believes may have mental retardation.			X		
Recommendation #4: 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				

Mental Retardation (Con't.)					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #5: The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.	X				
Recommendation #6: 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 #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against “waivers” that are the product of their mental disability.		X			

The State of Ohio does not have a statute banning the execution of mentally retarded offenders, but following the United States Supreme Court decision in *Atkins v. Virginia*, the Ohio Supreme Court confirmed, in *State v. Lott*, that Ohio courts should use the clinical definitions of mental retardation cited with approval in *Atkins* to assess whether a capital defendant was mentally retarded at the time of the offense.

Ohio comports with many of the ABA recommendations in this area, including that:

- Ohio courts adhere to the American Association on Intellectual and Developmental Disabilities (AAIDD) definition of mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18;”¹⁸
- Ohio law allows for a determination of mental retardation as a bar to execution in the pretrial stages; and
- While the burden of proof is on the defense to prove mental retardation, he/she is only required to prove mental retardation at trial by a preponderance of the evidence and in post-conviction by clear and convincing evidence.

We also reviewed Ohio’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

¹⁸ State v. Lott, 779 N.E.2d 1011, 1013-14 (Ohio 2002).

defense to the murder charge; and it can be the centerpiece of the mitigation case. Conversely, 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, tragic consequences often follow for the defendant.

A summary of Ohio’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>Partially in 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, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death-row inmates.			X			
Recommendation #2: 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.			X			
Recommendation #3: 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.				X		

Mental Illness (Con't.)						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
<p>Recommendation #4: 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.</p>			X			
<p>Recommendation #5: 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.</p>					X	
<p>Recommendation #6: 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.</p>				X		
<p>Recommendation #7: 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.</p>				X		

Mental Illness (Con't.)					
Compliance	<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation					
Recommendation #8: 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		
Recommendation #9: 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 #10: 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.			X		

Mental Illness (Con't.)						
<i>Compliance</i>		<i>In Compliance</i>	<i>Partially in Compliance</i>	<i>Not in Compliance</i>	<i>Insufficient Information to Determine Statewide Compliance</i>	<i>Not Applicable</i>
Recommendation						
<p>Recommendation #11: 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.</p>				X		
<p>Recommendation #12: 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.</p>			X			
<p>Recommendation #13: 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.</p>		X				

The State of Ohio has taken some minimal steps to protect the rights of individuals with mental disorders or disabilities by requiring or providing the education of certain actors in the criminal justice system about mental illness and by adopting certain relevant court procedures. For example, law enforcement officers receive—as part of their basic training course—sixteen hours of training on the “special needs population,” including information on the causes and symptoms of several mental illnesses, as well as how to respond to a person who the officer believes to be mentally ill. Despite this, the State of Ohio does not provide a system in which the rights of individuals with mental illness are fully protected; for example:

- The State of Ohio does not formally commute the death sentence upon a finding that the inmate is permanently incompetent to proceed on factual matters requiring the prisoner's input;
- The State of Ohio does not provide a mechanism for "next friend" petitioners to act 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. This is particularly concerning given that nearly a quarter of the individuals executed since Ohio resumed executions in 1999--seven of the twenty-six inmates executed in Ohio--waived either part or all of their post-conviction appeals and effectively "volunteered" to be executed;
- While the State of Ohio permits a court to hold a competency hearing to determine whether an inmate is competent to waive or withdraw his/her post-conviction review, there is no constitutional or statutory entitlement to competency to proceed with post-conviction relief and the petitioner need not be competent to participate. Consequently, the State of Ohio does not stay post-conviction proceedings where a death-row inmate's mental disease or defect impairs the inmate's ability or capacity to understand, communicate, or otherwise assist counsel in connection with post-conviction proceedings;
- The State of Ohio provides no statutory right to appointment of a mental health expert in post-conviction proceedings, nor does it appear that post-conviction courts use their discretion to appoint experts; and
- The State of Ohio does not require that jurors be specifically instructed to distinguish between the particular defense of insanity and the defendant's subsequent reliance on a mental disorder or disability as a mitigating factor at sentencing, nor does it have a pattern jury instruction on the administration of medication to the defendant for a mental disorder or disability.

Based on this information, the State of Ohio should adopt the Ohio Death Penalty Assessment Team's recommendation, previously discussed on page vi-vii of the Executive Summary, to adopt a law or rule excluding individuals with serious mental disorders other than mental retardation from being sentenced to death and/or executed.

INTRODUCTION

GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court 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 provides a fair and accurate system for every person who faces the death penalty.

Over the course of 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 moratorium on 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 autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Moratorium Implementation Project (the Project). The Project collects and monitors data on domestic and international death penalty developments; conducts analyses of governmental and judicial responses to death penalty administration issues; publishes periodic reports; encourages lawyers and bar associations to press for moratoriums and reforms in their jurisdictions; convenes conferences to discuss issues relevant to the death penalty; 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 decided in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and provide due process. In addition to the Ohio assessment, the Project has released state assessments of Alabama, Arizona, Florida, Georgia, Indiana, and Tennessee. In the future, it plans to release an additional report in Pennsylvania. 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.

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols 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: preservation and testing of DNA evidence, identification and interrogation procedures, crime laboratories and medical examiners, prosecutors, and the direct appeal process.

Each assessment has been or is being conducted by a state-based assessment team. The teams are comprised of or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a moratorium on executions.

The state assessment teams are responsible for collecting and analyzing various laws, rules, procedures, standards, and guidelines relating to the administration of the death penalty. In an effort to guide the teams' research, the Project created an Assessment Guide that detailed the data to be collected. The Assessment Guide includes sections on the following: (1) death-row demographics, DNA testing, and the location, testing, and preservation of biological evidence; (2) law enforcement tools and techniques; (3) crime laboratories and medical examiners; (4) prosecutors; (5) defense services during trial, appeal, and state post-conviction and clemency proceedings; (6) direct appeal and the unitary appeal process; (7) state post-conviction relief proceedings; (8) clemency; (9) jury instructions; (10) judicial independence; (11) racial and ethnic minorities; and (12) mental retardation and mental illness.

The assessment findings of each team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states can launch comprehensive self-examinations. 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 summary of the findings and proposals of the Ohio Death Penalty Assessment Team. The body of this report sets out these findings and proposals in more detail. The Project and the Ohio Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Ohio death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

MEMBERS OF THE OHIO DEATH PENALTY ASSESSMENT TEAM

Phyllis Crocker, Chair of the Ohio Assessment Team, is Associate Dean of Academic Affairs and Professor of Law at Cleveland-Marshall College of Law at Cleveland State University. She joined the faculty in 1994 and teaches civil procedure, criminal law, criminal procedure, and capital punishment and the law. In Spring 2004, she served as a Visiting Professor of Law at Northeastern School of Law. Previously, Professor Crocker spent five years as a staff attorney at the Texas Resource Center, which represents death row inmates in state and federal post-conviction litigation. She also was an associate at Hartunian, Futterman & Howard in Chicago, Illinois, where she specialized in complex federal litigation, and served as a clerk for Judge Warren J. Ferguson of the United States Court of Appeals for the Ninth Circuit. She currently serves on the Editorial Board of the *Journal of Aggression, Maltreatment and Trauma*. She also has published extensively, including: *Not to Decide is to Decide: The U.S. Supreme Court's Thirty-Year Struggle with One Case About Competency to Waive Death Penalty Appeals*, 49 *Wayne L. Rev.* 885 (2004), *Is the Death Penalty Good for Women*, 4 *Buff. Crim. L. Rev.* 917 (2001), and *Crossing the Line: Rape-Murder and the Death Penalty*, 26 *Ohio N.U. L. Rev.* 689 (2000). She received her B.A. from Yale University and her J.D. from Northeastern University School of Law.

Mark Godsey is a Professor of Law and Faculty Director of the Lois and Richard Rosenthal Institute for Justice/Ohio Innocence Project at the University of Cincinnati College of Law. In this position, Mr. Godsey is an active criminal litigator. He previously taught at Northern Kentucky University College of Law and served as the Faculty Supervisor to the Kentucky Innocence Project. Previously, he served as an Assistant United States Attorney for the Southern District of New York, practiced civil litigation and white collar criminal defense at Jones, Day, Reavis and Pogue, and clerked for Chief Judge Monroe G. McKay of the United States Court of Appeals for the Tenth Circuit. Mr. Godsey received his B.S. from Northwestern University and his J.D. from The Ohio State University College of Law.

Margery Malkin Koosed is the Aileen McMurray Trusler Professor of Law for Public Service at the University of Akron School of Law. Professor Koosed teaches criminal law, administration of criminal justice, and seminars in criminal process and capital punishment litigation. Professor Koosed previously served as Coordinator of the Appellate Review/Legal Clinical Program at the University of Akron and was a Visiting Professor at Case Western Reserve University School of Law. Her scholarly articles have included: *The Proposed Innocence Protection Act Won't - Unless it Also Curbs Mistaken Eyewitness Identifications*, 63 *Ohio St. L.J.* 263 (2002), *Averting Mistaken Executions by Adopting the Model Penal Code Exclusion of Death in the Presence of Lingering Doubt*, 21 *N. Ill. U. L. Rev.* 41 (2001), and *On Seeking and Reseeking Death in Ohio*, 46 *Clev.-Marshall L. Rev.* 268 (1998). She also has served as the coordinator for the Ohio Death Penalty Task Force, as a Commissioner on the State Public Defender Commission, as Chair of the State Public Defender Commission's Committee on Capital Defense Counsel Qualifications, as Acting Judge of the South Euclid Municipal Court, and as a member of the Executive Committee of the Association of American Law

Schools Section on Criminal Justice. Professor Koosed graduated cum laude from Miami University and received her J.D. from Case Western Reserve University.

Geoffrey S. Mearns is the Dean and a Professor at the Cleveland-Marshall College of Law at Cleveland State University. Prior to his appointment as Dean and Professor, Mr. Mearns was a partner in the Litigation Group in the Cleveland, Ohio office of Baker & Hostetler LLP. Mr. Mearns is an expert in white-collar criminal defense and heads the firm's national Business Crimes and Corporate Investigations team. Mr. Mearns was also an adjunct professor at Case Western Reserve University School of Law, where he taught a course on complex federal criminal investigations. Prior to entering private practice in 1998, he worked in the United States Department of Justice in various capacities. As Special Attorney to the United States Attorney General, he assisted with the prosecution of Terry Nichols, one of the two defendants convicted of the Oklahoma City bombing. Mr. Mearns also spent three years as First Assistant United States Attorney for the Eastern District of North Carolina and was an Assistant District Attorney in the Eastern District of New York from 1989 to 1995. While in New York, Mr. Mearns served as Chief of the Organized Crime and Racketeering Section garnering extensive trial experience in complex organized crime cases. He also served as a clerk to Judge Boyce F. Martin Jr. of the United States Court of Appeals for the Sixth Circuit. Mr. Mearns received his B.A. from Yale University and his J.D. from the University of Virginia School of Law.

Judge Michael R. Merz is the Chief Magistrate Judge of the United States District Court for the Southern District of Ohio. First appointed in 1984, he recently began serving his third term. Judge Merz has taught at the University of Dayton School of Law since 1979, where he most recently taught a course on jurisprudence. In 1976, Judge Merz was appointed to the Ohio Municipal Court where he served until 1984. Prior to his first judicial appointment, he had been a partner at Smith & Schnacke in Dayton, Ohio since 1970. He served seven years on the Ohio Supreme Court's Rules Advisory Committee, was the Sixth Circuit Trustee of the Federal Magistrate Judges Association, and was the Chair of the Ohio State Bar Association Judicial Administration Committee. Judge Merz also served as Chairman of the United Way of Greater Dayton, President of the Board of Trustees of the Dayton Public Library, and received the City of Dayton's Outstanding Service Award in 1982. Judge Merz graduated *cum laude* from Harvard University and received his J.D. from Harvard as well.

S. Adele Shank is an attorney in private practice in Columbus, Ohio. Her practice includes representation of capital defendants in trial, appeal, state post conviction, and federal habeas corpus proceedings, as well as representation of counsel in matters relating to attorney-client privilege and ethical matters that arise in the context of criminal representation, the application of international human rights standards in capital cases, and clemency. She headed the legal team that successfully defended against the Ohio Attorney General's challenge to Governor Richard F. Celeste's 1991 grants of commutation to seven death row inmates. *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513 (1995). Ms. Shank appeared before the United States Supreme Court to argue *Ohio Adult Parole Authority v. Woodard*, 140 L.Ed.2d 387 (1998), a challenge to Ohio's death

penalty clemency procedures. Ms. Shank is the author of several publications including “The Death Penalty in Ohio: Fairness, Reliability and Justice at Risk,” 63 Ohio St. L. J. 371 (2002), “Obligations to Foreigners Accused of Crime in the United States: A Failure of Enforcement,” 9 Criminal Law Forum 99 (1998/99), and “Foreigners on Texas’s Death Row and the Right of Access to a Consul,” 26 St. Mary’s L. J. 719 (1995). She was formerly General Counsel to the Ohio Public Defender. Ms. Shank received a B.A. and M.A. from Ohio State University and a J.D. from the Ohio State University College of Law.

Senator Shirley A. Smith is a first-term State Senator representing the City of Cleveland. Senator Smith is the ranking minority member on the Health, Human Services, and Aging Committee, and is a member of the Highways and Transportation, Judiciary-Criminal Justice, and State and Local Government and Veterans Affairs committees. Previously, Senator Smith served four terms as the state representative from the 10th District of Ohio. She is on the Executive Committee of the National Black Caucus of State Legislators’ Executive Committee, serves as the Secretary of the Ohio Legislative Black Caucus, and is a member of the Ohio Legislative Women’s Caucus, the National Organization of Women, Women in Government, National Black Caucus of State Legislators, and Ohio Legislative Black Caucus. Rep. Smith received her B.A. from Cleveland State University and attended the Kennedy School of Government program for Senior Executives in State and Local Government at Harvard University as a Fannie Mae Foundation Fellow.

David C. Stebbins is a private practice attorney in Columbus, Ohio concentrating on criminal defense. Mr. Stebbins has been in private practice since 1994 and, during that time, he has represented ten defendants facing the death penalty. Previously, Mr. Stebbins served as a staff attorney to the Capital Case Resource Center of Tennessee, was an adjunct faculty member at Capital University School of Law, and spent ten years as Chief Death Penalty Counsel in the Office of the Ohio Public Defender. He also served two years as Executive Director of the Ohio Resource Center, providing representation in death penalty cases that reached the federal court. Mr. Stebbins served on the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, taught legal writing at the Cleveland-Marshall College of Law at Cleveland State University, and was a clerk to Judge Thomas J. Parrino of the Ohio Eighth District Court of Appeals. Mr. Stebbins received his B.A. from Denison University, M.A. from Cleveland State University, and J.D. from Cleveland-Marshall College of Law at Cleveland State University.

Congresswoman Stephanie Tubbs Jones, now serving in her fifth term, is the first African-American woman elected to the United States House of Representatives from Ohio. Prior to being elected to Congress, Rep. Jones served as the Cuyahoga County Prosecutor in Ohio. She also served as a Common Pleas and Municipal Court Judge. She obtained her Bachelor’s degree in Sociology and Juris Doctorate from Case Western Reserve University. Congresswoman Tubbs Jones is a lifelong resident of the 11th District, which encompasses the East Side and parts of the west side of Cleveland and includes parts of twenty-two municipalities. Congresswoman Tubbs Jones is a strong

advocate for many issues and has championed wealth building and economic development, access and delivery of health care, and quality education for all children. The Congresswoman is the first black woman to chair the Standards of Official Conduct (Ethics) Committee and the first black woman to serve on the Ways and Means Committee where her subcommittees are Healthcare, Oversight, and Social Security.

Judge J. Craig Wright sits on the Ohio Court of Claims and is a former Ohio Supreme Court Justice. Previously, he was a Senior Partner at Wright, Gilbert & Lewis in Columbus, Ohio. He also served in the United States Army in Counter Intelligence. Judge Wright received a B.A. from University of Kentucky and a J.D. from Yale University.

Law Student Researchers

Cleveland State University Cleveland-Marshall College of Law

Halli Brownfield
Jessica Cardenas
Christine Flanagan
Gregory Jolivette, Jr.
Erin Kriynovich
Scott Poe
Lindsey Renninger

Ohio State University Michael E. Moritz College of Law

Sarah Exten
Sam Hamilton
Jeremy Iskin
Nate Kamotani
Ryan Muennich
Veronica Norman
Veena Reddy
Tiffany Romine
Douglas Stoll
Steven Tung

University of Cincinnati College of Law

Joe Brunner
Kelly Church
Susan Lawrence

CHAPTER ONE

AN OVERVIEW OF OHIO'S DEATH PENALTY SYSTEM

I. DEMOGRAPHICS OF OHIO'S DEATH ROW

A. *Historical Data*

After *Furman v. Georgia*¹ effectively abolished the death penalty in Ohio in 1972, the sentences of the 65 women and men on Ohio's death row were reduced to life imprisonment.² The Ohio legislature reinstated the death penalty in 1974, but the United States Supreme Court struck down the statute in 1978,³ which resulted in the reduction of 120 death row inmates' sentences to life imprisonment.⁴ Ohio's current death penalty statute was passed by the Ohio General Assembly in 1981.⁵

1. Aggravated Murder Indictments and Death Sentences from 1981 through 2005

Between 1981 and 2005, there were a total of 2,768 capital indictments from eighty-three of Ohio's eighty-eight counties.⁶ Of these capital indictments 60% came from three of Ohio's major metropolitan areas: 1042, or 37%, from Cuyahoga County (Cleveland); 485 indictments, or 17%, from Franklin County (Columbus); and 154, or 5%, from Hamilton County (Cincinnati).⁷

During the same time period, 289 capital defendants were sentenced to death in Ohio.⁸ Four counties made up over 50% of all death sentences: 57 death sentences from

¹ 408 U.S. 238 (1972) (finding the imposition of the death penalty as practiced violated the Eighth and Fourteenth Amendments of the U.S. Constitution).

² Ohio Department of Rehabilitation and Correction, Capital Punishment in Ohio, *available at* <http://www.drc.state.oh.us/Public/capital.htm> (last visited Sept. 13, 2007).

³ *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (finding that Ohio's death penalty statute did not permit the individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments).

⁴ See Ohio Department of Rehabilitation and Correction, Capital Punishment in Ohio, *available at* <http://www.drc.state.oh.us/Public/capital.htm> (last visited Sept. 13, 2007).

⁵ *Id.*; see also OHIO REV. CODE § 2929.02 (West 2007).

⁶ See Office of the Ohio Public Defender, More Information on Death Row, Capital Indictments and Dispositions 2000-2005, *available at* http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007); Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author).

⁷ See Office of the Ohio Public Defender, More Information on Death Row, Capital Indictments and Dispositions 2000-2005, *available at* http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited on Sept. 13, 2007); Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author).

⁸ See OFFICE OF THE OHIO PUBLIC DEFENDER, FORMER DEATH ROW RESIDENTS UNDER 1981 LAW (May 2, 2007) [hereinafter FORMER DEATH ROW RESIDENTS], *available at* http://www.opd.ohio.gov/dp/dp_form.pdf (last visited Sept. 13, 2007); OFFICE OF THE OHIO PUBLIC DEFENDER, NUMBER OF DEATH SENTENCES PER COUNTY (May 2, 2007) [hereinafter NUMBER OF DEATH SENTENCES], *available at* http://www.opd.ohio.gov/dp/dp_per%20county.pdf (last visited Sept. 13, 2007); OFFICE OF THE OHIO PUBLIC DEFENDER, DEATH ROW RESIDENTS BY COUNTY (May 2, 2007) [hereinafter DEATH ROW RESIDENTS], *available at* http://www.opd.ohio.gov/dp/dp_cnty.pdf (last visited Sept. 13, 2007).

Cuyahoga County (19.7%); 57 death sentences from Hamilton County (19.7%); 21 death sentences from Lucas County (7.2%); and 19 death sentences from Franklin County (6.5%).⁹

Based on the preceding figures of capital indictments in Ohio between 1981 and 2005, sentences of death were given 10.4% of the time.¹⁰ Death-sentencing rates, i.e., the percentage of capital indictments that resulted in death sentences, are 5.4% for Cuyahoga County, 3.9% for Franklin County, 37% for Hamilton County, 19% for Lucas County, and 16.6% for Summit County.¹¹

2. Race and Ethnicity of Former and Current Residents of Death row From 1981 to 2006

Of the 292 people sentenced to death in Ohio from 1981 to 2006,¹² 145, or 49.65%, were white and 147, or 50.35%, were members of a minority race or ethnic group.¹³ One hundred ninety-five of these inmates, or 66.7%, were on death row for the aggravated murder of white victims; seventy-eight death row inmates, or 30.1%, were on death row for the aggravated murder of black victims; and nine death row inmates, or 3%, were on death row for the aggravated murder of victims of more than one race.¹⁴

3. Death Row Inmates Removed from Death Row between 1981 and 2007

⁹ See FORMER DEATH ROW RESIDENTS, *supra* note 8; NUMBER OF DEATH SENTENCES, *supra* note 8; DEATH ROW RESIDENTS BY COUNTY, *supra* note 8.

¹⁰ Office of the Ohio Public Defender, Capital Indictments and Dispositions 2000-2005, *available at* http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007); FORMER DEATH ROW RESIDENTS, *supra* note 8; NUMBER OF DEATH SENTENCES, *supra* note 8; DEATH ROW RESIDENTS BY COUNTY, *supra* note 8; Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author).

¹¹ See Office of the Ohio Public Defender, Capital Indictments and Dispositions 2000-2005, *available at* http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007); FORMER DEATH ROW RESIDENTS, *supra* note 8; NUMBER OF DEATH SENTENCES, *supra* note 8; DEATH ROW RESIDENTS BY COUNTY, *supra* note 8; Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author).

¹² See FORMER DEATH ROW RESIDENTS, *supra* note 8; DEATH ROW RESIDENTS BY COUNTY, *supra* note 8. Totals from these sources indicate that there have been a total of 294 death-row inmates between 1981 and 2006, however, two inmates, Donald Craig and James T. Conway are incarcerated on death row due to two separate aggravated murder convictions each. See OHIO ATTORNEY GENERAL, 2006 CAPITAL CRIMES ANNUAL REPORT 48-49, 54-55, *available at* http://www.ag.state.oh.us/le/prosecuting/pubs/ann_rpt_capital_crimes2006.pdf (last visited Sept. 13, 2007); Ohio Department of Rehabilitation and Correction, Offender Search, *available at* <http://www.drc.state.oh.us/OffenderSearch/Search.aspx> (last visited Sept. 13, 2007).

¹³ *Id.* “Minority” includes black, latino, native-american, and “other” races and ethnicities as found on the Office of the Ohio Public Defender website. See OFFICE OF THE OHIO PUBLIC DEFENDER, DEATH PENALTY PROPORTIONALITY STATISTICS, *available at* http://www.opd.ohio.gov/dp/dp_prosta.pdf (last visited Sept. 13, 2007).

¹⁴ *Id.*

Between 1981 and March 1, 2007, one hundred and four individuals were removed from Ohio's death row.¹⁵ Of these, twenty-four were executed, nineteen died of natural causes, nine had their sentences commuted by the Governor,¹⁶ four were re-sentenced to death, eleven were re-sentenced to life imprisonment without parole, thirty-two received a life sentence or a life sentence with parole eligibility after a term of years, one sentence was voided due to improper jurisdiction, one has not yet been re-sentenced, and three were released from prison and not retried.¹⁷ Notably, in forty-three of these cases, the inmate was removed from death row and re-sentenced to something less than death.¹⁸

4. Executions in Ohio from 1981 through 2006

Despite the fact that the Ohio death penalty statute has been in place since 1981, the first execution of a death row inmate convicted under the statute did not take place until

¹⁵ OHIO ATTORNEY GENERAL, 2005 CAPITAL CRIMES ANNUAL REPORT [hereinafter AG'S 2005 CAPITAL CRIMES ANNUAL REPORT], available at http://www.ag.state.oh.us/le/prosecuting/pubs/ann_rpt_capital_crimes2005.pdf (last visited Sept. 13, 2007).

¹⁶ Eight of the nine clemencies occurred in 1991 as a result of commutations issued by Ohio Governor Richard F. Celeste who cited a "disturbing racial pattern" in death sentencing, as well as several of the defendants' mental impairments as grounds for his decisions. See Death Penalty Information Center, Clemency, available at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13#process> (last visited Sept. 13, 2007); see also JAMES W. ELLIS, MENTAL RETARDATION AND THE DEATH PENALTY: A GUIDE TO LEGISLATIVE ISSUES 24 n.75, available at <http://www.deathpenaltyinfo.org/MREllisLeg.pdf> (last visited Sept. 13, 2007) (citing concerns over four death-row inmates mental impairments as cause for clemency). Governor Celeste commuted these sentences from death to life imprisonment without the possibility of parole, and in the cases of Rosalie Grant and Beatrice Lampkin, commuted their sentences from death to life imprisonment. See also *Maurer v. Sheward*, 644 N.E.2d 369, 371 (Ohio 1994).

¹⁷ See FORMER DEATH ROW RESIDENTS, *supra* note 8; AG'S 2005 CAPITAL CRIMES ANNUAL REPORT, *supra* note 18; Ohio Department of Rehabilitation and Correction, Offender Search, available at <http://www.drc.state.oh.us/OffenderSearch/Search.aspx> (last visited on March 7, 2007). Terrell Yarbrough's conviction for aggravated murder was reversed on Jan. 19, 2005 due to lack of jurisdiction, however, the Attorney General's Annual report on Capital Crimes 2005 indicates that Yarbrough will be retried in Pennsylvania and that State will seek the death penalty. AG'S 2005 CAPITAL CRIMES ANNUAL REPORT, *supra* note 15, at 243. David Mapes' death sentence was vacated by the Ohio Appeals Court for the Eighth District; Mapes remains incarcerated on robbery charges and has not been re-sentenced as of March 7, 2007. See OFFICE OF THE OHIO PUBLIC DEFENDER, OHIO DEATH PENALTY REPORT FIRST QUARTER 2006, available at http://www.opd.ohio.gov/AArchive/dp_Reports/dp_Report_1Q_06.pdf (last visited Sept. 13, 2007); Ohio Department of Rehabilitation and Correction, Offender Search, available at <http://www.drc.state.oh.us/OffenderSearch/Search.aspx> (last visited Sept. 13, 2007).

¹⁸ Ohio Department of Rehabilitation and Correction, Offender Search, available at <http://www.drc.state.oh.us/OffenderSearch/Search.aspx> (last visited Sept. 13, 2007). Some of these cases were due to the death penalty law in force at the time, which stated that if a capital defendant's sentence was vacated for errors that occurred in the sentencing phase of his/her trial, and the defendant was sentenced prior to July 1, 1996, the defendant could not receive the death penalty at re-sentencing. This may account for a large number of death-row inmates receiving sentences of life imprisonment with parole eligibility after a term of years, or life imprisonment without parole, rather than a death sentence, upon re-sentencing. See also *State v. Penix*, 513 N.E.2d 744 (Ohio 1987) (holding that when a case is remanded to the trial court following vacation of the death sentence due to error occurring at the penalty phase of the proceeding, the trial court may not re-sentence the defendant to death); OHIO REV. CODE § 2929.06 (West 2007) (permitting the trial court to re-sentence a defendant to any of the sentences that were available at the time the offender committed the offense for offenses committed after July 1, 1996).

1999.¹⁹ From 1999 through December 2006, Ohio executed twenty-four people.²⁰ Of the twenty-four individuals, all were male, fifteen were white, and nine were black.²¹ All fifteen of the white death row inmates and four of the black death row inmates were executed for the murder of white victims.²² Five of the black death row inmates were executed for the murder of black victims.²³ No white death row inmate has been executed for the murder of a black victim.²⁴ Additionally, six of the fifteen white death row inmates were executed for the murder of more than one victim, while only two of the nine black death row inmates were executed for the murder of more than one victim.²⁵

The average age of an executed inmate was 44.5 years of age; the oldest inmate to be executed was sixty-two years of age at execution, the youngest was twenty-eight years of age at execution.²⁶ Death row inmates executed since 1999 were tried and convicted in thirteen of Ohio's eighty-eight counties.²⁷ Additionally, five of the twenty-four executed inmates were "volunteers," i.e. death-sentenced inmates who voluntarily waived their right to appeal their death sentence(s) and/or conviction(s).²⁸

B. A Current Profile of Ohio's Death Row

There are currently 188 inmates on Ohio's death row.²⁹ This number includes ninety-five black men, eighty-five white men, four Hispanic men, two Native American men,

¹⁹ Ohio Department of Rehabilitation and Correction, Ohio Executions 1999 to Present, *available at* <http://www.drc.state.oh.us/web/Executed/executed25.htm> (last visited Sept. 13, 2007).

²⁰ *Id.* From 1885 to 1963, Ohio executed 315 death-row inmates. David L. Hoeffel, *Ohio's Death Penalty: History and Current Developments*, 31 CAP. U. L. REV. 659, 659 n.1 (2003).

²¹ See Death Penalty Information Center, Searchable Database of Executions, *available at* <http://www.deathpenaltyinfo.org/executions.php> (last visited Sept. 13, 2007) (search only by "State," select "OH" in state drop-down box). This information is also confirmed by the Ohio Department of Rehabilitation and Correction, Ohio Executions 1999 to Present, *available at* <http://www.drc.state.oh.us/web/Executed/executed25.htm> (last visited Sept. 13, 2007); see also CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW U.S.A. FALL 2006, at 6 (2006) [hereinafter DEATH ROW U.S.A. FALL 2006], *available at* http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Fall_2006.pdf (last visited Sept. 13, 2007).

²² See Death Penalty Information Center, Searchable Database of Executions, *available at* <http://www.deathpenaltyinfo.org/executions.php> (last visited Sept. 13, 2007) (search only by "State," select "OH" in state drop-down box).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Ohio Department of Rehabilitation and Correction, Ohio Executions 1999 to Present, *available at* <http://www.drc.state.oh.us/web/Executed/executed25.htm> (last visited Sept. 13, 2007). Executed death-row inmates were tried and convicted in the following counties: Cuyahoga County (four); Franklin County (two); Greene County (one); Hamilton County (five); Lake County (one); Licking County (one); Lucas County (one); Mahoning County (one); Montgomery County (2); Summit County (3); Warren County (one); Wayne County (one); and Wood County (one). *Id.*

²⁸ See *id.*

²⁹ Ohio Department of Rehabilitation and Correction, Death Row Inmates, *available at* <http://www.drc.state.oh.us/Public/deathrow.htm> (last visited Sept. 13, 2007) (information current through Jan. 31, 2007). However, other sources indicated that there are currently 192 people on death row in Ohio. See, e.g., DEATH ROW U.S.A. FALL 2006, *supra* note 21, at 49-51 (information current through Oct. 1, 2006).

two Arab American men, and one white female.³⁰ The youngest person on death row in Ohio is a black male, now aged twenty-seven, who committed the aggravated murder(s) for which he was sentenced to death at age eighteen; the oldest also is a black male, now aged sixty-six, who was sixty-three years old at the time he committed the aggravated murder(s) for which he was sentenced to death.³¹

³⁰ *Id.*

³¹ *Id.*

II. THE STATUTORY EVOLUTION OF OHIO'S DEATH PENALTY SCHEME

A. *Ohio's Post-Furman Death Penalty Statute*

Soon after the United States 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 of the U.S. Constitution,³² the Ohio Supreme Court held in *State v. Leigh* that Ohio's death penalty statute, which left the penalty decision to the unguided discretion of the triers of fact, also was unconstitutional.³³

1. 1974 Amendments to Ohio's Death Penalty Statute

In December of 1972, the Ohio General Assembly responded to *Furman* and *Leigh* by passing a new death penalty statute that went into effect on January 1, 1974.³⁴ The new death penalty law amended: (1) the murder statute to delineate offenses that constituted aggravated murder;³⁵ (2) the penalties statute to authorize imposition of the death penalty and other penalties for felony convictions;³⁶ and (3) the death penalty statute to describe the sentencing procedures for capital cases and enumerate the statutory aggravating and mitigating circumstances.³⁷

a. Ohio's 1974 Murder Statute, Ohio Rev. Code § 2903.01

The 1974 murder statute prohibited acts in which a person (1) purposely, and with prior calculation and design, caused the death of another person; or (2) purposely caused the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.³⁸ The statute further provided that whoever violated the above provision was guilty of aggravated murder³⁹ and would be punished by death or imprisoned for life and could be fined an amount fixed by the court not to exceed \$25,000.⁴⁰

b. Ohio's 1974 Death Penalty Sentencing Statutes, Ohio Rev. Code § 2929.03 *et seq.*

³² 408 U.S. 238 (1972).

³³ 285 N.E.2d 333 (1972). In *Leigh*, the Ohio Supreme Court found that the only possible exception permitting imposition of the death penalty would be a conviction for the murder or attempted murder of the President or Vice-President of the United States (or a person in line of succession to the presidency) or the Governor or Lieutenant Governor of Ohio. *Id.* at 334-35.

³⁴ Hoeffel, *supra* note 20, at 663-664.

³⁵ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2903.01 (West 1974).

³⁶ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2929.02 (West 1974).

³⁷ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE §§ 2929.03, .04 (West 1974).

³⁸ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2903.01(A), (B) (West 1974).

³⁹ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2903.01(C) (West 1974).

⁴⁰ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2903.01(C) (West 1974); *see also* OHIO REV. CODE § 2929.02(A) (West 1974).

If a defendant was found guilty of aggravated murder, the 1974 statute required that his/her sentence be imposed in accordance with the standards and procedures set forth in Ohio Rev. Code §§ 2929.03 and 2929.04, governing the imposition of the death penalty on a defendant.⁴¹

In order for the defendant to be sentenced to death, at least one of the following aggravating circumstances had to be specified in the indictment and proven beyond a reasonable doubt:⁴²

- (1) The offense was the assassination of the president of the United States, the governor or lieutenant governor of the State, or a person in line of succession to or candidate for the presidency of the United States or the governor or lieutenant governor of the State, or a candidate for any of the above offices;⁴³
- (2) The offense was committed for hire;⁴⁴
- (3) The offense was committed for the purpose of escape from detention, apprehension, trial or punishment for another offense committed by the offender;⁴⁵
- (4) The offense was committed while the offender was in a detention facility;⁴⁶
- (5) The offender had previously been convicted of an offense of which the “gist” was the purposeful killing of or attempt to kill another, or the current offense was part of a course of conduct involving the purposeful killing to attempt to kill two or more persons by the offender;⁴⁷
- (6) The victim of the offense was a law enforcement officer and the offender had reasonable cause to know the victim was a law enforcement officer, or it was the offender’s specific purpose to kill a law enforcement officer;⁴⁸
- (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery or aggravated burglary.⁴⁹

The 1974 statute also provided that if any of the following mitigating circumstances were found by a preponderance of the evidence, regardless of whether one or more aggravating circumstances had been proven, the defendant could not be sentenced to death:⁵⁰

⁴¹ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972), amending OHIO REV. CODE § 2903.02(A) (West 1974).

⁴² See *Lockett v. Ohio*, 438 U.S. 586, 609-12 (1978) (citing OHIO REV. CODE § 2929.04(A) (1975)).

⁴³ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2903.04(A)(1) (West 1974).

⁴⁴ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2903.04(A)(2) (West 1974).

⁴⁵ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2903.04(A)(3) (West 1974).

⁴⁶ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2903.04(A)(4) (West 1974).

⁴⁷ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2903.04(A)(5) (West 1974).

⁴⁸ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2903.04(A)(6) (West 1974).

⁴⁹ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2929.04(A)(7) (West 1974).

⁵⁰ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2929.04 (West 1974)

- (1) The victim of the offense induced or facilitated [the murder];
- (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
- (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.⁵¹

The U.S. Supreme Court struck down the 1974 Ohio death penalty statute in *Lockett v. Ohio*,⁵² finding that the statute did not sufficiently permit the type of individualized consideration of mitigating circumstances required under the Eighth and Fourteenth Amendments of the United States Constitution.⁵³

B. Ohio's 1981 Adoption of a Revised Death Penalty Statute

As a result of *Lockett*, the Ohio legislature enacted a revised death penalty statute in 1981.⁵⁴ That statute provided that a jury or, if the defendant waived him/her right to a trial by jury, a three-judge panel, would determine whether the defendant was to be sentenced to death.⁵⁵ If the jury recommended a death sentence, the ultimate decision as to whether to impose the death penalty lay with the trial court.⁵⁶

1. 1981 Amendments to Ohio's Aggravated Murder Statute, Ohio Rev. Code § 2903.01

The 1981 aggravated murder statute prohibited the same acts proscribed in the 1974 version.⁵⁷ In addition, the General Assembly passed an amendment relating to proof of intent to commit aggravated murder which required that "no person shall be convicted of aggravated murder unless [s/]he is specifically found to have intended to cause the death of another."⁵⁸ The amendment further clarified that:

- (1) No jury in an aggravated murder case may be instructed that an offender's intent to commit murder may conclusively be inferred from that offender's participation in a common design to commit an offense--i.e. kidnapping,

⁵¹ H.B. 511, 109th Gen. Assem., Reg. Sess. (Ohio 1972); OHIO REV. CODE § 2929.04(B)(1)-(3) (West 1974).

⁵² 438 U.S. 586 (1978). These individualized considerations include the defendant's character, prior record, age, lack of specific intent to cause death, and the defendant's relatively minor part in the crime. *Id.* at 597.

⁵³ *Id.* at 597-98, 606.

⁵⁴ See S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981), amending OHIO REV. CODE §§ 2929.02-.04 (West 1981).

⁵⁵ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2945.06 (West 1981) (stating that when the defendant is charged with a crime punishable by death and the defendant waives his/her right to a trial by jury, the defendant must be tried before a three-judge panel).

⁵⁶ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2920.03(D)(3) (West 1981).

⁵⁷ See *supra* notes 38-40 and accompanying text.

⁵⁸ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2903.01(D) (West 1981).

- rape, arson, robbery, burglary or escape--that would be likely to result in the death of another person; and
- (2) If a jury in an aggravated murder case is instructed that it may infer that a defendant who commits or attempts to commit kidnapping, rape, arson, robbery, burglary or escape also intended to cause the death of any person who is killed during the commission of the offense, because the defendant engaged in a common design to commit that offense that would likely produce death, the jury also must be instructed that the inference is non-conclusive, that the inference may be considered in determining intent, and that it is to consider all evidence introduced by the prosecution to indicate the defendant's intent and by the defendant to indicate him/her lack of intent in determining whether the defendant specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the defendant to have caused the death by proof beyond a reasonable doubt.⁵⁹

Additionally, the murder statute was amended to permit the death penalty to be imposed whenever the defendant was convicted of, pleaded guilty to, or pleaded no contest to aggravated murder.⁶⁰ The statute also required that the defendant be at least eighteen years of age or older at the time of the offense if the death penalty was to be imposed.⁶¹

Finally, the 1981 murder statute required that whenever the indictment for murder contained one or more aggravating circumstances listed in section 2929.04 of the Ohio Revised Code, the clerk of court, within fifteen days after the day on which the indictment was filed, was required to file a notice with the Ohio Supreme Court indicating that the indictment had been filed, the name of the person charged, the docket numbers in the case(s), the court in which the case would be heard, and the date on which the indictment had been filed.⁶² If the defendant pleaded guilty or no contest to any offense in the case or if any count in the indictment was dismissed, the clerk of court also was required to notify the Ohio Supreme Court, within fifteen days after the plea was entered or the count was dismissed, the offender's name, the docket numbers of the case(s), and the sentence imposed, if any.⁶³

2. 1981 Amendments to Ohio's Death Penalty Sentencing Statute

a. 1981 Amendments to Ohio Rev. Code § 2929.04

The 1981 death penalty statute retained four of the aggravating factors from the 1974 statute, amended three of the 1974 aggravating factors, and added a new aggravating factor. Under the 1981 revisions, the imposition of the death penalty for aggravated

⁵⁹ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2903.01(D) (West 1981).

⁶⁰ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2903.02(A) (West 1981).

⁶¹ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2903.02(A) (West 1981).

⁶² S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.021(A)(1)-(4) (West 1981).

⁶³ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.021(B)(1)-(3) (West 1981).

murder was precluded unless one or more of the following eight aggravating circumstances was specified in the indictment⁶⁴ and was found beyond a reasonable doubt:

- (1) The offense was the assassination of the president of the United States, the governor or lieutenant governor of the State, or a person in line of succession to or candidate for the presidency of the United States or the governor or lieutenant governor of the State, or a candidate for any of the above offices;
- (2) The offense was committed for hire;
- (3) The offense was committed for the purpose of escape from detention, apprehension, trial or punishment for another offense committed by the offender;
- (4) The offense was committed while the offender was in a detention facility;
- (5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons by the offender;
- (6) The victim of the offense was a peace officer whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties or it was the offender's specific purpose to kill a peace officer;
- (7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design; and
- (8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his/[her] testimony in an criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his/[her] testimony in any criminal proceeding.⁶⁵

⁶⁴ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(A) (West 1981). Ohio law requires that an indictment for aggravated murder provide specifications as to the aggravating circumstances of the offense if the State will seek to impose the death penalty on the defendant. *Id.*; *see also* OHIO REV. CODE § 2941.14(B) (West 1981) (precluding imposition of the death penalty unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in section 2929.04(A) of the Ohio Revised Code).

⁶⁵ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.04(A)(1)-(8) (West 1981).

In order to comport with *Lockett*,⁶⁶ the Ohio General Assembly also made revisions to the mitigating circumstances available to a defendant under Ohio's death penalty statute. If one or more aggravating factors was specified in the indictment, proven beyond a reasonable doubt, and the offender was found to be age eighteen or older at the time of the offense, the trier of fact was required to consider and weigh against the aggravating circumstances "the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:"⁶⁷

- (1) Whether the victim of the offense induced or facilitated [the murder];
- (2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;
- (3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;
- (4) The youth of the offender;
- (5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;
- (6) The offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim; and
- (7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.⁶⁸

The defendant had the burden of "going forward with the evidence of any factor in mitigation of the imposition of the death penalty" and the prosecution had the burden of proving that the aggravating circumstances outweighed the mitigating factors beyond a reasonable doubt.⁶⁹ The 1981 death penalty statute also provided that the defendant was to be given "great latitude" in the presentation of evidence of the mitigating factors delineated in the statute, as well as "any other factors in mitigation of the imposition of the death sentence."⁷⁰ The 1981 statute also changed prior law that had prohibited imposition of a death sentence when any mitigating factor had been proved by providing that "the existence of any of the mitigating factors does not preclude the imposition of a sentence of death on the offender," but was to be weighed by the trial jury, the trial judge, or the three-judge panel against the aggravating circumstances the offender was found guilty of committing pursuant to section 2929.03(D)(2) and (3) of the Ohio Revised Code.⁷¹

⁶⁶ *Lockett v. Ohio*, 438 U.S. 586 (1978).

⁶⁷ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.04(B) (West 1981).

⁶⁸ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.04(B)(1)-(7) (West 1981).

⁶⁹ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(D) (West 1981).

⁷⁰ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.04(C) (West 1981); *see also* OHIO REV. CODE § 2929.03(D)(1) (West 1981).

⁷¹ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.04(C) (West 1981).

b. 1981 Amendments to Ohio Rev. Code § 2929.03

In deciding whether the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors in the case, Ohio Rev. Code § 2929.03 required that the trial jury consider the “relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and if applicable, [the pre-sentence mental health examination reports on the offender].”⁷² The 1981 statute specified that if the trial jury found that the aggravating factors were sufficient to outweigh the mitigating factors beyond a reasonable doubt, the trial jury was required to recommend that a sentence of death be imposed; however, absent such a finding, the jury was required to recommend that the offender be sentenced to life imprisonment with parole eligibility after imprisonment for twenty full years, or life imprisonment with parole eligibility after imprisonment for thirty full years.⁷³

If the jury recommended a period of life imprisonment, the court was required to impose the sentence recommended by the jury – i.e., the judge could not override a life sentence recommendation in favor of the death penalty.⁷⁴ If the jury recommended a death sentence, the trial court was required to consider the “relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and if applicable, [the pre-sentence mental health examination reports on the offender].”⁷⁵ If the court or the panel of three judges unanimously found by proof beyond a reasonable doubt that the aggravating circumstances the offender was found guilty of committing outweighed the mitigating factors, it was required to impose a sentence of death upon the offender.⁷⁶ Absent such a finding, the court or three-judge panel was required to impose a sentence of life imprisonment with parole eligibility after imprisonment for twenty full years or life imprisonment with parole eligibility after imprisonment for thirty full years.⁷⁷

Whenever the trial court or the panel of judges imposed a sentence of death or life imprisonment, it was required to set forth in an opinion its specific findings as to the existence of mitigating factors as well as the aggravating circumstances the offender was found guilty of committing.⁷⁸ If a death sentence was imposed, the trial court or panel of judges was required to explain why the aggravating circumstances were sufficient to outweigh the mitigating factors; similarly, if a sentence of life imprisonment was imposed, it was required to explain why the aggravating circumstances were not sufficient to outweigh the mitigating factors.⁷⁹ Whenever a death sentence was imposed,

⁷² S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(D)(2) (West 1981).

⁷³ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(D)(2) (West 1981).

⁷⁴ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(D)(2) (West 1981).

⁷⁵ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(D)(2), (3) (West 1981).

⁷⁶ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(D)(3) (West 1981).

⁷⁷ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(D)(3) (West 1981).

⁷⁸ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(F) (West 1981).

⁷⁹ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(F) (West 1981).

the clerk of the court in which the judgment was rendered was required to deliver the entire trial record to the appellate court.⁸⁰

c. Prohibition of Imposition of Death Penalty in Certain Circumstances, Ohio Rev. Code § 2929.03

Several other additions and amendments were made to Ohio's death penalty statute in 1981. The statute prohibited the imposition of the death penalty on anyone who was under the age of eighteen at the time of the commission of the offense.⁸¹ If the defendant was convicted of aggravated murder and of one or more aggravating circumstance(s), but the defendant was not eighteen years of age or older at the time of the commission of the offense, the court or the panel of judges could impose a sentence of life imprisonment with parole eligibility after twenty years of full imprisonment, or life imprisonment with parole eligibility after thirty years of full imprisonment.⁸² Additionally, if the aggravating factors set out in Ohio Rev. Code § 2929.04(A) were not specified in the indictment for aggravated murder, then following a guilty conviction of the defendant for aggravated murder, the statute required that the trial court impose a sentence of life imprisonment with parole eligibility after twenty years of full imprisonment.⁸³ Lastly, if the defendant was found guilty of aggravated murder, but not guilty as to an aggravating specification, regardless of the age of the defendant,⁸⁴ the trial court had to impose a sentence of life imprisonment with parole eligibility after serving twenty years of full imprisonment.⁸⁵

d. Defendant's Pre-sentence Request for Mental Examination, Ohio Rev. Code § 2929.03

The 1981 statute also provided that whenever the death penalty could be imposed on the defendant, the defendant was the only party who could request a pre-sentence mental examination. If such request was made, the trial court was required to grant it. Any findings made pursuant to the examination had to be submitted to the trial court.⁸⁶ The

⁸⁰ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(G) (West 1981).

⁸¹ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(E) (West 1981); *see also* OHIO REV. CODE §§ 2929.02(A), .023(A)(2)(b) (West 1981).

⁸² S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(E) (West 1981); *see also* OHIO REV. CODE § 2929.02(A) (West 1981). If the defendant was under the age of eighteen at the time of the commission of the offense and was convicted of aggravated murder by a trial jury, sections 2909.03(E) and 2929.022 of the Ohio Revised Code stipulate that the trial court, not the jury, sentence the defendant to either life imprisonment with parole eligibility after 20 years, or life imprisonment with parole eligibility after 30 years. *See* OHIO REV. CODE §§ 2909.03(E), 2929.022 (West 1981). If the defendant was under the age of eighteen at the time of the commission of the offense, waived his/her right to a jury trial and was convicted of aggravated murder by a panel of three judges, the panel judges must sentence the defendant to either life imprisonment with parole eligibility after 20 years, or life imprisonment with parole eligibility after 30 years. *Id.*

⁸³ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(A) (West 1981).

⁸⁴ *See supra* note 81 and accompanying text (regarding the prohibition on the imposition of a death sentence on a defendant who was under the age of eighteen at the time of the commission of the offense).

⁸⁵ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(C)(1) (West 1981).

⁸⁶ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(D)(1) (West 1981).

statute required that no statement or information provided by the defendant pursuant to this provision could be disclosed to any person or be used against the defendant on the issue of guilt in any retrial,⁸⁷ however, copies of any mental examination report made pursuant to this provision must be provided to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use in determining aggravating circumstances and/or mitigating factors.⁸⁸

e. Death Penalty Appeals Procedures, Ohio Rev. Code § 2929.05

Under the 1981 statute, the courts of appeals and the Ohio Supreme Court were required to review the imposition of a death sentence at the same time that any other grounds for appeal were reviewed in the condemned offender's case.⁸⁹ The courts of appeals and the Ohio Supreme Court were required to review the judgment in the case and the sentence of death imposed by the trial court or panel of judges in the same manner that these courts reviewed other criminal cases.⁹⁰ However, these courts also were required to review and independently weigh all of the facts and evidence disclosed in the case record and to consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweighed the mitigating factors in the case, as well as whether the sentence of death was appropriate.⁹¹ In determining whether the sentence of death was appropriate, the court was required to: (1) consider whether the sentence was excessive or disproportionate to the penalty imposed in similar cases; (2) review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of judges found the offender guilty of committing; and (3) determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors.⁹² The courts of appeals and the Ohio Supreme Court could affirm a sentence of death only if the particular court was "persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case."⁹³

The courts of appeals also was required, in any case in which a death sentence was imposed, to file a separate opinion as to its findings with the Clerk of the Ohio Supreme Court within fifteen days of issuing its opinion.⁹⁴ The courts of appeals and the Ohio Supreme Court also were required to give priority to review cases in which the death penalty was imposed over other cases before the court.⁹⁵

⁸⁷ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(D)(1) (West 1981).

⁸⁸ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.03(D)(1) (West 1981).

⁸⁹ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.05(A) (West 1981).

⁹⁰ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.05(A) (West 1981).

⁹¹ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.05(A) (West 1981).

⁹² S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.05(A) (West 1981).

⁹³ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.05(A) (West 1981).

⁹⁴ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.05(A) (West 1981).

⁹⁵ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.05(B) (West 1981).

f. Re-sentencing After Death Sentence is Vacated, Ohio Rev. Code § 2929.06

The 1981 statute also set limitations on available sentences when a capital defendant's sentence was vacated by the courts of appeals or Supreme Court of Ohio. When a death sentence imposed on a capital defendant was vacated on appeal by the Court of Appeals or the Supreme Court because the court (1) could not affirm the sentence of death under the standards imposed in Ohio Rev. Code § 2929.05 (2) vacated the sentence for the sole reason that the statutory procedure for imposing the death sentence in Ohio Rev. Code §§ 2929.03 and 2929.04 of the Ohio Revised Code is unconstitutional; or (3) vacated the sentence pursuant to Ohio Rev. Code § 2929.05(C) of the Ohio Revised Code, the trial court was required to re-sentence the defendant to life imprisonment with parole eligibility after serving twenty years or life imprisonment with parole eligibility after serving thirty years.⁹⁶

C. *Amendments to Ohio's Murder Statute, Ohio Rev. Code § 2903.01; Death Penalty Statute, Ohio Rev. Code §§ 2929.03 and 2929.04; and Death Penalty Appeals Procedures, Ohio Rev. Code §§ 2929.05 and 2929.06*

1. Amendments to Ohio's Murder Statute, Ohio Rev. Code § 2903.01

In 1996, the Ohio General Assembly amended the aggravated murder statute to include the unlawful termination of another's pregnancy as a homicide punishable under the statute.⁹⁷ The 1996 amendments also made several non-substantive amendments to make the language of the murder statute gender neutral.⁹⁸

In 1997, the General Assembly added "purposely causing the death of another who is under the age of thirteen at the time of the offense" as a prohibited act constituting aggravated murder.⁹⁹ The 1997 amendments also renumbered the aggravated murder statute so that section 2903.01(A)-(C) of the Ohio Rev. Code delineated the specific proscribed acts constituting aggravated murder; Ohio Rev. Code § 2903.01(D) stated that anyone who committed any of the above proscribed acts was guilty of aggravated murder and would be punished as provided in Ohio Rev. Code § 2929.02 of the; and Ohio Rev. Code § 2903.01(E) of the described the lengthy inferences that a jury was prohibiting from making in determining whether the defendant had the intent to commit aggravated

⁹⁶ S.B. 1, 114th Gen. Assem., Reg. Sess. (Ohio 1981); OHIO REV. CODE § 2929.06 (West 1981). In *State v. Penix*, the Ohio Supreme Court held that since there was no provision in Ohio law for a re-sentencing court to impanel a jury to re-sentence the defendant, the defendant could not be re-sentenced to death under section 2929.06 of the Ohio Revised Code. 513 N.E.2d 744, 748 (Ohio 1987).

⁹⁷ See S.B. 158, 121st Gen. Assem., Reg. Sess. (Ohio 1996); OHIO REV. CODE § 2903.01(A)-(C) (West 1996).

⁹⁸ See S.B. 158, 121st Gen. Assem., Reg. Sess. (Ohio 1996); OHIO REV. CODE § 2903.01 (West 1996).

⁹⁹ S.B. 32, 122d Gen. Assem., Reg. Sess. (Ohio 1997); OHIO REV. CODE § 2903.01(A)-(C) (West 1997).

murder.¹⁰⁰ However, in 1998, the General Assembly eliminated section 2903.01(E) of the Ohio Revised Code altogether.¹⁰¹

Between 1998 and 2002, the Ohio General Assembly again amended the aggravated murder statute by classifying the following as aggravated murder: (1) any person who purposely causes the death of another while under detention as a result of having been found guilty of a violation of Ohio law, pleaded guilty to a felony, or who breaks that detention;¹⁰² (2) any person who purposefully causes the death of a law enforcement officer who the offender knows or has reasonable cause to know is a law enforcement officer, when either (i) the victim, at the time of the commission of the offense, is engaged in the victim's duties; or (ii) it is the offender's specific intent to kill a law enforcement officer;¹⁰³ and (3) any person who purposefully causes the death of another or the unlawful termination of another's pregnancy in the course of committing an act of terrorism.¹⁰⁴

2. Amendments to Ohio's Death Penalty Sentencing Statute, Ohio Rev. Code § 2929.04

Between 1997 and 2002, the Ohio General Assembly amended Ohio Rev. Code § 2929.04 of the Ohio Revised Code, expanding the number of aggravating factors for which a defendant could be found guilty and subject to the death penalty.

In 1997, the Ohio General Assembly expanded the list of aggravating factors to include the following: (1) the offender purposefully caused the death of another who was under thirteen years age at the time of the commission of the offense, and the offender was the principal offender in the commission of the offense, or if not the principal offender, committed the offense with prior calculation and design;¹⁰⁵ and (2) Ohio Rev. Code § 2929.04(A)(6), relating to the killing of a "peace officer," was replaced with "law enforcement officer," which incorporated the numerous positions defined as "law enforcement" under Ohio Rev. Code § 2901.01(A)(11), including "employees of the department of rehabilitation and correction who are authorized to carry weapons within the course and scope of their duties."¹⁰⁶

In 1998, the Ohio General Assembly expanded the aggravating circumstance in which the defendant was "under detention" to include while the defendant was "at large after having broken detention."¹⁰⁷ This amendment specified that "detention" did not include hospitalization, institutionalization, or confinement in a mental health or developmentally

¹⁰⁰ See S.B. 32, 122nd Gen. Assem., Reg. Sess. (Ohio 1997); OHIO REV. CODE § 2903.01 (West 1997).

¹⁰¹ H.B. 5, 122nd Gen. Assem., Reg. Sess. (Ohio 1998); deleting OHIO REV. CODE § 2903.01(E) (West 1998).

¹⁰² S.B. 193, 122nd Gen. Assem., Reg. Sess. (Ohio 1998); OHIO REV. CODE § 2903.01(D) (West 1998).

¹⁰³ S.B. 193, 122nd Gen. Assem., Reg. Sess. (Ohio 1998); OHIO REV. CODE § 2903.01(E) (West 1998).

¹⁰⁴ S.B. 184, 124th Gen. Assem., Reg. Sess. (Ohio 2002); OHIO REV. CODE § 2903.01(B) (West 2002).

¹⁰⁵ S.B. 32, 122d Gen. Assem., Reg. Sess. (Ohio 1997); OHIO REV. CODE § 2929.04(A)(9) (West 1997).

¹⁰⁶ See OHIO REV. CODE § 2911.01(D)(2) (West 2007); OHIO REV. CODE § 2901.01(A)(11)(a)-(m) (West 2007).

¹⁰⁷ S.B. 193, 122d Gen. Assem., Reg. Sess. (Ohio 1998); OHIO REV. CODE § 2929.04(A)(4) (West 1998).

disabled facility, unless the offender was in the facility as a result of being charged, convicted of or pleading guilty to a violation of Ohio law at the time of commission of the offense.¹⁰⁸

In 2002, the General Assembly again expanded the number of aggravating circumstances by adding the following aggravator: the offense was committed while the offender was “committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.”¹⁰⁹

3. Amendments to Death Penalty Appeals Procedures, Ohio Rev. Code § 2929.05

In 1994, the State of Ohio amended the Ohio Constitution by referendum and removed original appellate jurisdiction from the Court of Appeals in death penalty cases.¹¹⁰ The courts of appeals may review direct appeals only in death penalty cases in which a sentence of death was imposed for an offense committed prior to January 1, 1995.¹¹¹ In all other cases, there is no intermediate appeal to the courts of appeals in death penalty cases and all direct appeals following the imposition of a death sentence proceed directly to the Ohio Supreme Court.¹¹²

4. Amendments to Ohio’s Death Sentencing Statute, Ohio Rev. Code §§ 2929.03 and 2929.06

Between 1995 and 2004, the Ohio General Assembly adopted life imprisonment without parole as an alternative sentence in aggravated murder cases, in addition to adding optional and mandatory penalties when certain circumstances existed in particular aggravated murder cases. Through these years, the General Assembly also revised the death penalty statute to incorporate several non-substantive changes and to make the language of the statute gender neutral.¹¹³

In 1995 (effective July 1, 1996), the Ohio General Assembly amended Ohio Rev. Code § 2929.03 to adopt life imprisonment without parole as an optional sentence for a defendant convicted of aggravated murder when the trial court or three-judge panel could not

¹⁰⁸ S.B. 193, 122d Gen. Assem., Reg. Sess. (Ohio 1998); OHIO REV. CODE § 2929.04(A)(4)(a)-(b) (West 1998).

¹⁰⁹ S.B. 184, 124th Gen. Assem., Reg. Sess. (Ohio 2002); OHIO REV. CODE § 2929.04(A)(10), (B) (West 2002).

¹¹⁰ See H.R.J. 15, 120th Gen. Assem., Reg. Sess. (Ohio 1994) (proposing constitutional amendment to article IV, sections 2 and 3 of Ohio State Constitution to give the Ohio Supreme Court original jurisdiction in direct appeals of death penalty cases). H.R.J. 15 was approved by Ohio voters on Nov. 8, 1994. See S.B. 4, 121st Gen. Assem., Reg. Sess. (Ohio 1995).

¹¹¹ S.B. 4, 121st Gen. Assem., Reg. Sess. (Ohio 1995); OHIO REV. CODE § 2929.05 (West 1994); OHIO CONST. art. IV, §§ 2, 3 (amended 1995).

¹¹² S.B. 4, 121st Gen. Assem., Reg. Sess. (Ohio 1995); OHIO REV. CODE § 2929.05 (West 1994); OHIO CONST. art. IV, §§ 2, 3 (amended 1995).

¹¹³ See, e.g., S.B. 4, 121st Gen. Assem., Reg. Sess. (Ohio 1995); OHIO REV. CODE §§ 2929.03, .04 (West 1995).

impose a death sentence on the defendant.¹¹⁴ If the jury recommended a sentence of death, and the trial court then found that the aggravating circumstances did not outweigh the mitigating factors beyond a reasonable doubt, the court could now impose a sentence of life imprisonment with parole eligibility after twenty years, life imprisonment with parole eligibility after thirty years, *or* life imprisonment without parole.¹¹⁵ The trial court also could impose a sentence of life imprisonment without parole on an offender found guilty of aggravated murder who was under the age of eighteen at the time of the offense.¹¹⁶

Additionally, the 1995 amendments provided that when a sentence of death is later vacated by the Court of Appeals or the Supreme Court of Ohio pursuant to the provisions of Ohio Rev. Code § 2929.06(A),¹¹⁷ the trial court was required to conduct a re-sentencing hearing during which the court may sentence the defendant to life imprisonment without parole, life imprisonment with parole eligibility after twenty years, or life imprisonment with parole eligibility after thirty years.¹¹⁸ The amendment also added a new section, 2929.06(B), which stated that if a defendant's sentence to life imprisonment without parole is later vacated,¹¹⁹ the defendant could be sentenced to either life imprisonment with parole eligibility after twenty years or life imprisonment with parole eligibility after thirty years upon re-sentencing.¹²⁰

A year later, in 1996, the General Assembly eliminated the sentencing possibility of life imprisonment with parole eligibility after twenty years and instead required that when a trial court or panel of judges sentenced the defendant to life imprisonment, the defendant

¹¹⁴ S.B. 2, 121st Gen. Assem., Reg. Sess. (Ohio 1995); *see generally* OHIO REV. CODE §§ 2929.03, .06 (West 1995). This instance arises when, for example, the defendant was under age eighteen at the time of the offense, the aggravating circumstances were not specified in the indictment, the aggravators were not proven beyond a reasonable doubt, or the aggravating factors did not outweigh the mitigating factors beyond a reasonable doubt.

¹¹⁵ S.B. 2, 121st Gen. Assem., Reg. Sess. (Ohio 1995); OHIO REV. CODE § 2929.03(D)(3) (West 1995). The statute remained unchanged with regard to the factors that the trial court should consider in its determination as to whether to affirm the jury's recommendation that a death sentence be imposed. *See supra* note 75 and accompanying text.

¹¹⁶ S.B. 2, 121st Gen. Assem., Reg. Sess. (Ohio 1995); OHIO REV. CODE § 2929.03(E) (West 1995).

¹¹⁷ Specifically, the 1995 amendment states that the trial court may impose a sentence of life imprisonment without parole or with parole eligibility, but not death, when: (1) the courts of appeals or the Ohio Supreme Court could not affirm the sentence of death under standards set forth in section 2929.05 of the Ohio Revised Code (relating to the standards by which death sentences will be reviewed on appeal); (2) the death sentence is vacated upon appeal solely because the statutory procedure set forth in sections 2929.03 and 2929.04 of the Ohio Revised Code is unconstitutional; or (3) the death sentence is vacated pursuant to 2929.05(C) (prohibiting the imposition of a death sentence on a defendant who was under eighteen years of age at the time of the offense). *See* S.B. 2, 121st Gen. Assem., Reg. Sess. (Ohio 1995); OHIO REV. CODE § 2929.06(A) (West 1995).

¹¹⁸ S.B. 2, 121st Gen. Assem., Reg. Sess. (Ohio 1995); OHIO REV. CODE § 2929.06(A) (West 1995).

¹¹⁹ Specifically, the defendant may be re-sentenced only to life imprisonment with parole eligibility when the defendant's sentence is vacated on appeal because the statutory procedure for imposing the sentence of life imprisonment without the parole, under sections 2929.03 and 2929.04 of the Ohio Revised Code, is unconstitutional. *See* S.B. 2, 121st Gen. Assem., Reg. Sess. (Ohio 1995); OHIO REV. CODE § 2929.06(B) (West 1995).

¹²⁰ S.B. 2, 121st Gen. Assem., Reg. Sess. (Ohio 1995); OHIO REV. CODE § 2929.06(B) (West 1995).

would not be eligible for parole until after serving twenty-five years of full imprisonment or thirty years of full imprisonment, or life imprisonment without parole.¹²¹

Another 1996 amendment provided that when a defendant's sentence was vacated due to an error in the sentencing phase of the capital trial and the provisions of Ohio Rev. Code § 2929.06(A) did not apply to the vacation of the sentence, the trial court was required to impanel a jury or three-judge panel to re-sentence the defendant.¹²² At the hearing, the jury or three-judge panel was required to re-sentence the defendant in accordance with Ohio Rev. Code § 2929.03 to determine whether to impose a sentence of death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty years, or life imprisonment with parole eligibility after serving thirty years.¹²³

Additionally, the Ohio General Assembly amended the death penalty statute in 1996 to require that when a defendant is found guilty of a "sexually motivated" or "sexually violent predator" aggravating circumstance, and such circumstance is stated in the indictment, the offender was required to be sentenced to death or life imprisonment without parole.¹²⁴ Additionally, if the defendant was convicted of aggravated murder on or after the effective date of this 1996 amendment and the defendant was found guilty of a sexually motivated or sexually violent aggravating circumstance, but the death sentence imposed on the defendant was later vacated pursuant to the provisions of Ohio Rev. Code § 2929.06(A)(1),¹²⁵ the defendant was required to instead serve a sentence of life imprisonment without parole.¹²⁶

Lastly, in 2004, the General Assembly expanded the use of the sentences of life imprisonment without parole and life imprisonment with parole eligibility after serving twenty-five or thirty years imprisonment. If a defendant was found guilty of aggravated murder, but the indictment charging aggravated murder did not contain one or more specifications of the aggravating circumstances listed in Ohio Rev. Code § 2929.04, or if the specification of the aggravating circumstance(s) was included in the indictment, but the defendant was nonetheless found not guilty as to each of the specifications, the trial court could now impose a sentence of: (1) life imprisonment without parole; (2) life imprisonment with parole eligibility after twenty-five years; (3) life imprisonment with parole eligibility after thirty years; or (4) life imprisonment with parole eligibility after

¹²¹ S.B. 269, 121st Gen. Assem., Reg. Sess. (Ohio 1996); OHIO REV. CODE § 2929.03(C)(2), (D)(2), (D)(3)(b), (E)(2) (West 1996); OHIO REV. CODE § 2929.06 (West 1996).

¹²² S.B. 258, 121st Gen. Assem., Reg. Sess. (Ohio 1996); OHIO REV. CODE § 2929.06(A)(2) (West 1996). If the defendant was originally sentenced by a three-judge panel instead of a jury, the trial court must impanel a three-judge panel to re-sentence the defendant. *Id.*

¹²³ S.B. 258, 121st Gen. Assem., Reg. Sess. (Ohio 1996); OHIO REV. CODE § 2929.06(A)(2) (West 1996).

¹²⁴ H.B. 180, 121st Gen. Assem., Reg. Sess. (Ohio 1996); OHIO REV. CODE § 2929.03(C)(2)(a)(ii) (West 1996); *see also* OHIO REV. CODE § 2929.03(D)(2)(b) (West 1996). This rule eliminates the possibility of the trial court or panel of judges sentencing the defendant to life imprisonment with parole eligibility after twenty or thirty years, and requires a sentence of life imprisonment without parole, if it finds that the aggravating circumstances are outweighed by the mitigating factors when a defendant has been found guilty of a sexually motivated or sexually violent aggravating circumstance. *Id.*

¹²⁵ *See infra* note 127 on circumstances in which a capitally sentenced defendant would receive a re-sentencing hearing pursuant to section 2929.06(A)(1) or (A)(2) of the Ohio Revised Code.

¹²⁶ H.B. 180, 121st Gen. Assem., Reg. Sess. (Ohio 1996); OHIO REV. CODE § 2929.06(A) (West 1996).

-serving twenty years imprisonment, (which was the only available sentence under these circumstances before the 2004 amendment).¹²⁷

Additionally, the 2004 amendment replaced the existing version of Ohio Rev. Code § 2929.06 (A), and now provides that if a death sentence imposed on an offender is set aside, nullified, or vacated, because the Ohio Supreme Court (or the courts of appeals in cases in which the offense took place prior to July 1, 1995): (a) could not affirm the death sentence under the standards imposed in Ohio Rev. Code § 2929.05; (2) set aside, nullified, or vacated the sentence on appeal for the sole reason that the statutory procedure for imposing the death sentence in Ohio Rev. Code §§ 2929.03 and 2929.04 are unconstitutional; (3) set aside, nullified, or vacated the sentence pursuant to Ohio Rev. Code § 2929.05(C); or (4) set aside, nullified, or vacated the sentence because the offender is mentally retarded under standards set forth in decisions by the U.S. Supreme Court and the Supreme Court of Ohio, the trial court was required to re-sentence the defendant.¹²⁸ At the re-sentencing hearing, the court was required to impose a sentence of life imprisonment pursuant to the life imprisonment sentences that were available under Ohio Rev. Code §§ 2929.03(D) or 2909.24 at the time the offender committed the offense.¹²⁹

The 2004 amendment revised Ohio Rev. Code § 2929.06(B) to require that whenever an Ohio state court or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender for a sentencing error that occurred during the penalty phase of the defendant's capital trial, and if Ohio Rev. Code § 2929.06(A) does not apply, the trial court was required to impanel a jury or three-judge panel to re-sentence the offender.¹³⁰ The jury or three-judge panel will recommend whether the defendant should be re-sentenced to death or life imprisonment pursuant to the limitations contained within Ohio Rev. Code § 2929.03(D).¹³¹ If the jury or three-judge panel decides to re-sentence the defendant to life imprisonment, the sentences to which the court may sentence to defendant are the same sentences that were available at the time the defendant committed the offense.¹³² Also, the 2004 amendments provide that nothing in Ohio Rev. Code § 2929.06 should be construed as to limit or restrict the rights of the State to appeal any order setting aside, nullifying, or vacating a conviction or death sentence¹³³ and that Ohio Rev. Code § 2929.06 applies to all offenses committed on or after October 19, 1981.¹³⁴

¹²⁷ H.B. 184, 125th Gen. Assem., Reg. Sess. (Ohio 2004); OHIO REV. CODE § 2929.03(A)(1) (West 2004).

¹²⁸ H.B. 184, 125th Gen. Assem., Reg. Sess. (Ohio 2004); OHIO REV. CODE § 2929.06(A) (West 2004).

¹²⁹ H.B. 184, 125th Gen. Assem., Reg. Sess. (Ohio 2004); OHIO REV. CODE § 2929.06(A) (West 2004).

¹³⁰ H.B. 184, 125th Gen. Assem., Reg. Sess. (Ohio 2004); OHIO REV. CODE § 2929.06(B) (West 2004). This amendment effectively overruled *State v. Penix* and permitted the trial court to re-sentence the defendant to death. See *supra* note 96 and accompanying text.

¹³¹ H.B. 184, 125th Gen. Assem., Reg. Sess. (Ohio 2004); OHIO REV. CODE § 2929.06(B) (West 2004).

¹³² H.B. 184, 125th Gen. Assem., Reg. Sess. (Ohio 2004); OHIO REV. CODE § 2929.06(B) (West 2004).

¹³³ H.B. 184, 125th Gen. Assem., Reg. Sess. (Ohio 2004); OHIO REV. CODE § 2929.06(D) (West 2004).

¹³⁴ H.B. 184, 125th Gen. Assem., Reg. Sess. (Ohio 2004); OHIO REV. CODE § 2929.06(E) (West 2004).

III. THE PROGRESSION OF AN OHIO DEATH PENALTY CASE

A. *Pretrial Process*

1. Indictment

Death-eligible crimes must be prosecuted by indictment.¹³⁵ In order to prosecute an individual accused of aggravated murder capitally, a grand jury¹³⁶ must issue an indictment¹³⁷ containing a statement that “the defendant has committed a public offense” and specifying the offense and be signed by “the prosecuting attorney or in the name of the prosecuting attorney by an assistant prosecuting attorney.”¹³⁸ The manner in which, or the means by which the death was caused does not need to be detailed in the indictment.¹³⁹ In cases in which the death penalty may be sought, the indictment or count in the indictment charging the offense must specify the aggravating circumstances alleged to be present.¹⁴⁰

The clerk of the court of common pleas must make and deliver a copy of the indictment to the sheriff, defendant, or the defendant’s counsel within three days of it being filed.¹⁴¹ A defendant may not be arraigned or be called to answer the indictment until at least one day has elapsed after receiving or having an opportunity to receive a copy of the indictment, in person or by counsel.¹⁴²

In Ohio, a person is eligible for the death penalty only if he/she is found guilty of aggravated murder with at least one specification.¹⁴³ The aggravated murder statute states that:

¹³⁵ OHIO R. CRIM. P. 7(A).

¹³⁶ A grand jury is composed of fifteen people who satisfy the qualifications of a juror specified in section 2313.42 of the Ohio Revised Code. OHIO REV. CODE § 2939.02 (West 2007). At least twelve of the grand jurors must concur in the finding of an indictment. OHIO REV. CODE § 2939.20(West 2007); OHIO R. CRIM. P. 7(A).

¹³⁷ OHIO R. CRIM. P. 6(F).

¹³⁸ OHIO R. CRIM. P. 7(B). “The statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.” *Id.*

¹³⁹ OHIO REV. CODE § 2941.14(A) (West 2007).

¹⁴⁰ OHIO REV. CODE § 2941.14(B) (West 2007).

¹⁴¹ OHIO REV. CODE § 2941.49 (West 2007).

¹⁴² *Id.*

¹⁴³ OHIO REV. CODE § 2929.02 (West 2007). The term “specification” refers to aggravating circumstances. As stated in section 2941.14(B) of the Ohio Revised Code, “[i]mposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.” OHIO REV. CODE § 2941.14(A) (West 2007).

- (1) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.
- (2) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.
- (3) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.
- (4) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.
- (5) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:
 - (a) The victim, at the time of the commission of the offense, is engaged in the victim's duties.
 - (b) It is the offender's specific purpose to kill a law enforcement officer.¹⁴⁴

2. Initial Appearance

When the accused is taken before a court or magistrate after the indictment has been filed, the court or magistrate will:

- (1) Inform the defendant of the charges against him/her and the identity of the complainant and permit the accused or his counsel to see and read the affidavit or complaint;
- (2) Inform the defendant of him/her right to have counsel, the right to a continuance in the proceedings to secure counsel, and the right to have counsel assigned to him/her without cost if he/she is unable to employ counsel;¹⁴⁵
- (3) Inform the defendant that he/she need not make any statement and that any statement may be used against him/her;
- (4) When the defendant's appearance is not pursuant to an indictment, inform the defendant of him/her right to a preliminary hearing;
- (5) Inform the accused of the effect of pleas of guilty, not guilty, and no contest, and of his/her right to trial by jury;

¹⁴⁴ OHIO REV. CODE § 2903.01(West 2007).

¹⁴⁵ The appointment of counsel is dealt with in Rule 20 of the Rules of Superintendence for the Courts of Ohio. See RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20. A more detailed discussion of counsel qualification requirements may be found in Chapter Six: Defense Services, located on page 179-183.

- (6) Inform the accused of the nature and extent of possible punishment on conviction.¹⁴⁶

The accused will not be asked to plead to the charges at the initial appearance.¹⁴⁷

3. Arraignment

Arraignment is conducted in open court and consists of reading the indictment to the defendant or stating the substance of the charge and calling on him/her to plead to the charge(s).¹⁴⁸ The judge or magistrate then will ask the accused whether he/she understands the nature of the charge(s) against him/her and, if not, explain them.¹⁴⁹ The defendant must be given a copy of the indictment before being asked to plead¹⁵⁰ and must be present at the arraignment, unless a plea of not guilty is entered, the defendant consents to the plea, and the prosecuting attorney agrees.¹⁵¹

When a defendant is not represented by counsel, the judge or magistrate must ensure that the defendant understands that:

- (1) He/she has a right to retain counsel even if he/she intends to plead guilty, and has a right to a reasonable continuance in the proceedings to secure counsel, and has the right to have counsel assigned without cost if he/she is unable to employ counsel;
- (2) He/she has a right to bail, if the offense is bailable; and
- (3) He/she does not need to make any statement during the proceeding, but any statement made can and may be used against him/her.¹⁵²

The defendant may plead guilty, not guilty, not guilty by reason of insanity, or no contest.¹⁵³ If the defendant declines to plead, a plea of not guilty will be entered.¹⁵⁴ A plea of not guilty also will be entered if the court refuses to accept a plea of guilty or no contest.¹⁵⁵ The defense of not guilty by reason of insanity must be pleaded at the time of

¹⁴⁶ OHIO REV. CODE § 2937.02 (West 2007); OHIO R. CRIM. P. 5(A).

¹⁴⁷ OHIO R. CRIM. P. 5(A).

¹⁴⁸ OHIO REV. CODE § 2935.03 (West 2007); OHIO R. CRIM. P. 10(A).

¹⁴⁹ OHIO REV. CODE § 2935.03 (West 2007).

¹⁵⁰ OHIO R. CRIM. P. 10(A).

¹⁵¹ OHIO R. CRIM. P. 10(B).

¹⁵² OHIO R. CRIM. P. 10(C).

¹⁵³ OHIO R. CRIM. P. 11(A). Section 2937.06(A)(1) of the Ohio Revised Code only provides for pleas of guilty or not guilty in felony cases, however. OHIO REV. CODE § 2937.06(A)(1) (West 2007). The plea of guilty is a complete admission of the defendant's guilt. OHIO R. CRIM. P. 11(B)(1). The plea of no contest is "not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the indictment, information, or complaint, and the plea or admission shall not be used against the defendant in any subsequent civil or criminal proceeding." OHIO R. CRIM. P. 11(B)(2).

¹⁵⁴ OHIO REV. CODE § 2937.06(A)(1) (West 2007); OHIO R. CRIM. P. 11(A).

¹⁵⁵ OHIO R. CRIM. P. 11(G). In such cases, neither plea is admissible into evidence or may be the subject of comment by the prosecuting attorney or the court. *Id.*

arraignment, unless the court permits such a plea to be entered at another time before trial.¹⁵⁶

The court may not accept a guilty plea in cases in which the defendant is unrepresented by counsel, unless the defendant waives the right to counsel after being re-advised that the right exists.¹⁵⁷ Furthermore, the court can refuse to accept a guilty plea and may not accept such a plea without first addressing the defendant personally and:

- (1) Determining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing;
- (2) Informing the defendant of and determining that the defendant understands the effect of the plea of guilty, and that the court, upon acceptance of the plea, may proceed with judgment and sentence; and
- (3) Informing the defendant and determining that the defendant understands that by the plea the defendant is waiving the rights to jury trial, to confront witnesses against him or her, to have compulsory process for obtaining witnesses in the defendant's favor, and to require the state to prove the defendant's guilt beyond a reasonable doubt at a trial at which the defendant cannot be compelled to testify against himself or herself.¹⁵⁸

If the defendant enters a written plea of guilty or pleads not guilty, but waives the right to have the court take evidence concerning the offense, the court may find that the crime has been committed and that there is probable and reasonable cause to hold the defendant for trial pursuant to indictment by the grand jury.¹⁵⁹ If the defendant negotiates a plea of guilty or no contest, the underlying agreement upon which the plea is based must be stated on the record in open court.¹⁶⁰

The defendant must plead separately to the charge of aggravated murder and each specification.¹⁶¹ A plea of guilty or no contest to the charge waives the defendant's right to a jury trial, and before accepting a plea of guilty or no contest, the court will advise the defendant and determine that the defendant understands the consequences of the plea.¹⁶² If the indictment contains one or more specifications and a plea of guilty to the charge is accepted, the court may dismiss the specifications and impose sentence accordingly, in the interests of justice.¹⁶³ If the indictment contains one or more specifications that are

¹⁵⁶ OHIO R. CRIM. P. 11(H).

¹⁵⁷ OHIO R. CRIM. P. 11(C)(1).

¹⁵⁸ OHIO R. CRIM. P. 11(C)(2). According to section 2937.09 of the Ohio Revised Code, before receiving a guilty plea in a felony case, the court must "advise the accused that such plea constitutes an admission which may be used against him[/her] at a later trial." OHIO REV. CODE § 2937.09 (West 2007).

¹⁵⁹ OHIO REV. CODE § 2937.09 (West 2007).

¹⁶⁰ OHIO R. CRIM. P. 11(F).

¹⁶¹ OHIO R. CRIM. P. 11(C)(3).

¹⁶² *Id.* This includes using the admission against the defendant at a later trial. OHIO REV. CODE § 2937.09 (West 2007).

¹⁶³ OHIO R. CRIM. P. 11(C)(3).

not dismissed upon acceptance of a guilty plea, or if guilty pleas are accepted to the charge and one or more specifications, a court composed of a three judge panel will:

- (1) Determine whether the offense was aggravated murder or a lesser offense;
- (2) If the offense is determined to have been a lesser offense, impose sentence accordingly; and
- (3) If the offense is determined to have been aggravated murder, proceed as provided by law to determine the presence or absence of the specified aggravating circumstances and of mitigating circumstances, and impose sentence accordingly.¹⁶⁴

The court of common pleas will set criminal cases for trial within thirty days after the date the defendant's plea was entered.¹⁶⁵ Continuances will not be granted unless there is proof that the ends of justice require a continuance.¹⁶⁶

4. Pre-trial Motions

Either party may file a pre-trial motion raising any defense, objection, evidentiary issue, or request that may be determined without trial.¹⁶⁷ Some issues must be raised pre-trial, including:

- (1) Defenses and objections based on defects in the institution of the prosecution;
- (2) Defenses and objections based on defects in the indictment, other than failure to show jurisdiction in the court or to charge an offense;
- (3) Motions to suppress evidence, including statements and identification testimony, on the grounds that it was illegally obtained;
- (4) Requests for discovery; and
- (5) Requests for severance of charges or defendants.¹⁶⁸

In addition, if a defendant intends to offer testimony to establish an alibi, he/she must provide the prosecution with written notice of this intention at least seven days before trial.¹⁶⁹

B. The Capital Trial

Capital trials are heard in the court of common pleas and conducted in two phases: the guilt/innocence proceeding and, if the defendant is found guilty, the sentencing proceeding.¹⁷⁰

¹⁶⁴ *Id.*

¹⁶⁵ OHIO REV. CODE § 2945.02 (West 2007). *But see* OHIO REV. CODE § 2945.71 (West 2007).

¹⁶⁶ *Id.*

¹⁶⁷ OHIO R. CRIM. P. 12(C).

¹⁶⁸ *Id.*

¹⁶⁹ OHIO R. CRIM. P. 12.1. The court may allow this evidence to be presented, even if the defendant fails to provide notice to the prosecution, if the court determines that it is in the interest of justice to do so. *Id.*

¹⁷⁰ OHIO REV. CODE § 2929.022(B) (West 2007).

1. Trial Phase

All individuals charged with a capital crime possess the right to a trial by jury,¹⁷¹ although the defendant may “knowingly, intelligently and voluntarily” waive this right.¹⁷² If the defendant waives his/her right to a jury trial, the case will be heard by a three judge panel.¹⁷³ If the defendant does not waive his/her right to a jury trial, the court, in conjunction with the state and defense, must select twelve jurors¹⁷⁴ and, if deemed necessary by the court, alternate jurors.¹⁷⁵

When selecting the jury, the court, state, and defense may examine the prospective jurors.¹⁷⁶ The state and defense may challenge any juror for cause for the following reasons:

- (1) The juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury;
- (2) The juror is a chronic alcoholic, or drug dependent person;
- (3) The juror was a member of the grand jury that found the indictment in the case;
- (4) The juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside;
- (5) The juror served as a juror in a civil case brought against the defendant for the same act;
- (6) The juror has an action pending between him/her and the State of Ohio or the defendant;
- (7) The juror or the juror’s spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror;
- (8) The juror has been subpoenaed in good faith as a witness in the case;
- (9) The juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial;
- (10) The juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense

¹⁷¹ OHIO CONST. art. I, § 5; OHIO REV. CODE § 2945.17 (West 2007).

¹⁷² OHIO REV. CODE § 2945.05 (West 2007); OHIO R. CRIM. P. 23.

¹⁷³ OHIO REV. CODE § 2945.06 (West 2007).

¹⁷⁴ OHIO R. CRIM. P. 23; *see also* OHIO REV. CODE § 2945.23 (West 2007).

¹⁷⁵ OHIO R. CRIM. P. 24(G).

¹⁷⁶ OHIO REV. CODE § 2945.27 (West 2007); OHIO R. CRIM. P. 24(B).

- charged, or to the person on whose complaint the prosecution was instituted, or to the defendant;
- (11) The juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant;
 - (12) The juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in number 11;
 - (13) English is not the juror's first language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and law in the case; and
 - (14) The juror is otherwise unsuitable for any other cause to serve as a juror.¹⁷⁷

A juror also may be excluded for cause if he/she unequivocally states that under no circumstances will he/she follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case.¹⁷⁸ A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause.¹⁷⁹

In addition to challenges for cause, each party may peremptorily challenge up to six jurors.¹⁸⁰

Once empanelled, the jury must decide whether the prosecution has proved beyond a reasonable doubt that the defendant is guilty of aggravated murder with specifications or some lesser included offense or offenses.¹⁸¹ In addition, the jury must decide whether the prosecution has proved beyond a reasonable doubt that the defendant is guilty of each charged specification.¹⁸²

¹⁷⁷ OHIO REV. CODE §§ 2313.42, 2945.25 (2007); OHIO R. CRIM. P. 24(C). A potential juror may be challenged for cause if he/she has a position against the death penalty that would interfere with his/her ability to recommend the death penalty in cases where it is warranted or if he/she would automatically recommend the death penalty if a conviction of a capital felony occurs.

¹⁷⁸ OHIO REV. CODE § 2945.25(C) (2007). All parties will be given wide latitude in *voir dire* questioning in this regard. *Id.*; see also *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). In 1968, the United States Supreme Court, in *Witherspoon*, found that a defendant's right to an impartial jury, under the Sixth and Fourteenth Amendments of the United States Constitution, is violated when prospective jurors who possess "general objections to the death penalty or conscientious or religious scruples against its infliction" are excluded for cause. See *Witherspoon*, 391 U.S. at 522. Almost twenty years later, the Court, in *Witt*, established the standard for determining when a prospective juror may be excluded for cause because of his/her views on the death penalty. See *Witt*, 469 U.S. at 424. The standard includes the following: "whether the juror's views would 'prevent or substantially impair the performance of his[her] duties as a juror in accordance with his[her] instructions and his[her] oath.'" *Id.* In *Morgan*, the Court identified prospective jurors who would "automatically vote for the death penalty in every case" as individuals who may be removed for cause because such individuals are biased and would be unwilling to consider the court's evidence as required by its instructions. See *Morgan*, 504 U.S. at 729.

¹⁷⁹ OHIO REV. CODE § 2945.25(C) (West 2007).

¹⁸⁰ OHIO REV. CODE § 2945.23(West 2007); OHIO R. CRIM. P. 24(D).

¹⁸¹ OHIO REV. CODE § 2929.03(B) (West 2007).

¹⁸² *Id.*

During the guilt/innocence phase, both the State and defense may present opening and closing arguments, as well as witnesses and other types of evidence, and have the opportunity to cross-examine all witnesses presented by the other side.¹⁸³ After both sides have presented their closing arguments, the court will instruct the jury as to the law of the case.¹⁸⁴

To render a verdict, the jury must be unanimous.¹⁸⁵ If the defendant is found guilty of the capital offense and at least one specification (i.e., aggravating circumstance), he/she will proceed to the penalty phase of the capital trial.¹⁸⁶

2. Penalty Phase

The purpose of the penalty phase is for the judge and jury to determine whether the appropriate sentence for a defendant convicted of a capital felony and found guilty for one or more charged specifications is death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.¹⁸⁷

If the defendant was tried by jury during the guilt phase, the penalty phase will be conducted before the trial judge and the trial jury. If the defendant waived the right to a jury trial and was tried by a three judge panel, the same panel of judges that tried the defendant during the guilt phase will hear the penalty phase.¹⁸⁸

The court and trial jury will consider:

- (1) Any evidence raised at trial that is relevant to the aggravating circumstances of which the defendant was found guilty;
- (2) Any factors in mitigation of the imposition of a death sentence;
- (3) Testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances of which the defendant was found guilty;
- (4) The statutory mitigating factors;
- (5) Any other factors in mitigation of the imposition of a death sentence;
- (6) The statement, if any, of the offender; and
- (7) The arguments, if any, of counsel for the defense and prosecution which are relevant to the penalty that should be imposed on the defendant.¹⁸⁹

¹⁸³ OHIO REV. CODE §§ 2315.01(A), 2945.10 (West 2007).

¹⁸⁴ OHIO REV. CODE §§ 2315.01(A)(7), 2945.10(G) (West 2007).

¹⁸⁵ OHIO R. CRIM. P. 31(A).

¹⁸⁶ OHIO REV. CODE § 2929.19(A)(1) (West 2007).

¹⁸⁷ OHIO REV. CODE § 2929.03 (West 2007).

¹⁸⁸ OHIO REV. CODE § 2929.03(C)(2)(b) (West 2007).

¹⁸⁹ OHIO REV. CODE § 2929.03(D)(1) (West 2007).

In addition, the court may require a pre-sentence investigation and/or a mental examination to be conducted upon the defendant's request. The trial court and trial jury must consider any report that was prepared pursuant to the examination and/or investigation.¹⁹⁰

Based on the evidence presented by the state and defense, the jury or three judge panel must assess whether the state has proved beyond a reasonable doubt that the aggravating circumstances the defendant was found guilty of committing outweigh the factors in mitigation of a death sentence.¹⁹¹ If the jury or three judge panel unanimously finds that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, the trial jury or judicial panel must recommend a sentence of death.¹⁹² Absent this finding, the jury or judicial panel must recommend that the defendant be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.¹⁹³

If the trial jury recommends a sentence of life without parole or life imprisonment with the possibility of parole after twenty-five or thirty years, the court must impose the sentence recommended by the jury.¹⁹⁴ If the jury recommends that a death sentence be imposed, the court must independently determine beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating factors.¹⁹⁵ If the court does so, it will impose a sentence of death.¹⁹⁶ Without such a finding, the defendant will be sentenced to either life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.¹⁹⁷

Within fifteen days of the defendant being sentenced to death,¹⁹⁸ the court must file an opinion stating its specific findings regarding the existence of any of the statutory mitigating factors, any non-statutory mitigating factors, the aggravating circumstances of

¹⁹⁰ *Id.* The defendant may also receive a mental examination pursuant to section 2929.024 of the Ohio Revised Code. OHIO REV. CODE § 2929.024 (West 2007) (“If the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant’s counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120 [“Public Defenders”] of the Revised Code.”).

¹⁹¹ OHIO REV. CODE § 2929.03(D)(1) (West 2007).

¹⁹² OHIO REV. CODE § 2929.03(D)(2) (West 2007).

¹⁹³ *Id.* If the defendant also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged aggravated murder, the defendant must be sentenced to life without parole. *Id.*

¹⁹⁴ *Id.* If the sentence is a sentence of life imprisonment without parole imposed because the defendant was convicted of or pled guilty to a sexual motivation specification and a sexually violent predator specification, the sentence will be served pursuant to Section 2971.03 of the Ohio Revised Code. *Id.*

¹⁹⁵ OHIO REV. CODE § 2929.03(D)(2)(b), (D)(3) (West 2007).

¹⁹⁶ OHIO REV. CODE § 2929.03(D)(3) (West 2007).

¹⁹⁷ *Id.*

¹⁹⁸ OHIO REV. CODE § 2929.03(F) (West 2007).

which the defendant was found guilty, and the reasons why the aggravating circumstances outweigh the mitigating factors.¹⁹⁹

After imposing sentence, the court must advise the defendant that he/she has the right to appeal the conviction and sentence and that:

- (1) The defendant may appeal without payment;
- (2) Counsel will be appointed to him/her if the defendant is unable to pay;
- (3) Documents necessary for an appeal will be provided without costs if the defendant is unable to pay for them; and
- (4) The defendant has the right to have a timely notice of appeal filed for him/her.²⁰⁰

Death sentences are automatically appealed to the Ohio Supreme Court.²⁰¹ Upon the defendant's request, the court will appoint counsel for the appeal.²⁰²

After the verdict of conviction, the defendant may move for a new trial.²⁰³ A new trial may be granted for any of the following situations which materially affected the defendant's substantial rights:

- (1) Irregularity in the proceedings of the court, jury, prosecuting attorney, or the witnesses for the state, or for any order of the court, or abuse of discretion by which the defendant was prevented from having a fair trial;
- (2) Misconduct of the jury, prosecuting attorney, or the witnesses for the state;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) That the verdict is not sustained by sufficient evidence or is contrary to law, but if the evidence shows the defendant is not guilty of the degree of crime for which he/she was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and pass sentence on such verdict or finding as modified, provided that this power extends to any court to which the cause may be taken on appeal;
- (5) Error of law occurring at the trial; and
- (6) When new evidence is discovered material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing of said motion, in support thereof, the affidavits of the witnesses by whom such

¹⁹⁹ *Id.*

²⁰⁰ OHIO R. CRIM. P. 32(A).

²⁰¹ OHIO REV. CODE § 2929.05(A) (West 2007). For offenses committed before January 1, 1995, the courts of appeals also would determine whether the sentence of death is appropriate.

²⁰² OHIO R. CRIM. P. 32(A).

²⁰³ OHIO REV. CODE § 2945.79 (West 2007).

evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as under all the circumstances of the case is reasonable. The prosecuting attorney may produce affidavits or other evidence to impeach the affidavits of such witnesses.²⁰⁴

An application for a new trial, for every reason other than newly discovered evidence, must be filed within fourteen days of the verdict being rendered.²⁰⁵ A motion for a new trial based on newly discovered evidence must be filed within 120 days following the day the verdict was rendered.²⁰⁶ When a new trial is granted, the defendant will stand for trial as though there has been no previous trial.²⁰⁷

A motion for a new trial will not be granted as a result of:

- (1) An inaccuracy or imperfection in the indictment, provided that the charge is sufficient to fairly and reasonably inform the accused of the nature and cause of the accusation against him;
- (2) A variance between the allegations and the proof thereof unless the defendant is misled or prejudiced thereby;
- (3) The admission or rejection of any evidence offered against or for the defendant unless it affirmatively appears on the record that the defendant was or may have been prejudiced thereby;
- (4) A misdirection of the jury unless the accused was or may have been prejudiced thereby; and
- (5) Any other cause unless it appears affirmatively from the record that the defendant was prejudiced thereby or was prevented from having a fair trial.²⁰⁸

A motion for a new trial is not a prerequisite to obtain appellate review.²⁰⁹

C. The Direct Appeal

An individual convicted of aggravated murder with specifications may have his/her conviction reviewed in the Ohio Supreme Court and/or the United States Supreme Court. The Ohio Supreme Court is obligated to review all cases in which the defendant has been

²⁰⁴ OHIO REV. CODE § 2945.79 (West 2007); OHIO R. CRIM. P. 33(A).

²⁰⁵ OHIO R. CRIM. P. 33(B). The time period may be extended if it is made to appear by clear and convincing evidence that the defendant was unavoidably prevented from filing his/her motion for a new trial. In this situation, the motion for a new trial should be filed within three days of the court's finding that he/she was unavoidably prevented from filing the motion within the time provided. *Id.*

²⁰⁶ *Id.* The time period may be extended if it is made to appear by clear and convincing evidence that the defendant was unavoidably prevented from filing his/her motion for a new trial. In this situation, the motion for a new trial should be filed within three days of the court's finding that he/she was unavoidably prevented from filing the motion within the time provided. *Id.*

²⁰⁷ OHIO REV. CODE § 2945.82 (West 2007).

²⁰⁸ OHIO REV. CODE § 2945.83 (2007); OHIO R. CRIM. P. 33(E).

²⁰⁹ OHIO REV. CODE § 2945.831 (2007); OHIO R. CRIM. P. 33(F).

convicted of aggravated murder and sentenced to death.²¹⁰ The United States Supreme Court may hear an appeal, but is not required to do so.²¹¹

A person who is convicted of aggravated murder and sentenced to death receives an automatic appeal to the Ohio Supreme Court.²¹² An appeal to the Ohio Supreme Court is commenced by the filing of a notice of appeal in the Supreme Court within forty-five days from the “journalization” of the entry of the judgment being appealed or the filing of the trial court opinion, whichever is later.²¹³ If the appellant is indigent and unrepresented, the Supreme Court will appoint the Ohio Public Defender or other qualified counsel to represent him/her, or will order the trial court to appoint counsel.²¹⁴ During the appeals process, counsel for the appellant and the state both have the opportunity to file appellate briefs²¹⁵ and make oral arguments before the Ohio Supreme Court.²¹⁶

The Ohio Supreme Court²¹⁷ will review the judgment in the case and the sentence of death in the same manner that it reviews other criminal cases, except that it will (1) review and independently weigh all of the facts and other evidence disclosed in the case record; (2) consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case; and (3) determine whether the sentence of death is appropriate.²¹⁸ Furthermore, the court will consider whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases and will review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances of which the appellant was found guilty and will determine whether the sentencing court properly weighed the aggravating circumstances and mitigating factors.²¹⁹

Ultimately, after considering the appeal on its merits on the assignments of error set forth in the briefs, the record, and, unless waived, the oral arguments, the Ohio Supreme Court

²¹⁰ OHIO REV. CODE § 2953.02 (2007); OHIO REV. CODE § 2929.05(A) (West 2007); OHIO SUP. CT. RULES OF PRACTICE R. II(1)(C)(1). For offenses committed before January 1, 1995, both the Ohio courts of appeals and the Ohio Supreme Court will hear the appellant’s direct appeal. OHIO REV. CODE § 2953.07(West 2007); OHIO SUP. CT. RULES OF PRACTICE R. II(1)(A)(1).

²¹¹ SUP. CT. R. 16.

²¹² OHIO REV. CODE §§ 2953.02, .05(A) (West 2007).

²¹³ OHIO SUP. CT. RULES OF PRACTICE R. XIX(1)(A)(1). If the appellant files a motion for a new trial or for arrest of judgment in the trial court, the time for filing a notice of appeal begins to run after the order denying the motion is entered. However, a motion for a new trial on the ground of newly discovered evidence extends the time for filing the notice of appeal only if the motion is made before the expiration of the time for filing a motion for a new trial on grounds other than newly discovered evidence. OHIO SUP. CT. RULES OF PRACTICE R. XIX(1)(A)(2).

²¹⁴ OHIO SUP. CT. RULES OF PRACTICE R. XIX(2); *see also* RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20.

²¹⁵ OHIO R. APP. P. 16; OHIO SUP. CT. RULES OF PRACTICE R. XIX(5).

²¹⁶ OHIO R. APP. P. 21; OHIO SUP. CT. RULES OF PRACTICE R. IX(1)(A)(1).

²¹⁷ For offenses committed before January 1, 1995, the Ohio courts of appeals also review the judgment. OHIO REV. CODE § 2953.07 (West 2007); OHIO SUP. CT. RULES OF PRACTICE R. II(1)(A)(1).

²¹⁸ OHIO REV. CODE § 2929.05(A) (West 2007).

²¹⁹ *Id.*

will (1) review and affirm, modify, or reverse the judgment, (2) unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.²²⁰ The Ohio Court of Appeals and Ohio Supreme Court will affirm a death sentence only if the court is persuaded that the aggravating factors outweigh the mitigating factors and that the sentence of death is the appropriate sentence.²²¹

The trial court that sentenced the offender will conduct a re-sentencing hearing if a sentence of death is set aside, nullified, or vacated because:

- (1) The reviewing court could not affirm the death sentence under the standards discussed above;
- (2) The statutory procedure for imposing a death sentence is declared unconstitutional;
- (3) The offender was less than eighteen years of age at the time of the crime; or
- (4) The offender is mentally retarded.²²²

At this re-sentencing hearing, the court will impose a sentence of life imprisonment.²²³

If the sentence was set aside, nullified, or vacated because of error in the sentencing phase of the trial and the situations listed above do not apply, the trial court will conduct a re-sentencing hearing.²²⁴ If the offender was tried by jury previously, the trial court will impanel a new jury for the re-sentencing hearing.²²⁵ If the offender was tried by a three judge panel, that panel or a new panel will conduct the re-sentencing hearing.²²⁶ The offender may be re-sentenced to death or to life imprisonment.²²⁷

If the Ohio Supreme Court affirms the appellant's conviction and sentence, the appellant has ninety days after the decision is entered to file a petition for a writ of *certiorari* with the United States Supreme Court, seeking discretionary review of the Ohio Supreme Court's decision affirming the appellant's conviction and sentence.²²⁸ The United States Supreme Court either may deny or accept appellant's case for review.²²⁹ If the United States Supreme Court accepts the case, the Court may affirm the conviction and the

²²⁰ OHIO R. APP. P. 12(A).

²²¹ OHIO REV. CODE § 2929.05(A) (West 2007).

²²² OHIO REV. CODE § 2929.06(A) (West 2007).

²²³ *Id.* The court will choose from the life sentences under section 2929.03(D) of the Ohio Revised Code or section 2929.04 of the Ohio Revised Code that were available at the time the offender committed the offense for which the death sentence was imposed. *Id.*

²²⁴ OHIO REV. CODE § 2929.06(B) (West 2007).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* If the court determines that it will sentence the offender to life imprisonment, the court will choose from the life sentences under section 2929.039(D) of the Ohio Revised Code or section 2929.04 of the Ohio Revised Code that were available at the time the offender committed the offense for which the death sentence was imposed. *Id.*

²²⁸ 28 U.S.C. § 1257 (2007).

²²⁹ SUP. CT. R. 16.

sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.²³⁰

E. “Murnahan” Appeal

In what is called a “Murnahan” appeal, the appellant may, but is not required to, file for reconsideration of the Ohio Supreme Court’s direct appeal decision, based on a claim of ineffective assistance of counsel in the Ohio Supreme Court.²³¹ This appeal will be filed in the same court where the direct appeal was decided.²³² Consequently, for cases arising after 1994, the appeal will be filed in the Ohio Supreme Court and for cases arising prior to 1994, the appeal will be filed in an Ohio court of appeals.²³³

An application for reopening the case must be filed within ninety days from journalization of the direct appeal judgment, unless the petitioner shows good cause for filing at a later time.²³⁴ The application must contain:

- (1) The appellate case number in which reopening is sought and the trial court case number or numbers from which the appeal was taken;
- (2) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment;
- (3) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel’s deficient performance;
- (4) A sworn statement of the basis for the claim that appellate counsel’s representation was deficient with respect to the assignments of error or arguments raised in support of assignments of error that were considered on an incomplete record because of appellate counsel’s deficient representation and the manner in which the deficiency prejudicially affected the outcome of the appeal; and
- (5) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.²³⁵

An application for reopening will be granted if “there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel” on appeal.²³⁶ If the court denies the application, it must state the reasons for the denial. If the court grants the application, it must (1) appoint counsel to represent the applicant if he/she is indigent and unrepresented and (2) impose any conditions that are necessary to preserve the status quo

²³⁰ 28 U.S.C. § 2106 (2007).

²³¹ OHIO SUP. CT. RULES OF PRACTICE R. XI(6)(A). An application for reopening must be filed within ninety days from entry of the judgment, unless the appellant shows good cause for filing at a later time. *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ OHIO R. APP. P. 26(B)(2).

²³⁶ OHIO SUP. CT. RULES OF PRACTICE R. XI(6)(E); OHIO R. APP. P. 26(B)(5).

during the pendency of the reopened appeal.²³⁷ If the application is granted, the court will proceed as though on the initial appeal, although it may limit its review to those assignments of error and arguments that have not previously been considered.²³⁸

If the court finds that the performance of appellate counsel was deficient and the petitioner was prejudiced by that deficiency, the court must vacate its prior judgment and enter the appropriate judgment.²³⁹ If the court does not find that appellate counsel's performance was deficient, or finds that it was deficient, but that it did not prejudice the petitioner, the court will issue an order confirming its prior judgment.²⁴⁰

If the Ohio Supreme Court affirms the appellant's conviction and sentence, the appellant has ninety days after the decision is entered to file a petition for a writ of *certiorari* with the United States Supreme Court, seeking discretionary review of the Ohio Supreme Court's decision affirming the appellant's conviction and sentence.²⁴¹ The United States Supreme Court either may deny or accept appellant's case for review.²⁴² If the United States Supreme Court accepts the case, the Court may affirm the conviction and the sentence, affirm the conviction and overturn the sentence, or overturn both the conviction and sentence.²⁴³

The appellant may continue to challenge his/her conviction and/or sentence by filing a petition for post-conviction relief with the trial court.

D. State Post-Conviction Relief

A defendant under sentence of death is entitled to file a collateral appeal to ask the court to render void or voidable the judgment with respect to the conviction of aggravated murder or the specification of an aggravating circumstance or the sentence of death.²⁴⁴ The petition must be filed no later than 180 days after the date on which the trial transcript is filed in the Ohio Supreme Court for the direct appeal.²⁴⁵ If the petitioner intends to file a post-conviction petition and is indigent, the trial court should appoint him/her counsel.²⁴⁶

A petition for post-conviction relief must contain a case history, statement of facts, and separately identified grounds for relief.²⁴⁷ Every ground for relief must be stated, or it is

²³⁷ OHIO R. APP. P. 26(B)(6).

²³⁸ OHIO R. APP. P. 26(B)(7); OHIO SUP. CT. RULES OF PRACTICE R. XI(6)(G).

²³⁹ OHIO R. APP. P. 26(B)(9); OHIO SUP. CT. RULES OF PRACTICE R. XI(6)(I).

²⁴⁰ OHIO R. APP. P. 26(B)(9); OHIO SUP. CT. RULES OF PRACTICE R. XI(6)(I).

²⁴¹ 28 U.S.C. § 1257 (2007).

²⁴² SUP. CT. R. 16.

²⁴³ 28 U.S.C. § 2106 (2007).

²⁴⁴ OHIO REV. CODE § 2953.21(A)(1)(a), (A)(3) (West 2007).

²⁴⁵ OHIO REV. CODE § 2953.21(A)(2) (West 2007). This may be while the direct appeal is still pending.

See OHIO REV. CODE § 2953.21(C) (West 2007).

²⁴⁶ OHIO REV. CODE § 2953.21(I)(1) (West 2007). The court cannot appoint the attorney who represented the petitioner at trial unless the petitioner and the counsel expressly request the appointment. OHIO REV. CODE § 2953.21(I)(2) (West 2007).

²⁴⁷ OHIO R. CRIM. P. 35(A).

waived.²⁴⁸ The defendant cannot dispute the conviction or sentence directly, but can allege state and federal constitutional violations.²⁴⁹ Ineffective assistance of counsel during post-conviction proceedings does not constitute grounds for relief.²⁵⁰ The petition may include a claim that the petitioner was denied the equal protection of the laws in violation of the United States or Ohio Constitutions because the sentence imposed was part of a “consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner’s race, gender, ethnic background, or religion.”²⁵¹

The State must file its response to the defendant’s petition within ten days after the petition has been docketed.²⁵² Either party may file for summary judgment within twenty days from the date the issues are raised.²⁵³ The court will then review the petition to determine whether there are substantive grounds for relief.²⁵⁴ In making this determination, the court will consider the petition, the supporting affidavits, the documentary evidence, and the files and records pertaining to the proceedings against the petition, including the indictment, the court’s journal entries, the journalized records of the clerk of the court, and the court reporter’s transcript.²⁵⁵ If the court dismisses the petition, it must make and file findings of fact and conclusions of law with respect to the dismissal.²⁵⁶ If the court does not dismiss the petition, it will hold a hearing on the issues.²⁵⁷

Once the court hears oral arguments and reviews the evidence, it must issue a ruling on each claim.²⁵⁸ If the court does not find grounds for relief, it will make and file findings of fact and conclusions of law and will enter judgment denying relief on the petition.²⁵⁹ If the case’s direct appeal has already been resolved and the court finds grounds for relief, or if the direct appeal is pending and has been remanded to the court, it will make and file findings of fact and conclusions of law and will enter a judgment that vacates and sets aside the judgment in question.²⁶⁰ The petitioner will be discharged, re-sentenced, or granted a new trial.²⁶¹ The court also may make supplementary orders concerning issues such as re-arraignment, retrial, custody, and bail.²⁶²

²⁴⁸ OHIO REV. CODE § 2953.21(A)(4) (West 2007).

²⁴⁹ OHIO REV. CODE § 2953.21(A)(1)(a) (West 2007).

²⁵⁰ OHIO REV. CODE § 2953.21(I)(2) (West 2007).

²⁵¹ OHIO REV. CODE § 2953.21(A)(5) (West 2007).

²⁵² OHIO REV. CODE § 2953.21(D) (West 2007). This time period may be extended if the court believes that good cause has been shown. *Id.*

²⁵³ *Id.*

²⁵⁴ OHIO REV. CODE § 2953.21(C) (West 2007).

²⁵⁵ *Id.*

²⁵⁶ *Id.*; OHIO R. APP. P. 12(A)(1).

²⁵⁷ OHIO REV. CODE § 2953.21(E) (West 2007).

²⁵⁸ *Id.*; OHIO R. APP. P. 12(A)(1).

²⁵⁹ OHIO REV. CODE § 2953.21(G) (West 2007).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

The court's order on a post-conviction petition is a final judgment and is appealable as a matter of right.²⁶³ The courts of appeal entertain all appeals of right in capital post-conviction proceedings and further appeals to the Ohio Supreme Court are discretionary.²⁶⁴ In reviewing whether the trial court erred in denying a petitioner's motion for post-conviction relief, the appellate court applies an abuse of discretion standard.²⁶⁵ If the court of appeals and, if accepted for review, the Ohio Supreme Court affirms the lower court decision, the petitioner may file a request for *certiorari* with the United States Supreme Court.²⁶⁶ If the U.S. Supreme Court declines to hear the appeal or affirms the lower court decision, the state post-conviction appeal is complete.

A second or successive post-conviction motion may be filed to appeal an order awarding or denying relief as a result of the original post-conviction petition,²⁶⁷ but such a motion is generally barred if the same or similar claims were already litigated and decided, or if the claims could have been raised in the first or earlier motion.²⁶⁸ To have a second or successive petition heard:

- (1) The petitioner must show that he/she was unavoidably prevented from discovery of the facts upon which the petitions must rely to present the claim for relief, or the United States Supreme Court recognized a new federal or state right that applies retroactively to people in the petitioner's situation, and the petition asserts a claim based on that right; or
- (2) The petitioner shows by clear and convincing evidence that, but for constitutional error at trial, no reasonable fact finder would have found the petitioner guilty of the offense of which the petitioner was convicted or but for constitutional error at the sentencing hearing, no reasonable fact finder would have found the petitioner eligible for the death sentence;²⁶⁹ and
- (3) The petitioner had DNA testing performed and the results establish by clear and convincing evidence that the petitioner is actually innocent of the crime or of the aggravating circumstance or circumstances that are the basis of the death sentence.²⁷⁰

The remedies available to a movant under a second or successive post-conviction petition are the same as for the initial petition.

²⁶³ OHIO REV. CODE § 2953.23(B) (West 2007).

²⁶⁴ OHIO CONST. art. IV, §§ 2-3. If the trial court's order granting post-conviction relief is reversed by an appellate court and direct appeal has been remanded from the appellate court, the appellate court reversing the post-conviction order must notify appellate court handling the direct appeal and reinstate the direct appeal. OHIO REV. CODE § 2953.21(G) (West 2007).

²⁶⁵ *State v. Back*, 2006 WL 2575961, *2 (Ohio Ct. App. 10th Dist. Aug. 31, 2006).

²⁶⁶ 28 U.S.C. § 1257 (2004).

²⁶⁷ Any motion filed after the initial post-conviction petition is considered "second" or "successive," as a state court already has ruled on a post-conviction motion challenging the same conviction and death sentence.

²⁶⁸ OHIO REV. CODE § 2953.23 (West 2007).

²⁶⁹ OHIO REV. CODE § 2953.23(A)(1) (West 2007).

²⁷⁰ OHIO REV. CODE § 2953.23(A)(2) (West 2007).

F. Federal Habeas Corpus

A petitioner wishing to challenge a conviction or death sentence as being in violation of federal law may file a petition for a writ of *habeas corpus* with the federal district court in Ohio having jurisdiction over the case. The petitioner may be entitled to appointed counsel to prepare the petition if the petitioner “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.”²⁷¹

The petitioner must have raised all relevant federal claims in state court before filing the petition for a writ of *habeas corpus*.²⁷² The petitioner’s failure to exhaust all state remedies available on appeal and collateral review could result in the federal court denying the petition on the merits.²⁷³

The petitioner must identify and raise all possible grounds of relief and summarize the facts supporting each ground.²⁷⁴ If the petitioner challenges a state court’s determination of 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.²⁷⁵ Additionally, if the petitioner raises a claim that the state court decided on the merits, the petitioner must establish that the state court’s decision of the claim was contrary to or involved an unreasonable application of federal law or was based on an unreasonable determination of the facts in light of the evidence presented.²⁷⁶ In addition to the petition, the petitioner may, but is not required to, attach certified copies of the indictment, plea, and judgment to the petition.²⁷⁷ If the petitioner does not include these documents with the petition, the respondent must promptly file copies of those documents with the court.²⁷⁸

The petition must be filed in the federal district court for the district where the petitioner is in custody or in the district where the petitioner was convicted and sentenced.²⁷⁹ The deadline for filing the petition is one year²⁸⁰ from the date on which (1) the judgment

²⁷¹ 18 U.S.C. § 3599(a)(2) (2007); *see also* *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994) (citing 21 U.S.C. § 848(q)(4)(B), which has since been repealed.)

²⁷² 28 U.S.C. § 2254(b)(1) (2007).

²⁷³ 28 U.S.C. § 2254(b)(2) (2007).

²⁷⁴ RULE 2(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁷⁵ 28 U.S.C. § 2253(e)(1) (2007).

²⁷⁶ 28 U.S.C. § 2253(d) (2007).

²⁷⁷ 28 U.S.C. § 2249 (2007).

²⁷⁸ 28 U.S.C. § 2249 (2007).

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

²⁸⁰ In states that have “opted-in” to the “Special Habeas Corpus Procedures in Capital Cases,” 28 U.S.C. §§ 2261-2266, the deadline for federal habeas corpus petitions is 180 days after the conviction and death sentence have been affirmed on direct review or the time allowed for seeking such review has expired. *See* 28 U.S.C. § 2263(a) (2007). However, a state may only “opt-in” to these expedited procedures if (1) the Attorney General of the United States certifies that the state has established a mechanism for providing counsel in post-conviction proceedings as provided in 28 U.S.C. § 2265; and (2) counsel was appointed pursuant to that mechanism, the petitioner validly waived counsel, the petitioner retained counsel, or the

became final; (2) the state impediment that prevented the petitioner from filing was removed; (3) the United States Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review; or (4) the underlying facts of the claim(s) could have been discovered through due diligence.²⁸¹ 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.²⁸²

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.²⁸³ If the judge finds that the petitioner is not entitled to relief, the judge may summarily dismiss the petition.²⁸⁴ In contrast, if the judge finds that the petitioner may be entitled to district court relief, the judge will order the respondent to file an answer replying to the allegations contained in the petition.²⁸⁵ In addition to the answer, the respondent must furnish all portions of the state court transcripts it deems relevant to the petition.²⁸⁶ The judge on his/her own motion or on the motion of the petitioner may order that additional portions of the state court transcripts be provided to the parties.²⁸⁷

Additionally, either party may submit a request for the invocation of the discovery process.²⁸⁸ The judge may grant such request if the requesting party establishes “good cause.”²⁸⁹ The judge also may direct the parties to expand the record by providing additional evidence relevant to the merits of the petition.²⁹⁰ This may include: letters predating the filing of the petition, documents, exhibits, answers to written interrogatories, and affidavits.²⁹¹

petitioner was found not to be indigent. *See* 28 U.S.C. § 2261(b) (2007). The mechanism for appointing, compensating, and reimbursing competent counsel must:

- (1) Offer counsel to all state prisoners under capital sentence; and
- (2) Provide the court of record the opportunity to enter an order (a) appointing one or more counsel to represent the prisoner upon a finding that the prisoner is indigent and accepted the offer or is unable completely to decide whether to accept or reject the offer; (b) finding, after a hearing if necessary, that the prisoner rejected the offer of counsel and made the decision with an understanding of its legal consequences; or (c) denying the appointment of counsel upon a finding that the prisoner is not indigent.

See U.S.C. § 2261(c) (2007).

²⁸¹ U.S.C. § 2244(d)(1) (2007).

²⁸² U.S.C. § 2244(d)(2) (2007).

²⁸³ RULE 4 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁸⁴ *Id.*

²⁸⁵ RULES 4 AND 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁸⁶ RULE 5 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁸⁷ *Id.*

²⁸⁸ RULE 6(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁸⁹ RULE 6(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹⁰ RULE 7(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹¹ RULE 7(b) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

Upon review of the state court proceedings and the evidence presented, the judge must determine whether an evidentiary hearing is required.²⁹² The judge may not hold an evidentiary hearing on a claim that was not factually developed during the state court proceedings unless (1) it is necessary to find facts underlying a newly recognized constitutional law or newly discovered, previously unavailable evidence, or (2) the facts underlying the claim would be sufficient to establish that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.²⁹³ If the judge decides that an evidentiary hearing is unnecessary, the judge will make a decision on the petition without additional evidence.²⁹⁴ However, if an evidentiary hearing is required, the judge should appoint counsel to the petitioner²⁹⁵ and conduct the hearing as promptly as possible.²⁹⁶

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 penalty phase, a new direct appeal, or deny relief.

In order to appeal the district court judge's decision, the applicant for the appeal must file a notice of appeal with the district court within thirty days after the judgment.²⁹⁷ The petitioner must request a "certificate of appealability" from either a district or circuit court judge.²⁹⁸ A judge may issue a "certificate of appealability" only if the petitioner makes a substantial showing of the denial of a constitutional right in the request for the certificate.²⁹⁹ If the "certificate of appealability" is granted, the appeal will proceed to the Sixth Circuit Court of Appeals.

In rendering its decision, the Sixth Circuit may consider the record from the federal district court, the briefs submitted by the parties, and the oral arguments, if permitted. Based on the evidence, the Sixth Circuit may order a new appeal in the federal district court or the state court, an evidentiary hearing by the federal district court, or a new guilt/innocence or penalty phase in the state court.

Both parties may then seek review of the Sixth Circuit Court's decision by filing a petition for a writ of *certiorari* in the United States Supreme Court.³⁰⁰ The United States 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/innocence phase, a new penalty phase, or a new appeal.

²⁹² RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹³ 28 U.S.C. § 2253(e)(2) (2007).

²⁹⁴ RULE 8(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹⁵ RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; 18 U.S.C. § 3006A(g) (2007) (denoting the qualifications for federal habeas corpus counsel).

²⁹⁶ RULE 8(c) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

²⁹⁷ FED. R. APP. P. 4(a)(1)(A).

²⁹⁸ 28 U.S.C. § 2253(c)(1) (2007); FED. R. APP. P. 22(b)(3).

²⁹⁹ 28 U.S.C. § 2253(c)(2) (2007)

³⁰⁰ 28 U.S.C. § 1254(1) (2007).

If the petitioner wishes to file a second or successive *habeas corpus* petition, he/she must submit a motion to the Sixth Circuit Court of Appeals requesting an order authorizing the petitioner to file the petition and the district court to consider it.³⁰¹ A three-judge panel of the Sixth Circuit must consider the motion.³⁰² The panel specifically must assess whether the petition makes a *prima facie* showing that the claims presented in the second or successive petition were not previously raised and that the new claim (1) relies on a new, previously unavailable constitutional rule, or (2) relies on newly discovered, previously unascertainable facts that, if proven, 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.³⁰³ Claims of factual innocence (“actual innocence”) must meet the requirements of the latter provision.³⁰⁴ Any second or successive petition that presents a claim raised in a prior petition will be dismissed.³⁰⁵

If the Sixth Circuit denies the motion, the petitioner may not seek appellate review of such decision.³⁰⁶ If the Sixth Circuit grants the motion, then the second or successive motion will continue through the same process as the initial petition.

The petitioner may seek final review of his/her conviction and sentence by pursuing clemency relief.

G. Clemency

Under the Ohio Constitution, the Governor is given clemency powers in accordance with the regulations provided by law.³⁰⁷ Ohio law permits the granting of reprieves, commutations, and pardons to individuals under a sentence of death.³⁰⁸ The Ohio legislature created the Adult Parole Authority (Authority) to oversee the clemency process.³⁰⁹

To initiate the clemency process, the inmate is supposed to submit a written application for pardon or commutation of sentence to the Authority,³¹⁰ although the process will begin automatically in capital cases once the Board receives notice that the Ohio Supreme Court has set an execution date, regardless of whether the inmate has submitted a written application.³¹¹ The governor may grant a reprieve for a definite time with or without notice or application.³¹²

³⁰¹ 28 U.S.C. § 2244(b)(3)(A) (2007).

³⁰² 28 U.S.C. § 2244(b)(3)(B) (2007).

³⁰³ 28 U.S.C. § 2244(b)(2) (2007).

³⁰⁴ 28 U.S.C. § 2244(b)(2)(B) (2007).

³⁰⁵ 28 U.S.C. § 2244(b)(1) (2007).

³⁰⁶ 28 U.S.C. § 2244(b)(3)(E) (2007).

³⁰⁷ OHIO CONST. art. III, § 11.

³⁰⁸ *Id.*

³⁰⁹ OHIO REV. CODE § 2967.02(A), (B) (West 2007).

³¹⁰ OHIO REV. CODE § 2967.07 (West 2007).

³¹¹ Death Penalty Clemency Procedure, Ohio Dep’t of Rehabilitation and Correction Policy, No. 105-PBD-01, § VI(B)(1). The Parole Board may begin its investigation at an earlier date on its own initiative.
Id.

³¹² OHIO REV. CODE § 2967.08 (West 2007).

Upon the submission of an application, the setting of an execution date, or when directed by the governor, the Authority must conduct a “thorough investigation into the propriety of granting a pardon, commutation, or reprieve.”³¹³ The Authority will conduct a hearing and makes its recommendation for or against clemency on a majority vote.³¹⁴ The Authority must provide the governor a written report stating the facts in the case, along with the recommendation for or against the granting of a pardon, commutation, or reprieve, the grounds for its recommendation, and the records or minutes relating to the case.³¹⁵ The final decision regarding whether to grant clemency rests with the governor.³¹⁶

H. Execution

An inmate’s death sentence will be carried out by lethal injection.³¹⁷ The death sentence will be carried out with the state correctional institution designated by the Director of Rehabilitation under the direction of the warden of the institution or, in the warden’s absence, a deputy warden.³¹⁸

The following people may be present at an execution:

- (1) The warden of the state correctional institution in which the sentence is executed or a deputy warden, any other person selected by the director of rehabilitation and correction to ensure that the death sentence is executed, any persons necessary to execute the death sentence by lethal injection, and the number of correction officers that the warden thinks necessary;
- (2) The sheriff of the county in which the prisoner was tried and convicted;
- (3) The Director of Rehabilitation and Correction, or the director’s agent;
- (4) Physicians of the state correctional institution in which the sentence is executed;
- (5) The clergyperson in attendance upon the prisoner, and not more than three other persons, to be designated by the prisoner, who are not confined in any state institution;
- (6) Not more than three person to be designated by the immediate family of the victim; and
- (7) Representatives of the news media as authorized by the Director of Rehabilitation and Correction.³¹⁹

³¹³ OHIO REV. CODE § 2967.07 (West 2007); Death Penalty Clemency Procedure, Ohio Dep’t of Rehabilitation and Correction, Policy No. 105-PBD-01, § VI(B)(1).

³¹⁴ Death Penalty Clemency Procedure, Ohio Dep’t of Rehabilitation and Correction, Policy No. 105-PBD-01, § VI(B)(1), (2).

³¹⁵ *Id.*

³¹⁶ OHIO CONST. art. III, § 11.

³¹⁷ OHIO REV. CODE § 2949.22(A) (West 2007). If lethal injection has been determined to be unconstitutional, the death sentence will be carried out through a different method. OHIO REV. CODE § 2949.22(C) (West 2007).

³¹⁸ OHIO REV. CODE § 2949.22(B) (West 2007).

³¹⁹ OHIO REV. CODE § 2949.25(A) (West 2007).

At least one representative of a newspaper, at least one representative of a television station, and at least one representative of a radio station must be authorized to be present at the execution of the sentence.³²⁰

³²⁰ OHIO REV. CODE § 2949.25(B) (West 2007).

CHAPTER TWO

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

INTRODUCTION TO THE ISSUE

DNA testing is a useful law enforcement tool that can help to establish guilt as well as innocence. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence collected during the investigation of a criminal case is preserved and made available to defendants and convicted persons seeking to establish their innocence.¹ Since then, over thirty-five jurisdictions have adopted laws concerning post-conviction DNA testing.² However, the standards for preserving biological evidence and seeking and obtaining post-conviction DNA testing vary widely among the states.

Many who may have been wrongfully convicted cannot prove their innocence because states often fail to adequately preserve material evidence. Written procedures for collecting, preserving and safeguarding biological evidence should be established by every law enforcement agency, made available to all personnel, and designed to ensure compliance with the law.³ The procedures should be regularly updated 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 the procedures should be enforceable through the agency disciplinary process.⁴

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,⁵ and through the priorities and practices of other police oversight groups.⁶

¹ See ABA Criminal Justice Section, Recommendation 115, 2000 Annual Meeting, *available at* <http://www.abanet.org/crimjust/policy/cjpol.html#am00115> (last visited Sept. 13, 2007).

² See National Conference of State Legislatures, Post-Conviction DNA Motions, *at* <http://www.ncsl.org/programs/cj/postconviction.htm> (last visited Sept. 13, 2007); *see also* Innocence Project, Fix the System, Access to DNA Testing, *at* <http://www.innocenceproject.org/fix/DNA-Testing-Access.php> (last visited Sept. 13, 2007) (noting that forty-two states have some form of post-conviction DNA testing mechanism).

³ See 1 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).

⁴ See 1 ABA Standards for Criminal Justice, Urban Police Function (2d ed. 1979) (Standard 1-5.3(a)) (identifying “[c]urrent methods of review and control of police activities”).

⁵ 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.

⁶ Such organizations include the U.S. Department of Justice which is empowered to sue police agencies under authority of the pattern and practice provisions of the 1994 Crime Law. 28 U.S.C. § 14141 (2007); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 814 (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 50 states.

Training should include information about the possibility that the loss or compromise of evidence may lead to an inaccurate result. 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.⁷

Initial training is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques. 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.⁸ 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.⁹

Similar, state-based organizations exist in many places, as do government established independent monitoring agencies. *See* CALEA Online, at <http://www.calea.org/> (last visited Sept. 13, 2007). 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). ASCLD-LAB, at <http://www.asclld-lab.org> (last visited Sept. 13, 2007); NFSTC, at <http://www.nfstc.org/> (last visited Sept. 13, 2007).

⁷ Standard 1-7.3 provides:

- (a) Training programs should be designed, both in their content and in their format, so that the knowledge that is conveyed and the skills that are developed relate directly to the knowledge and skills that are required of a police officer on the job.
- (b) Educational programs that are developed primarily for police officers should be designed to provide an officer with a broad knowledge of human behavior, social problems, and the democratic process.

Standard 1-7.3; *see also* Standard 1-5.2(a) (noting value of “education and training oriented to the development of professional pride in conforming to the requirements of law and maximizing the values of a democratic society”).

⁸ *See generally* 1 ABA Standards for Criminal Justice, Urban Police Function, Part VII (2d ed. 1979) (“Adequate Police Resources”).

⁹ *See, e.g.*, ABA House of Delegates, Report No. 8A, 2004 Midyear Meeting (requiring videotaping of interrogations).

I. FACTUAL DISCUSSION

Five Ohio death-row inmates have been exonerated since Ohio's reinstatement of the death penalty in 1974.¹⁰ In 2003, in order to provide for greater access to DNA testing and analysis, the Ohio Legislature adopted sections 2953.71 through 2953.84 of the Ohio Rev. Code, providing the means for individuals to challenge their convictions and sentences in certain circumstances by seeking DNA testing of evidence.¹¹

A. *Preservation of DNA Evidence and Other Types of Evidence*

The State of Ohio does not statutorily require the preservation of evidence, biological or otherwise, except for the period between the completion of post-conviction DNA testing on biological evidence and a designated period of time after the execution of the death-sentenced inmate.¹²

1. Procedures for Pre-Trial Preservation of Evidence

Ohio law enforcement agencies which collect evidence during a criminal investigation are responsible for holding and maintaining that evidence throughout the pre-trial phase. All police departments, sheriffs' departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Ohio that are certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)¹³ are required to adopt written directives

¹⁰ See Death Penalty Information Center, Innocence: List of Those Freed From Death Row, *available at* <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited Sept. 13, 2007). The Death Penalty Information Center lists individuals on its "Innocence List" if they had "been convicted and sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped, or b) they were given an absolute pardon by the governor based on new evidence of innocence." *Id.* In Ohio, the five exonerated individuals are Gary Beeman (acquitted at re-trial in 1979), Dale Johnson (charges dismissed in 1990), Timothy Howard (charges dismissed in 2003), Gary Lamar James (charges dismissed in 2003), and Derrick Jamison (charges dismissed in 2005). *Id.* DNA was not a factor in any of the five exoneration cases in Ohio. *Id.*

¹¹ OHIO REV. CODE §§ 2953.71 to 2953.84 (West 2007).

¹² OHIO REV. CODE §§ 2953.77 (West 2007).

¹³ Sixty-two police departments, sheriff's departments, and university/college police departments in Ohio have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA). See CALEA Online, Agency Search, *at* <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Sept. 13, 2007) (use second search function, designating "U.S."; "Ohio"; and "Law Enforcement Accreditation" as search criteria); *see also* CALEA Online, About CALEA, *at* <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Sept. 13, 2007) (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 (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)). To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of: (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) 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; (5) an on-site assessment by a team selected by the Commission to determine compliance who, in turn, will submit a compliance report to the Commission; and (6) a hearing where a

establishing procedures to be used in criminal investigations, including procedures on collecting, preserving, processing, and avoiding contamination of physical evidence.¹⁴

Furthermore, in order to be certified as a peace officer¹⁵ in the State of Ohio, a candidate must complete 558 hours of basic training at a school approved and monitored by the Ohio Peace Officer Training Commission (OPOT Commission).¹⁶ The basic training curriculum of every Ohio peace officer includes, among other requirements, fifty-four hours of instruction on criminal investigation.¹⁷ Specifically, the training includes instruction in the following relevant areas: (1) four hours on crime scene search; (2) sixteen hours on evidence collection techniques; (3) four hours on crime scene sketching and detailed drawing; (4) three hours on police photography; (5) one hour on arson investigation; and (6) three hours on ethics and professionalism.¹⁸

Additionally, all crime laboratories that are accredited through certain voluntary accreditation boards are required to adopt or abide by certain procedures relating to the preservation of evidence.¹⁹ Currently, the Ohio Bureau of Criminal Identification and Investigation (BCI), and eight local crime laboratories²⁰ voluntarily have obtained accreditation through the national accreditation programs of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) Legacy and International accreditation programs.²¹ ASCLD/LAB specifically requires laboratories

final decision on accreditation is rendered. *See* CALEA Online, The Law Enforcement Accreditation Process, at <http://www.calea.org/Online/CALEAPrograms/Process/accdprocess.htm> (last visited Sept. 13, 2007).

¹⁴ 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, 83-1 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standards 42.2.1 and 83.2.1).

¹⁵ The numerous law enforcement positions in the State of Ohio requiring peace officer basic training may be found in section 109.71(A)(1)-(22) of the Ohio Revised Code. Investigators of the Ohio Bureau of Criminal Identification and Investigation who have been certified by the OPOT Commission also are considered peace officers. OHIO REV. CODE §109.542(A) (West 2007).

¹⁶ OHIO REV. CODE §109.77(B)(1) (West 2007); OHIO ADMIN. CODE 109:2-1-16; OFFICE OF THE OHIO ATTORNEY GENERAL, OHIO PEACE OFFICER BASIC TRAINING REQUIREMENTS AND OPTIONS FOR ATTENDING 1 [hereinafter OPOT TRAINING REQUIREMENTS], available at http://www.ag.state.oh.us/le/training/pubs/requirements_options.pdf (last visited Sept. 13, 2007).

¹⁷ OPOT TRAINING REQUIREMENTS, *supra* note 16, at 3.

¹⁸ *Id.*

¹⁹ ASCLD/LAB, LABORATORY ACCREDITATION BOARD 2003 MANUAL 20-23 (on file with author) [hereinafter ASCLD/LAB 2003 MANUAL].

²⁰ The American Society of Crime Laboratory Directors indicates that there are eight accredited local or regional crime laboratories in Ohio that are not affiliated with BCI. *See* Am. Soc'y of Crime Lab. Dirs./Laboratory Accreditation Bd.-*Legacy*, Laboratories Accredited by ASCLD/LAB, available at <http://www.ascl-d-lab.org/legacy/aslablegacylaboratories.html#OH> (last visited Sept. 13 2007) (indicating crime laboratories in Canton-Stark County; City of Columbus, Cuyahoga County Coroner's Office; DNA Diagnostics Center in Fairfield, Ohio; Hamilton County Coroner's Office; Lake County (Regional); Mansfield, Ohio; and Miami Valley (Regional in Dayton, Ohio)).

²¹ The names of accredited crime laboratories are found on the accrediting organizations' websites. *See, e.g.,* Am. Soc'y of Crime Lab. Dirs./Laboratory Accreditation Bd.-*Legacy* (ASCLD/LAB-*Legacy*), Laboratories, available at <http://www.ascl-d-lab.org/legacy/aslablegacylaboratories.html> (last visited Sept. 13, 2007); Am. Soc'y of Crime Lab. Dirs./Lab Accreditation Bd.-*International* (ASCLD/LAB-

to have a written or secure electronic chain of custody record with all necessary data and a secure area for overnight and/or long-term storage of evidence.²² All evidence also must be marked for identification, stored under proper seal (meaning that the contents cannot readily escape), and be protected from loss, cross-transfer, contamination and/or deleterious change.²³

2. Procedures for Preservation of Evidence During and After Trial

The State of Ohio does not have any uniform procedures for the preservation of evidence during the capital trial or any uniform requirement for how long evidence must be preserved after the conclusion of the trial. Furthermore, Ohio courts have held that the destruction of “potentially useful evidence” is a due process violation only when the defendant can demonstrate bad faith on the part of the police or prosecutor.²⁴ Despite this, Ohio courts have held that police and prosecutors have a duty to preserve “material exculpatory evidence.”²⁵

3. Preservation of Evidence After the Completion of Post-Conviction DNA Testing

If post-conviction DNA testing is conducted, the state must preserve the remaining biological evidence after the testing is complete and may designate the testing authority to preserve such samples and maintain the results.²⁶ These samples must be preserved during the death-sentenced inmate’s incarceration and for a reasonable period of time not less than twenty-four months after his/her execution.²⁷

B. Post-Conviction DNA Testing

Sections 2953.71 through 2953.84 of the Ohio Rev. Code provide inmates in Ohio, death-sentenced or otherwise, the ability to obtain post-conviction DNA testing to prove their innocence.²⁸

1. Eligibility for Post-Conviction DNA Testing

International), International Directory of Accredited Laboratories, available at http://www.ascl-d-lab.org/cgi-bin/iso/csvsearch.pl?search=OH&order_by=lab&order=abc (last visited Sept. 13, 2007).

²² ASCLD/LAB 2003 MANUAL, *supra* note 19, at 20-23.

²³ *Id.*

²⁴ State v. Brown, 2007 WL 1219539, *3 (Ohio Ct. App. 5th Dist Apr. 26, 2007) (quoting Arizona v. Youngblood, 488 U.S. 51, 57 (1988), and holding that “potentially useful evidence” is defined as “evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant”).

²⁵ *Id.* at *4; State v. Coombs, 2004 WL 2813273, *2-3 (Ohio Ct. App. 5th Dist. Dec. 7, 2004).

“Materially exculpatory evidence” is defined as evidence that possesses an “exculpatory value that was apparent before the evidence was destroyed, and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Id.*

²⁶ OHIO REV. CODE § 2953.81(A) (West 2007).

²⁷ *Id.*

²⁸ OHIO REV. CODE §§ 2953.71 to 2953.84 (West 2007).

An inmate is “eligible” for post-conviction DNA testing if he/she:

- (1) Is challenging a felony for which he/she was convicted by a judge or jury;²⁹
- (2) Is challenging a felony for which he/she convicted following a plea of guilty or no contest;³⁰ and
- (3) Was sentenced to death or to a prison term for the felony being challenged and is serving a death sentence or has at least one year remaining in his/her sentence at the time of the application for post-conviction DNA testing.³¹

2. Submitting an Application for Post-Conviction DNA Testing

An “eligible” inmate who wishes to obtain post-conviction DNA testing must submit an application for such testing to the court of common pleas in which he/she was convicted and sentenced for the offense(s) he/she is challenging,³² and may do so at any time after his/her case enters the post-conviction stage.³³ The inmate must state in the application

²⁹ OHIO REV. CODE § 2953.72(C)(1)(a) (West 2007).

³⁰ OHIO REV. CODE § 2953.82(A)-(B) (West 2007). Prior to April 2007, Ohio statutory law did not automatically grant a death-sentenced inmate who pled guilty or no contest the right to obtain post-conviction DNA testing to challenge the conviction for which he/she received his/her death sentence. OHIO REV. CODE § 2953.82(D) (West 2007). Section 2953.82(B) required that inmates who pled guilty or no contest had to file, in the same manner as an inmate who was convicted following a trial, an application that complies with the same aforementioned pleading requirements and a signed acknowledgment. OHIO REV. CODE § 2953.82(B) (West 2007). Within forty-five days of the filing of the application, the prosecuting attorney had to file with the court a statement indicating whether the prosecuting attorney agreed or disagreed that the inmate should be permitted to obtain post-conviction DNA testing. OHIO REV. CODE § 2953.82(C) (West 2007). If the prosecuting attorney agreed, the application would move forward as if it was accepted and was filed by an inmate who had been convicted following a trial. *Id.* If, however, the prosecutor disagreed that the inmate should obtain post-conviction DNA testing, section 2953.82(D) contemplated that such disagreement was final and not appealable to any court. OHIO REV. CODE § 2953.82(D) (West 2007). Furthermore, section 2953.82(D) explicitly prohibited any court from ordering, without the prosecutor’s agreement, post-conviction DNA testing for an inmate who pled guilty or no contest. *Id.* In April 2007, the Ohio Supreme Court held that this provision, which allowed a prosecutor, simply by his/her disagreement, to make a final determination on whether an inmate who pled guilty or no contest would obtain post-conviction DNA testing, was a violation of the constitutional separation of powers. *See State v. Sterling*, 864 N.E.2d 630, 635 (Ohio 2007). Because the Ohio legislature made the prosecutor’s disagreement final and non-appealable, such executive action unconstitutionally encroached on the judiciary’s prerogative to determine guilt in criminal cases. *Id.* at 635-36. The Ohio Supreme Court severed section 2953.82(D), holding that applications for post-conviction DNA testing from inmates who pled guilty or no contest “should be submitted to the court of common pleas and that the court may then exercise its judicial authority to determine the disposition of the request subject to appropriate appellate review.” *Id.* at 636.

³¹ OHIO REV. CODE § 2953.72(C)(1)(b)-(c) (West 2007).

³² OHIO REV. CODE §§ 2953.72(A), 2953.73(A) (West 2007).

³³ The original version of the post-conviction DNA testing law included a deadline for submitting an application of one year from the October 29, 2003, effective date of the statute. The General Assembly later passed House Bill Number 525, which extended that deadline to October 29, 2005. In 2006, however, the legislature amended the statute to its current form and eliminated the deadline altogether. 2006 Ohio Sub. S.B. 262, 126th Gen. Assem. (eff. July 11, 2006).

the applicable offense(s) for which DNA testing is requested.³⁴ Additionally, the inmate must file an a signed acknowledgment form which states the eleven primary aspects of the DNA testing law³⁵ and verifies that the inmate has been notified of these aspects of the DNA testing scheme.³⁶ The Attorney General must create forms for both the application and the acknowledgment and supply them to the Department of Rehabilitation and Correction to, in turn, provide these forms directly to death-sentenced inmates free of charge.³⁷

Upon submitting the application, the inmate must serve a copy on the prosecuting attorney and the Attorney General.³⁸ While the prosecuting attorney and Attorney General are not required to file a response to the application, if either chooses to respond, such a response must be file within forty-five days of the application's submission and a copy of the response should be served on the inmate.³⁹

3. Disposition of the Inmate's Application for Post-conviction DNA Testing

The application generally will be assigned to the judge who presided over the inmate's trial, unless the judge is no longer a sitting judge of that court.⁴⁰ In making the determination whether to accept or reject an application, the court should consider certain items that include, but are not limited to, the application, the supporting affidavits, documentary evidence, the files and records pertaining to the proceedings against the applicant, the indictment, the court's journal entries, the journalized records of the clerk of the court, the court reporter's transcript, and any responses by the State to the application.⁴¹ The court is not required to hold an evidentiary hearing.⁴²

³⁴ OHIO REV. CODE § 2953.72(A) (West 2007).

³⁵ OHIO REV. CODE § 2953.72(A)(1)-(11) (West 2007). The acknowledgment form must notify the inmate that (1) the DNA testing law contemplates applications for DNA testing of eligible inmates during the post-conviction process; (2) the process of conducting post-conviction DNA testing begins when the eligible inmate submits the application and acknowledgment; (3) the eligible inmate must submit the application and acknowledgment to the court of common pleas in which the inmate was convicted of the offense; (4) the state has set forth a set of criteria that the judge will apply to the eligible inmate's application; (5) the result of the DNA testing will be provided to all parties in the post-conviction proceedings and to the court; (6) if an inclusion result is received, then the state will not offer a retest of the DNA sample; (7) if the court rejects an inmate's application because it does not satisfy the acceptance criteria, the court will not consider or accept subsequent applications; (8) this acknowledgment memorializes the provisions of sections 2953.71 to 2953.81 of the Ohio Revised Code with respect to the application; (9) post-conviction testing does not confer onto the inmate any additional constitutional rights; (10) an inmate must provide a DNA sample for testing and if the inmate refuses, the court will rescind the acceptance of the application and deny it; and (11) if the inmate pleaded guilty or no contest to a felony offense and is using the application and acknowledgment to request DNA testing, then all references in the acknowledgment to an "eligible inmate" are considered to and apply to the inmate. *Id.*

³⁶ OHIO REV. CODE § 2953.72(A) (West 2007).

³⁷ OHIO REV. CODE § 2953.72(B) (West 2007).

³⁸ OHIO REV. CODE § 2953.73(B)(1) (West 2007).

³⁹ OHIO REV. CODE § 2953.73(C) (West 2007).

⁴⁰ OHIO REV. CODE § 2953.73(B)(2) (West 2007).

⁴¹ OHIO REV. CODE § 2953.73(D) (West 2007).

⁴² *Id.*

a. Accepting an Application for Post-Conviction DNA Testing

If the inmate had prior inconclusive⁴³ DNA testing on the biological evidence he/she now seeks to be tested or he/she has had no previous DNA testing, the court must give the application an expedited review⁴⁴ and determine, on a case-by-case basis, whether to accept or reject the application.⁴⁵

The court may accept the inmate's application for post-conviction DNA testing only if the court determines that:

- (1) The inmate either:
 - (a) Did not have previous DNA testing on the biological evidence he/she seeks to have tested, a DNA exclusion⁴⁶ would have been outcome determinative⁴⁷ at trial when analyzed in the context of all available admissible evidence, and, at the time of trial, DNA testing was not generally accepted, not generally admissible in evidence, or not yet available;⁴⁸ or
 - (b) Did have prior DNA testing on the biological evidence he/she seeks to have tested, but the prior testing was not definitive and a DNA exclusion would have been outcome determinative at trial when analyzed in the context of all available admissible evidence;⁴⁹
- (2) The biological material to be tested was collected from the crime scene or from the victim and the "parent sample"⁵⁰ still exists at that point in time for comparison to a biological sample from the inmate;⁵¹
- (3) The testing authority determines that the parent sample of biological material:
 - (a) Contains scientifically sufficient material to extract a test sample;⁵²

⁴³ An "inconclusive result" is a result of DNA testing that is "rendered when a scientifically appropriate or definitive DNA analysis or result, or both, cannot be determined." OHIO REV. CODE § 2953.71(J) (West 2007).

⁴⁴ OHIO REV. CODE §§ 2953.73(D), 2953.74(A) (West 2007).

⁴⁵ OHIO REV. CODE § 2953.74(A) (West 2007).

⁴⁶ A DNA "exclusion" means that a result of DNA testing that "scientifically precludes or forecloses the subject inmate as a contributor of biological material recovered from the crime scene or victim in question, in relation to the offense for which the inmate is an eligible inmate and for which the sentence of death or prison term was imposed upon the inmate." OHIO REV. CODE § 2953.71(G) (West 2007).

⁴⁷ A DNA result is "outcome determinative" if "there is a strong probability that no reasonable factfinder would have found the inmate guilty" of the offense or aggravating circumstance(s) that are the basis of that sentence of death, had the results of DNA testing been presented at the trial, been found relevant and admissible, and been analyzed in the context of all available admissible evidence. OHIO REV. CODE §§ 2953.71(L), 2953.74(D) (West 2007).

⁴⁸ OHIO REV. CODE § 2953.74(B)(1) (West 2007).

⁴⁹ OHIO REV. CODE § 2953.74(B)(2) (West 2007).

⁵⁰ A "parent sample" is the biological material first collected from the crime scene or the victim, from which a sample will be presently taken to do a DNA comparison to the DNA of the subject inmate. OHIO REV. CODE § 2953.71(M) (West 2007).

⁵¹ OHIO REV. CODE § 2953.74(C)(1) (West 2007).

- (b) Is not so minute or fragile as to risk destruction of the parent sample during such extraction;⁵³ and
- (c) Has not degraded or been contaminated to the extent that it has become scientifically unsuitable for testing and has been preserved, and remains, in a condition suitable for testing;⁵⁴
- (4) Identity of the perpetrator was an issue at trial;⁵⁵
- (5) One or more of the defenses asserted at trial was of such a nature that an excluding result will be outcome determinative;⁵⁶
- (6) If DNA is conducted and an exclusion result is obtained, the results of the testing will be outcome determinative regarding the inmate;⁵⁷ and
- (7) Based on the chain of custody of the parent sample and test sample extracted from the parent sample, both samples are the same and there is no reason to believe that they have been out of state custody or been tampered with or contaminated since they were collected.⁵⁸

To ascertain whether these requirements for acceptance are met, Ohio law requires the performance of certain necessary inquiries:

i. Search for the Evidence

The prosecuting attorney must use reasonable diligence to determine whether biological material was collected from the crime scene or the victim of the offense, and whether the parent sample still exists.⁵⁹ In making this determination, the prosecuting attorney should search for the evidence at state evidence-holding agencies, which include, but are not limited to, all:

- (1) Prosecuting authorities that handled any stage of the instant case;
- (2) Law enforcement authorities involved with investigating the instant offense(s);
- (3) Custodial agencies involved at any time with the biological material in question, and the custodian of these agencies;
- (4) Crime laboratories involved at any time with the biological material in question; and
- (5) Other reasonable sources.⁶⁰

The prosecuting attorney must file a report with the court and serve a copy on the inmate and the Attorney General, stating its determination of whether biological material was collected and whether a parent sample still exists.⁶¹

⁵² OHIO REV. CODE § 2953.74(C)(2)(a) (West 2007).
⁵³ OHIO REV. CODE § 2953.74(C)(2)(b) (West 2007).
⁵⁴ OHIO REV. CODE § 2953.74(C)(2)(c) (West 2007).
⁵⁵ OHIO REV. CODE § 2953.74(C)(3) (West 2007).
⁵⁶ OHIO REV. CODE § 2953.74(C)(4) (West 2007).
⁵⁷ OHIO REV. CODE § 2953.74(C)(5) (West 2007).
⁵⁸ OHIO REV. CODE § 2953.74(C)(6) (West 2007).
⁵⁹ OHIO REV. CODE § 2953.75(A) (West 2007).
⁶⁰ OHIO REV. CODE § 2953.75(A)(1)-(6) (West 2007).

ii. Consultation with the Testing Authority Regarding the Quantity and Quality of the Evidence

Upon consultation by the prosecuting authority, the testing authority must determine whether there is a scientifically sufficient quantity of the parent sample to make the extraction of the test sample feasible or whether the parent sample is so minute or fragile that there is a substantial risk that the parent sample may be destroyed as a result of DNA testing, foreclosing the state's ability to present the original biological evidence at a future retrial.⁶² The court may determine on a case-by-case basis that, even if the DNA testing risks complete destruction of the parent sample, the application should not be rejected solely on this basis.⁶³ The testing authority also must determine whether the parent sample has become so degraded or contaminated that it is rendered scientifically unsuitable for DNA testing and, if not, whether it has been preserved properly and remains in a condition suitable for testing.⁶⁴ The testing authority must prepare a written document with these determinations and its reasoning, and provide a copy of the document to the court, the inmate, the prosecuting authority and the Attorney General.⁶⁵

Additionally, the court must determine, based on the chain of custody of the parent sample and the test sample extracted from the parent sample, whether both samples are in fact the same sample and whether there is any reason to believe that they have been out of state custody or been tampered with or contaminated since they were collected.⁶⁶

b. Rejecting an Application for Post-Conviction DNA Testing

The court must reject the application if the inmate has had prior DNA testing on the biological evidence⁶⁷ the inmate now seeks to be tested and that prior testing yielded a definitive result.⁶⁸ The court also may reject an application for testing if, after performing any of the aforementioned inquiries, the court finds that the applicant does not meet one or more of the requirements for accepting an application. Furthermore, the court can deny the application without significant review if the application, files and records show, on their face, that the applicant is not entitled to DNA testing.⁶⁹

c. The Order Accepting or Rejecting an Application for Post-Conviction DNA Testing

⁶¹ OHIO REV. CODE § 2953.75(B) (West 2007).

⁶² OHIO REV. CODE § 2953.76(A) (West 2007).

⁶³ *Id.*

⁶⁴ OHIO REV. CODE § 2953.76(A) (West 2007).

⁶⁵ OHIO REV. CODE § 2953.76(A), (B) (West 2007).

⁶⁶ OHIO REV. CODE § 2953.76(C) (West 2007).

⁶⁷ "Biological material" or evidence is any product of a human body containing DNA. OHIO REV. CODE § 2953.71(B) (West 2007).

⁶⁸ OHIO REV. CODE § 2953.74(A) (West 2007).

⁶⁹ OHIO REV. CODE § 2953.73(D) (West 2007).

The court must enter an order accepting or rejecting the application, with specific reasons it determined that the applicant did or did not meet the criteria necessary for obtaining post-conviction DNA testing.⁷⁰

4. Pre-Testing Procedures Following an Order Granting Post-Conviction DNA Testing

a. Selecting a Laboratory

The court may select a laboratory for post-conviction DNA testing only among those that are approved or designated by the Attorney General.⁷¹ The Attorney General must prepare a list of approved laboratories, continually update the list, and provide copies of the updated list to all courts of common pleas.⁷² A laboratory may be added to this list if the laboratory:

- (1) Is in compliance with nationally accepted quality assurance standards for forensic DNA testing or advanced DNA testing, as published in the quality assurance standards for forensic DNA testing laboratories issued by the FBI;
- (2) Undergoes an annual internal⁷³ or external⁷⁴ audit for quality assurance in conformity with the FBI quality assurance standards; and
- (3) Undergoes an external audit for quality assurance in conformity with the FBI quality assurance standards at least once in the preceding two-year period, and at least once each two-year period thereafter.⁷⁵

The inmate has no right to challenge or appeal the court's designation of a laboratory to perform the DNA testing.⁷⁶ If the inmate does in fact object to the selection of the laboratory, the court must rescind its prior acceptance of the application and deny the application, without prejudice for the inmate to re-apply at a later time and for the court to accept such a subsequent application for post-conviction DNA testing.⁷⁷

b. Procuring DNA Samples from the Inmate Applicant

Once testing is ordered, the state must coordinate with the Department of Rehabilitation and Correction to obtain a DNA sample from the inmate in accordance with medically

⁷⁰ OHIO REV. CODE § 2953.73(D) (West 2007). Copies of the order should be sent to the inmate, the prosecuting attorney, and the Attorney General. *Id.*

⁷¹ OHIO REV. CODE §§ 2953.78(A), 2953.80(A) (West 2007).

⁷² OHIO REV. CODE § 2953.78(C) (West 2007).

⁷³ An "internal audit" is a review of a testing authority that is conducted by the testing authority itself. OHIO REV. CODE § 2953.80(B)(2) (West 2007).

⁷⁴ An "external audit" is a quality assurance review of a testing authority conducted by a forensic DNA agency outside of, and not affiliated with, the testing authority. OHIO REV. CODE § 2953.80(B)(1) (West 2007).

⁷⁵ OHIO REV. CODE § 2953.80(A)(1)-(3) (West 2007).

⁷⁶ OHIO REV. CODE § 2953.78(D) (West 2007).

⁷⁷ OHIO REV. CODE § 2953.78(B) (West 2007).

accepted procedures at the facility where the inmate is housed.⁷⁸ The state must provide notice to the inmate and to his/her counsel as to where and when such a sample will be collected.⁷⁹ The inmate's application for post-conviction DNA testing serves as the inmate's consent to such a sample being collected.⁸⁰ This inmate's sample will be used to compare with the test sample extracted from the parent sample collected at the scene of the crime or from the victim.⁸¹

If the inmate refuses to submit to the collection of a DNA sample⁸² or hinders the collection of such a sample,⁸³ the court must rescind its prior acceptance of the application for post-conviction DNA testing and deny the application.⁸⁴ It is the duty of the personnel assigned to collect the inmate sample to determine if the inmate has refused to submit to the collection of a sample or hindered such collection.⁸⁵ If such a refusal or hindrance has occurred, the collecting personnel must submit a written document to the court explaining how the inmate has refused or hindered the collection of the inmate sample.⁸⁶

c. Maintaining Chain of Custody

The court must require that chain of custody be maintained to ensure that all biological samples, including parent samples, test samples extracted from parent samples, and inmate samples, are not contaminated during the transport or testing process.⁸⁷ The court can ensure that chain of custody is maintained by:

- (1) Requiring that chain of custody be documented between the time the parent sample and test sample are removed from their place of storage or the time of their extraction to the time at which the DNA testing is performed;
- (2) Coordinating, between all relevant agencies, the transport of the parent sample and test sample between their place of storage and place of testing, and documenting the transporting procedures used;
- (3) Requiring that the testing authority determine and document the custodian of the parent sample and test sample after each are in the testing authority's possession; and

⁷⁸ OHIO REV. CODE § 2953.79(A)-(B) (West 2007).

⁷⁹ OHIO REV. CODE § 2953.79(B) (West 2007).

⁸⁰ OHIO REV. CODE § 2953.79(A) (West 2007).

⁸¹ *Id.*

⁸² An inmate's refusal to submit to the collection of a biological sample includes, but is not limited to, his/her rejection of the physical manner in which a sample of his/her biological material is taken. OHIO REV. CODE § 2953.79(C)(2)(a) (West 2007).

⁸³ An inmate's hindrance of the state in obtaining a biological sample includes, but is not limited to, the inmate being physically or verbally uncooperative or antagonistic during the collection of the biological sample. OHIO REV. CODE § 2953.79(C)(2)(b) (West 2007).

⁸⁴ OHIO REV. CODE § 2953.79(C)(1) (West 2007).

⁸⁵ OHIO REV. CODE § 2953.79(D) (West 2007).

⁸⁶ *Id.*

⁸⁷ OHIO REV. CODE § 2953.77(A) (West 2007).

- (4) Requiring that the testing authority maintain and preserve the parent sample and test sample after they are in the testing authority's possession and document the maintenance and preservation procedures used.⁸⁸

5. Post-Testing Procedures

While the results of the testing remain state's evidence,⁸⁹ such results are public record⁹⁰ and the testing authority must provide a copy of the results to the:

- (1) Prosecuting Authority;
- (2) Attorney General;
- (3) Inmate;
- (4) Court of Common Pleas that granted the DNA application;
- (5) Any other state court in which the inmate has a post-conviction proceeding currently pending; and
- (6) Any other federal court in which the inmate has a post-conviction proceeding currently pending.⁹¹

The inmate or the state may use the results in any proceeding.⁹² Specifically, the death-sentenced inmate may file a new post-conviction petition based on results of the post-conviction DNA testing in the court that imposed the death sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief.⁹³ In order to obtain such relief based on DNA test results, those results must establish "actual innocence," by clear and convincing evidence.⁹⁴ In other words, the petitioner must demonstrate that had the results of the DNA testing been presented at trial and been analyzed in the context of all available admissible evidence in the inmate's case, no reasonable judge or jury would have found the petitioner guilty of the capital offense or aggravating circumstance(s) that are the basis of his/her death sentence.⁹⁵

Additionally, if the results of the post-conviction DNA testing exclude the inmate, the court may order the Bureau of Criminal Identification and Investigation (Bureau) to compare the DNA profile of the biological evidence collected from the crime scene or the victim to the Combine DNA Index System (CODIS) maintain by the Federal Bureau of Investigation or, if the comparison with CODIS does not yield a match, to other previously obtained DNA profiles of known individuals.⁹⁶ If the Bureau obtains a match after such a comparison to either CODIS or the DNA profiles of known individuals, it must provide this information to the court that accepted the application for post-

⁸⁸ OHIO REV. CODE § 2953.77(A)(1)-(4) (West 2007).

⁸⁹ OHIO REV. CODE § 2953.81(A) (West 2007).

⁹⁰ OHIO REV. CODE § 2953.81(B) (West 2007).

⁹¹ OHIO REV. CODE § 2953.81(C)-(E) (West 2007).

⁹² OHIO REV. CODE § 2953.81(F) (West 2007).

⁹³ OHIO REV. CODE § 2953.21(A)(1)(a) (West 2007).

⁹⁴ *Id.*

⁹⁵ OHIO REV. CODE § 2953.21(A)(1)(b) (West 2007).

⁹⁶ OHIO REV. CODE § 2953.74(E) (West 2007).

conviction DNA testing, the prosecuting attorney, and the Attorney General.⁹⁷ Both the inmate and the state may use this information for any lawful purpose.⁹⁸

6. Appealing a Rejection of the Application for Post-Conviction DNA Testing

If the court of common pleas rejects the death-sentenced inmate's application for post-conviction DNA testing, the inmate may seek permission from the Ohio Supreme Court to appeal the rejection in that court.⁹⁹ The court of appeals has no jurisdiction to review the rejection of a death-sentenced inmate's application for post-conviction DNA testing.¹⁰⁰

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ OHIO REV. CODE § 2953.73(E)(1) (West 2007).

¹⁰⁰ *Id.*

II. ANALYSIS

A. Recommendation #1

Preserve all biological evidence¹⁰¹ for as long as the defendant remains incarcerated.

The State of Ohio does not have a law requiring all government entities to preserve physical evidence in death penalty cases, at all stages of the case, for as long as the defendant remains incarcerated. The only uniform preservation rule that does exist in Ohio is triggered when a death-sentenced inmate applies for post-conviction DNA testing and that testing is granted and performed. After the completion of that testing, the state must preserve both the parent and inmate samples and the state may designate the testing authority to preserve such samples and maintain the results of the DNA testing.¹⁰² These samples must be preserved during the death-sentenced inmate's incarceration and for a reasonable period of time not less than twenty-four months after his/her execution.¹⁰³

Furthermore, Ohio courts have held that police and prosecutors have a duty to preserve "material exculpatory evidence," which is evidence that possesses an "exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."¹⁰⁴ Ohio courts have held, however, that the destruction of evidence that is merely "potentially useful" is a due process violation only when the defendant can demonstrate bad faith on the part of the police or prosecutor.¹⁰⁵

While the State of Ohio has some limited requirements to preserve evidence, it does not ensure that all biological evidence is preserved for as long as the defendant is incarcerated and, therefore, is not in compliance with Recommendation #1.

Based on this information, the Ohio Death Penalty Assessment Team recommends that the State of Ohio require that all biological evidence be preserved for as long as the defendant remains incarcerated.

B. Recommendation #2

¹⁰¹ "Biological evidence" includes: (1) the contents of a sexual assault examination kit; and/or (2) any item that contains blood, semen, hair, saliva, skin tissue, or other identifiable biological material, whether that material is catalogued separately or is present on other evidence. See INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING, *available at* http://www.innocenceproject.org/docs/Model_Statute.html (last visited Sept. 13, 2007).

¹⁰² OHIO REV. CODE § 2953.81(A) (West 2007).

¹⁰³ *Id.*

¹⁰⁴ *State v. Brown*, 2007 WL 1219539, *4 (Ohio Ct. App. 5th Dist. Apr. 26, 2007) (quoting *State v. Colby*, 2004 WL 145339, *2 (Ohio Ct. App. 11th Dist. Jan. 16, 2004)); *State v. Coombs*, 2004 WL 2813273, *2-3 (Ohio Ct. App. 5th Dist. Dec. 7, 2004) (quoting *Colby*, 2004 WL 145339, at *2).

¹⁰⁵ *Brown*, 2007 WL 1219539, at *3 (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) (holding that "potentially useful evidence" is defined as "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant"))).

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.

The State of Ohio 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 pre-trial discovery;¹⁰⁶ and (2) inmates may seek post-conviction DNA testing.¹⁰⁷

DNA Testing During Pre-Trial Discovery

Ohio law provides that the defendant may obtain discovery of, among other things, tangible objects available to or within the possession, custody or control of the state, and “which are material to the preparation of his defense, or are intended for use by the prosecuting attorney as evidence at the trial, or were obtained from or belong to the defendant.”¹⁰⁸ Additionally, the defendant may inspect and copy any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, that are in the possession of or can be obtained by the state.¹⁰⁹

Based on the discovery rules, it appears that a defendant has the right to inspect and test evidence that is in the possession of the prosecution and is “material” to the preparation of the defense, which could include biological evidence collected from the defendant and evidence collected from co-defendants and victims. Additionally, the defendant would clearly have the right to inspect and copy reports containing the results of DNA testing already performed in the case.

Post-Conviction DNA Testing

Any death-sentenced individual in Ohio may submit a written application with the trial court requesting post-conviction DNA testing.¹¹⁰

¹⁰⁶ See OHIO R. CRIM. P. 16(B).

¹⁰⁷ OHIO REV. CODE § 2953.71 to 2953.84 (West 2007).

¹⁰⁸ OHIO R. CRIM. P. 16(B)(1)(c).

¹⁰⁹ OHIO R. CRIM. P. 16(B)(1)(d).

¹¹⁰ OHIO REV. CODE §§ 2953.72(C), 2953.82(A)-(B) (West 2007). Until recently, Ohio statutory law did not automatically grant a death-sentenced inmate who pled guilty or no contest an opportunity to obtain post-conviction DNA testing to challenge the conviction for which he/she received his/her death sentence, if the prosecutor opposed the inmate’s application. OHIO REV. CODE § 2953.82(D) (West 2007). Such disagreement was final and not appealable to any court. *Id.* In April 2007, the Ohio Supreme Court held that this provision was a violation of the constitutional separation of powers because, by rendering prosecutor’s opposition to the application final and non-appealable, such executive action unconstitutionally encroached on the judiciary’s prerogative to determine guilt in criminal cases. *See State v. Sterling*, 864 N.E.2d 630, 635-36 (Ohio 2007).

Notably, judges are not required to hold a hearing on a petitioner's application requesting post-conviction DNA testing,¹¹¹ and may simply make a decision regarding the application on the pleadings.¹¹²

Regardless of whether the court holds an evidentiary hearing, Ohio law puts many restrictions on the granting of post-conviction DNA testing applications. For example, the court may reject an application for testing if the court finds that the applicant does not meet one or more of the requirements for accepting an application. Specifically, the court may reject an application by finding that the biological evidence requested to be tested does not exist,¹¹³ even though Ohio law does not require proof of non-existence in the form of a contemporaneously-made destruction order and it allows the court to simply rely on a report of the prosecuting attorney as to the existence of such evidence.¹¹⁴

Moreover, the court also may reject the application for post-conviction DNA testing if it finds that there is not a scientifically sufficient amount of biological material or the biological material is so degraded as to make DNA testing impracticable.¹¹⁵ Likewise, the court may reject an application if it finds that the biological sample is so minute that performing DNA testing would create a risk of consuming the whole sample, thus prejudicing any further use of the sample by the prosecution.¹¹⁶ These determinations, however, are likely only based on the ability of Ohio's Bureau of Criminal Identification and Investigation (BCI) to perform the DNA testing using the STR (short-tandem repeat) method of DNA testing, which is the only DNA testing method used by BCI.¹¹⁷ Because BCI does not perform more discriminating and exacting methods of DNA testing, such as Mitochondrial DNA testing of hair without roots, Y-Chromosome STR testing, or mini-STR testing, all of which are especially effective for obtaining conclusive DNA profiles from old, degraded biological samples, it appears that the reliance on BCI's determination of the suitability of a biological sample for post-conviction DNA testing may in fact be suspect and may lead to the erroneous rejection of meritorious applications.¹¹⁸

Furthermore, Ohio law even requires the summary rejection of such applications in certain circumstances. For example, a judge must reject the application if the inmate has had prior DNA testing on the biological evidence¹¹⁹ the inmate now seeks to be tested and that prior testing yielded what was previously deemed a definitive result,¹²⁰ even if

¹¹¹ OHIO REV. CODE § 2953.73(D) (West 2007).

¹¹² *Id.*

¹¹³ OHIO REV. CODE § 2953.74(C)(1) (West 2007).

¹¹⁴ OHIO REV. CODE § 2953.75(B) (West 2007).

¹¹⁵ OHIO REV. CODE § 2953.74(C)(2)(a)-(c) (West 2007).

¹¹⁶ OHIO REV. CODE § 2953.76(A) (West 2007).

¹¹⁷ Marc Dann, Attorney General, BCI Crime Lab, at <http://www.ag.state.oh.us/le/investigation/lab.asp> (last visited Sept. 13, 2007).

¹¹⁸ Y-STR testing is necessary for many of the cases in which there is a male perpetrator and a female victim. The fact that Ohio labs do not do YSTR testing puts innocent inmates at a great disadvantage.

¹¹⁹ "Biological material" or evidence is "any product of a human body containing DNA." OHIO REV. CODE § 2953.71(B) (West 2007).

¹²⁰ OHIO REV. CODE § 2953.74(A) (West 2007).

further advances in DNA testing methods may now lead to an exclusionary result.¹²¹ Ohio law even saddles the inmate with the harsh sanction of rescission of a previously granted DNA testing application if the inmate objects to the selection of the laboratory,¹²² or the inmate refuses to submit to the collection of a DNA sample¹²³ or hinders the collection of such a sample,¹²⁴ based solely on the determination of the prison personnel collecting the biological sample from the inmate.¹²⁵

Given the numerous ways in which a court can reject a meritorious application for post-conviction DNA testing, it is questionable whether death-sentenced inmates are truly given the necessary access to biological evidence during the post-conviction stage to prove their innocence or mitigate their sentence through DNA testing.

Conclusion

Although defendants in Ohio appear to have the ability to inspect and test certain evidence in the possession of the prosecution, death-sentenced post-conviction applicants in Ohio seeking DNA testing must comply with extremely stringent requirements to have their application granted and DNA testing performed to prove their innocence. The State of Ohio, therefore, is only in partial compliance with Recommendation #2.

C. Recommendation #3

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

The Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) requires each accredited law enforcement agency 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.¹²⁶ Sixty-four law enforcement agencies in Ohio have obtained or are in the process of obtaining accreditation by CALEA.¹²⁷ All Ohio accredited agencies, therefore, should

¹²¹ For example, an individual could have obtained a partial inclusionary DNA testing result pre-trial, which ultimately led to his/her conviction. Such a result, while considered an inclusion, would have a higher probability to also include other individuals with the same partial DNA profile because the testing authority did not obtain a result on any number of the remaining DNA loci. Further, developments in DNA testing methods, which were designed to yield results on smaller, more degraded samples, may in fact yield a full result on the previously tested sample, therefore, creating a possibility of an exclusion at the DNA loci where the previous, more primitive DNA testing produced no result.

¹²² OHIO REV. CODE § 2953.78(B) (West 2007).

¹²³ An inmate's refusal to submit to the collection of a biological sample includes, but is not limited to, his/her rejection of the physical manner in which a sample of his/her biological material is taken. OHIO REV. CODE § 2953.79(C)(2)(a) (West 2007).

¹²⁴ An inmate's hindrance of the state in obtaining a biological sample includes, but is not limited to, the inmate being physically or verbally uncooperative or antagonistic during the collection of the biological sample. OHIO REV. CODE § 2953.79(C)(2)(b) (West 2007).

¹²⁵ *Id.*

¹²⁶ CALEA STANDARDS, *supra* note 14, at 42-2, 83-1 (Standards 42.2.1 and 83.2.1).

¹²⁷ *See supra* note 13.

have a written directive establishing procedures governing the preservation of biological evidence, but the extent to which these procedures comply with Recommendation #3 is unknown.

Additionally, the Ohio Bureau of Criminal Identification and Investigation (BCI), and at least eight local crime laboratories¹²⁸ accredited by the American Society of Crime Lab Directors Laboratory Accreditation Board (ASCLD/LAB), are required, as a prerequisite to accreditation, to adopt specific procedures relating to the preservation of evidence.¹²⁹

In conclusion, although all certified crime laboratories have written procedures and policies that govern the preservation of biological evidence, it is unclear how many Ohio law enforcement agencies, certified or otherwise, have adopted such procedures. Therefore, the State of Ohio is only in partial compliance with Recommendation #3.

D. Recommendation #4

Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.

In order to be certified as a peace officer¹³⁰ in the State of Ohio, a candidate must complete 558 hours of basic training at a school approved and monitored by the Ohio Peace Officer Training Commission (OPOT Commission).¹³¹ The basic training curriculum of every Ohio peace officer includes, among other requirements, fifty-four hours of instruction on criminal investigation.¹³² Specifically the training includes instruction in the following relevant areas: (1) four hours on crime scene search; (2) sixteen hours on evidence collection techniques; (3) four hours on crime scene sketching and detailed drawing; (4) three hours on police photography; (5) one hour on arson investigation; and (6) three hours on ethics and professionalism.¹³³ We were unable, however, to obtain the training materials to determine whether this mandatory training course ensures that investigative personnel are prepared and accountable for their performance.

¹²⁸ The American Society of Crime Laboratory Directors indicates that there are eight accredited local or regional crime laboratories in Ohio that are not affiliated with BCI. See Am. Soc’y of Crime Lab. Dirs./Lab Accreditation Bd., Accredited Laboratories, available at <http://www.asclclab.org/legacy/asclclablaboratories.html> (last visited Sept. 13, 2007) (indicating crime laboratories in Canton-Stark County; Columbus Police Department, Cuyahoga County Coroner’s Office; DNA Diagnostics Center in Fairfield, Ohio; Hamilton County Coroner’s Office; Lake County (Regional); Mansfield, Ohio; and Miami Valley (Regional in Dayton, Ohio)).

¹²⁹ ASCLD/LAB 2003 MANUAL, *supra* note 19, at 20-23 (General Requirements for Accreditation (5.8.1)).

¹³⁰ The numerous law enforcement positions in the State of Ohio requiring peace officer basic training may be found in section 109.71(A)(1)-(22) of the Ohio Revised Code. Investigators of the Ohio Bureau of Criminal Identification and Investigation who have been certified by the OPOT Commission also are considered peace officers. OHIO REV. CODE §109.542(A) (West 2007).

¹³¹ OHIO REV. CODE §109.77(B)(1) (West 2007); see also OPOT TRAINING REQUIREMENTS, *supra* note 16, at 1

¹³² OPOT TRAINING REQUIREMENTS, *supra* note 16, at 3.

¹³³ *Id.*

In addition, law enforcement agencies in Ohio certified under CALEA are required to establish written directives requiring a training program¹³⁴ and an annual, documented performance evaluation of each employee.¹³⁵

Based on this information, it appears that law enforcement investigative personnel, including law enforcement officers, do receive mandatory basic training and some law enforcement agencies are required to keep performance evaluations. However, the extent to which the training courses and the CALEA certification program comply with Recommendation #4 by ensuring that investigative personnel are prepared and accountable for their performances is unknown. Therefore, the State of Ohio is in partial compliance with Recommendation #4.

E. Recommendation #5

Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.

Law enforcement agencies in Ohio certified under CALEA are required to establish written directives requiring written investigative procedures for all complaints against the agency and/or its employees.¹³⁶ It appears, therefore, that certified law enforcement agencies should have adopted written directives governing complaints against the agency and/or its employees. However, the extent to which these procedures comply with Recommendation #5 and the number of law enforcement agencies in the State of Ohio that have adopted such directives is unknown. Therefore, we are unable to determine whether the State of Ohio is in compliance with Recommendation #5.

F. Recommendation #6

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

Funding for the Preservation of Biological Evidence

Although the State of Ohio clearly provides funding to BCI crime laboratories through its appropriation to the Attorney General, it is unclear what portion of this funding goes to the preservation of biological evidence in the possession of BCI crime laboratories. Furthermore, we were unable to obtain the necessary information to determine whether local law enforcement agencies are provided with adequate funding for the preservation of biological evidence in their custody.

Funding for DNA Testing of Biological Evidence

¹³⁴ CALEA STANDARDS, *supra* note 14, at 33-3 to 33-4 (Standards 33.4.1, 33.4.2).

¹³⁵ CALEA STANDARDS, *supra* note 14, at 35-1 (Standards 35.1.2).

¹³⁶ CALEA STANDARDS, *supra* note 14, at 52-1 (Standard 52.1.1).

The amount of funding specifically dedicated to the preservation and testing of biological evidence in Ohio is unknown. However, we were able to obtain the total amount of funding provided to the Office of the Attorney General, and the Attorney General's Office then provides funding to BCI,¹³⁷ which handles evidence testing for law enforcement agencies not served by metropolitan or regional crime laboratories.¹³⁸ In fiscal year 2006-2007, the Ohio General Assembly appropriated \$169,999,139 to the Attorney General's Office¹³⁹ and the Governor's Office recommended that over \$47 million of this funding be directed to law enforcement in the State.¹⁴⁰

Additionally, Ohio's Law Enforcement Improvements Trust Fund, which was created to "maintain, upgrade, and modernize law enforcement training, technology, and laboratory facilities of the Attorney General,"¹⁴¹ is funded by the funds received by the State through the nationwide Tobacco Master Settlement Agreement.¹⁴² In fiscal years 2005 and 2006, the Law Enforcement Improvements Trust Fund provided over \$11 million to Office of the Attorney General.¹⁴³ In previous fiscal years, from 2003 to 2004, the Law Enforcement Improvements Trust Fund provided over \$9 million to the Attorney General's Office, part of which was used for "laboratory and technical enhancements at [BCI]," including improvements to "DNA analysis chemicals and services and continued training enhancement."¹⁴⁴ We were unable to determine the exact amount of funding provided to BCI in general by the Attorney General's Office, however, nor were we able to determine the exact amount of funding provided to the Crime Laboratory Services of BCI for the purposes of preserving and testing biological evidence.

Even with the funding provided to BCI crime laboratories, the State of Ohio has experienced backlogs in its crime laboratories, which appear to have affected the quality and thoroughness of the forensic analysis performed at the crime laboratories.¹⁴⁵ In order

¹³⁷ See, e.g., OHIO OFFICE OF BUDGET AND MANAGEMENT, STATE OF OHIO EXECUTIVE BUDGET FOR FISCAL YEARS 2006 AND 2007, at 270-71 (as proposed) [hereinafter EXECUTIVE BUDGET FY 2006 AND 2007], available at <http://www.obm.ohio.gov/budget/operating/executive/0607/bb0607.pdf> (last visited Sept. 13, 2007); see also H.B. 66, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (enacted).

¹³⁸ STATE OF OHIO ATTORNEY GENERAL, OHIO BUREAU OF CRIMINAL IDENTIFICATION AND INVESTIGATION 2003-2004 REPORT 5 [hereinafter BCI 2003-2004 REPORT], available at http://www.ag.state.oh.us/le/investigation/pubs/bci_annual_report_03-04.pdf (last visited Sept. 13, 2007).

¹³⁹ H.B. 66, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (enacted).

¹⁴⁰ EXECUTIVE BUDGET FY 2006 AND 2007, *supra* note 137, at Attorney General 2-3.

¹⁴¹ OHIO OFFICE OF BUDGET AND MANAGEMENT, STATE OF OHIO EXECUTIVE BUDGET FOR FISCAL YEARS 2005 AND 2006, OHIO'S TOBACCO FUNDS 1-2, 14 [hereinafter OHIO'S TOBACCO FUNDS FY 2005-2006], available at http://obm.ohio.gov/budget/tobacco/0506_tobacco_budget.pdf (last visited on March 26, 2007).

¹⁴² The Tobacco Master Settlement Agreement was signed by forty-six states, five U.S. territories, and the District of Columbia with the nation's largest tobacco manufacturers in 1998. *Id.* at 1.

¹⁴³ *Id.* at 14.

¹⁴⁴ *Id.*

¹⁴⁵ Specifically, in 2002, that there was a backlog of 3,068 cases in the State's crime laboratories for which DNA testing needed to be performed. Wes Hills, *Lag in Funds Stalls Rape Inquiries, Angers Victims*, DAYTON DAILY NEWS, March 10, 2002, at 1A. Additionally, in 2000, it was reported that BCI's crime laboratories had decreased the number of instances in which it conducted trace evidence analysis. For example, Dale Laux, a twenty-year veteran at one of BCI's crime laboratories testified at a rape trial in 2000 that he opted not to perform trace analysis on hair samples found at the scene of the crime, stating that

to combat increasing caseloads and an ever-growing backlog, a number of Ohio local and state law enforcement entities have received federal funding to improve the efficiency of crime laboratory work and eliminate the backlog of cases lingering in crime laboratories in the State, including backlogs in DNA testing.¹⁴⁶

Through this infusion of federal money, it appears that BCI and other law enforcement agencies in Ohio are improving their DNA services. For example, the increased funding has allowed BCI to hire additional DNA analysts, which dramatically decreased the amount of time between evidence receipt and laboratory analysis from 2002 to 2004,¹⁴⁷ even though, in that same time, BCI has reported increased use of the DNA/serology unit from 2003 to 2004,¹⁴⁸ and a 51 percent increase in the number of reports.¹⁴⁹

Conclusion

the laboratory had scaled back due to the volume of work it received and that the laboratory could not be as thorough as it once was. James Ewinger, *Lab Practices Questioned: Analyst Testifies Some Evidence May Be Withheld*, PLAIN DEALER (Cleveland, OH), August 18, 2000, at 1B.

¹⁴⁶ The Department of Justice's "Capacity Enhancement Program," which provides grants to state crime laboratories that conduct DNA analysis to improve laboratory infrastructure and analysis capacity so that DNA samples can be processed efficiently and cost-effectively, has awarded over \$4 million to various Ohio crime laboratory and law enforcement entities from 2004 through 2006. See President's DNA Initiative, Capacity Enhancement Funding Chart, available at <http://www.dna.gov/funding/labcapacity/capfunding/> (last visited Sept. 13, 2007). Between 2004 and 2006, the following grants have been awarded to Ohio crime laboratories and law enforcement entities by the Capacity Enhancement Program: (1) \$322,555 to the City of Columbus; (2) \$256,623 to the City of Mansfield; (3) \$448,380 to the Cuyahoga County Coroner's Office; (4) \$221,994 to Hamilton County; (5) \$97,610 to the Lake County Crime Laboratory; (6) \$1,287,466 to Montgomery County; and (7) \$1,472,259 to the Ohio Attorney General/Bureau of Criminal Identification and Investigation. *Id.*

Additionally, the Department of Justice's "Forensic Casework Backlog Reduction Program," which awards federal money to analyze backlogged forensic DNA casework samples from forcible rape and murder cases, awarded over \$3.9 million to Ohio crime laboratories and law enforcement entities from 2004 to 2006. See President's DNA Initiative, Forensic Casework DNA Backlog Reduction: Funding Chart, available at <http://www.dna.gov/funding/casework/fcfunding> (last visited Sept. 13, 2007). Between 2004 and 2006, the following grants have been awarded to Ohio crime laboratories and law enforcement entities by the Forensic Casework Backlog Reduction Program: (1) \$262,427 to the Cuyahoga County Coroner Office; (2) \$200,979 to the Mansfield Police Department; (3) \$846,821 to Montgomery County (Miami Valley Regional Crime Laboratory); and (4) \$2,619,947 to the Ohio Attorney General/Bureau of Criminal Identification and Investigation. *Id.*

Crime laboratories and law enforcement entities in the State of Ohio also have received federal Paul Coverdell Forensic Science Improvement grants to improve the quality, timeliness, and credibility of forensic science services performed in the State, totaling over \$1.5 million between fiscal years 2004 and 2006. See U.S. Dep't. of Justice, Office of Justice Programs FY 2004, Ohio, available at <http://www.ojp.usdoj.gov/fy2004grants/map/oh.htm> (last visited Sept. 13, 2007); Nat'l Inst. of Justice, NIJ Awards in FY 2005, available at http://www.ojp.usdoj.gov/nij/awards/2005_solicitation.htm (last visited Sept. 13, 2006); Nat'l Inst. of Justice, NIJ Awards in FY 2006, available at http://www.ojp.usdoj.gov/nij/awards/2006_solicitation.htm (last visited Sept. 13, 2007).

¹⁴⁷ BCI 2003-2004 REPORT, *supra* note 138, at 30. For example, due to an increase in funding and personnel in 2003, the average time from evidence receipt to final report improved from 151 days in 2002 to 65 days in 2003, and to 40 days in 2004. *Id.*

¹⁴⁸ *Id.* at 24-30.

¹⁴⁹ *Id.* at 30.

Although we cannot truly ascertain whether the State of Ohio is providing adequate funding to ensure the proper preservation and testing of biological evidence, we must commend the State of Ohio for taking steps to obtain additional funding and hire additional staff to perform forensic analysis in a more thorough and timely manner. Still, we were unable to gather sufficient information to appropriately assess whether the State of Ohio is in compliance with Recommendation #6.

CHAPTER THREE

LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

INTRODUCTION TO THE ISSUE

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Between 1989 and 2003, approximately 205 previously convicted “murderers” were exonerated nationwide.¹ In about 50 percent of these cases, there was at least one eyewitness misidentification, and 20 percent involved false confessions.²

Lineups and Showups

Numerous studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification. To avoid misidentification, the group should include foils chosen for their similarity to the witness’ description,³ and the administering officer should be unaware of the suspect’s identity and should tell the witness that the perpetrator may not be in the lineup. Caution in administering lineups and show-ups is especially important because flaws may easily taint later lineup and at-trial identifications.⁴

Law enforcement agencies should consider using a sequential lineup or photospread, rather than presenting everyone to the witness simultaneously.⁵ In the sequential approach, the witness views one person at a time and is not told how many persons he/she will see.⁶ As each person is presented, the eyewitness states whether or not it is the perpetrator.⁷ Once an identification is made in a sequential procedure, the procedure stops.⁸ The witness thus is encouraged to compare the features of each person viewed to the witness’s recollection of the 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 witness’s statement regarding hihe/sher degree of confidence in

¹ See Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 528-29 (2005), available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf> (last visited Sept. 13, 2007).

² *Id.* at 544.

³ See C.E. Luus & G.L. Wells, *Eyewitness Identification and the Selection of Distracters for Lineups*, 15 L. & HUM. BEHAVIOR 43-57 (1991).

⁴ See BRYAN CUTLER, *EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT’S WITNESSES* 13-17, 42-44 (2002).

⁵ *Id.* at 39; see also THE REPORT TO THE LEGISLATURE OF THE STATE OF ILLINOIS: THE ILLINOIS PILOT PROGRAM ON SEQUENTIAL DOUBLE-BLIND IDENTIFICATION PROCEDURES (2006), available at <http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf> (last visited Sept. 13, 2007) (calling into some doubt the benefits of sequential lineups over simultaneous lineups).

⁶ See CUTLER, *supra* note 4, at 39.

⁷ *Id.*

⁸ *Id.*

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.

Audio or Videotaping of Custodial Interrogations

Electronically recording interrogations from their outset—not just from when the suspect has agreed to confess—can help avoid erroneous convictions. Complete recording is on the increase in this country and around the world. Those law enforcement agencies that make complete recordings have found the practice beneficial to law enforcement.⁹ 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.

⁹ See Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127 (2005).

I. FACTUAL DISCUSSION

The Ohio Peace Officer Training Commission (OPOT Commission), under the control of the Ohio Attorney General, is the chief regulatory body of Ohio law enforcement and is charged with the development and enforcement of statewide law enforcement standards - including those on training all peace officers in the State of Ohio.¹⁰ Several Ohio law enforcement agencies have voluntarily obtained national accreditation through the Commission on Accreditation for Law Enforcement Agencies. Additionally, Ohio courts have created a body of law governing pre-trial identifications and interrogations conducted by law enforcement officers.

A. *Ohio Peace Officer Training Commission and Training*

1. Ohio Peace Officer Training Commission

The OPOT Commission was created by the Ohio General Assembly to recommend rules to the Ohio Attorney General about, among other things: (1) the approval or revocation of approval of peace officer training schools administered by the state and local authorities; (2) the minimum courses of study for peace officer training schools; (3) the minimum qualifications for instructors at approved peace officer training schools; and (4) the establishment of minimum qualifications and requirements for certification of correction officers.¹¹ The Ohio Attorney General has the discretion to adopt and promulgate any rule or regulation recommended by the OPOT Commission¹² and the executive director of the OPOT Commission must approve peace officer training schools in accordance with rules adopted by the Attorney General.¹³

Members of the OPOT Commission are appointed by the Governor and approved by the Ohio Senate.¹⁴ The nine members must include:

- (1) Two incumbent sheriffs;
- (2) Two incumbent Chiefs of Police;
- (3) One representative from the general public;
- (4) One member from the Department of Education, Trade and Industrial Education services;
- (5) One representative from the Ohio Bureau of Criminal Identification and Investigation;
- (6) One representative from the Ohio State Highway patrol; and
- (7) The Special Agent in charge of an Ohio field office of the Federal Bureau of Investigation.¹⁵

¹⁰ The numerous law enforcement positions in the State of Ohio requiring peace officer basic training may be found in section 109.71(A)(1)-(22) of the Ohio Revised Code. Investigators of the Ohio Bureau of Criminal Identification and Investigation who have been certified by the OPOT Commission also are considered peace officers. OHIO REV. CODE §109.542(A) (West 2007).

¹¹ OHIO REV. CODE § 109.73(A)(1)-(3), (11) (West 2007).

¹² OHIO REV. CODE § 109.74 (West 2007).

¹³ OHIO REV. CODE § 109.75(A) (West 2007).

¹⁴ OHIO REV. CODE § 109.71 (West 2007).

2. Ohio Peace Officer Training Schools

In order to be certified as a peace officer in the State of Ohio, a candidate must complete 558 hours of basic training at a school approved and monitored by the OPOT Commission and receive a certificate of completion from the executive director of the OPOT Commission.¹⁶ Officers who are appointed to a peace officer position in Ohio and have completed training in another state, or are certified by an entity other than the OPOT Commission, may apply to the OPOT Commission for prior equivalent training analysis.¹⁷ The basic training curriculum of every Ohio peace officer must include, among other requirements: (1) sixteen hours on the laws of arrest; (2) four hours on the legal aspects of interview and interrogation; (3) four hours on interview and interrogation techniques; (4) five hours on testifying in court and the rules of evidence; (5) two hours on observation, perception, and description during investigations; (6) two hours on line-ups; and (7) three hours on ethics and professionalism.¹⁸ There are eighty sites approved by the OPOT Commission to provide basic training to Ohio peace officers, including the Ohio Peace Officer Training Academy operated by the OPOT Commission.¹⁹

Additionally, the 2007 Course Catalog for the Ohio Peace Officer Training Academy, which describes courses for the continuing education of peace officers in Ohio, offers the following courses relevant to interrogations and identification of suspects: (1) “Interview and Interrogation,” including legal requirements and limitations of the *Miranda* and *Escobedo* decisions;²⁰ (2) “‘Reid’ Techniques for Interview and Interrogation,” including “profiling suspects for interrogation,” “playing one suspect against the other,” and “identifying the five facial expressions that indicate the emotional state of the suspect;”²¹ (3) “Legal Ramifications of *Miranda*” and supporting cases following *Miranda*;²² and (4) “Legal Update,” on recent legal decisions affecting the criminal justice system.²³

B. Law Enforcement Accreditation: The Commission on Accreditation for Law Enforcement Agencies, Inc.

The Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA) is an independent accrediting authority established by the four major law enforcement

¹⁵ OHIO REV. CODE § 109.71 (West 2007).

¹⁶ OHIO REV. CODE §109.77(B)(1) (West 2007); *see also* OFFICE OF THE OHIO ATTORNEY GENERAL, OHIO PEACE OFFICER BASIC TRAINING REQUIREMENTS AND OPTIONS FOR ATTENDING 1 [hereinafter OPOT TRAINING REQUIREMENTS], *available at* http://www.ag.state.oh.us/le/training/pubs/requirements_options.pdf (last visited Sept. 13, 2007).

¹⁷ OPOT TRAINING REQUIREMENTS, *supra* note 16, at 2.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 1. Individual jurisdictions may sponsor a sworn peace officer to attend basic training or individuals who are not appointed a peace officer position may openly enroll in basic training at their own expense. *Id.*

²⁰ OHIO PEACE OFFICER TRAINING ACADEMY, COURSE CATALOG 2007, at 114 [hereinafter OPOTA COURSE CATALOG 2007], *available at* <http://www.ag.state.oh.us/le/training/pubs/potaCourseCatalog2007.pdf> (last visited Sept. 13, 2007).

²¹ *Id.* at 115.

²² *Id.* at 120.

²³ *Id.*

membership associations in the United States.²⁴ CALEA has accredited sixty law enforcement agencies in Ohio,²⁵ while another eighteen are in the process of obtaining accreditation.²⁶

To obtain accreditation, a law enforcement agency must complete a comprehensive process consisting of (1) purchasing an application; (2) executing an Accreditation Agreement and submitting a completed application; (3) completing an Agency Profile Questionnaire; (4) 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; and (5) participating in an on-site assessment by a team selected by the Commission to determine compliance who will submit a compliance report to the

²⁴ CALEA Online, About CALEA, available at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Sept. 13, 2007) (noting that the Commission was established by the International Association of Chiefs of Police (IACP), National Organization of Black Law Enforcement Executives (NOBLE), National Sheriffs' Association (NSA), and Police Executive Research Forum (PERF)).

²⁵ CALEA Online, Agency Search, available at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Sept. 13, 2007) (using second search function designating "US" and "OH" 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 received CALEA accreditation: Amberly Village Police Department, Beavercreek Police Department, Boardman Police Department, Bowling Green Police Department, Centerville Police Department, Cincinnati Police Department, Colerain Township Police Department, Columbus Police Department, Delhi Township Police Department, Dublin Division of Police, Evendale Police Department, Fairfield Police Department, German Township Police Department, Greenville Police Department, Grove City Division of Police, Hamilton Police Department, Harrison Police Department, Heath Police Department, Huber Heights Police Division, Indian Hill Rangers Police Department, Kettering Police Department, Lebanon Division of Police, Manisfield Division of Police, Marion Police Department, Mason Police Department, Mentor-on-the-Lake Police Department, Miami Township Police Department, Middletown Police Department, Milford Police Department, Piqua Police Department, Powell Police Department, Reynoldsburg Division of Police, Shaker Heights Police Department, Springdale (City of) Police Department, Springfield Township Police Department, St. Bernard Police Department, Tiffin Police Department, Toledo Police Department, Trotwood Police Department, Troy Police Department, Union Township Police Department, Upper Arlington Division of Police, Vandalia Division of Police, West Carrollton Police Department, Xenia Police Division, Greene County Sheriff's Office, Licking County Sheriff's Office, Medina County Sheriff's Office, Montgomery County Sheriff's Office, Ohio State Highway Patrol, Ohio Bureau of Criminal Identification & Investigation, Kent State University Police Department, Ohio Department of Taxation – Enforcement Division, Columbus Regional Airport Authority Division of Public Safety, Police Section, Cuyahoga Metro Housing Authority Police, Hamilton County Park District, Bexley Police Department, Forest Park Police Department, Hebron Police Department, and Ohio Peace Officer Training Academy. *Id.*

²⁶ *Id.* The following law enforcement agencies are in the process of obtaining accreditation: Beachwood Police Department, Fairfield Township Police Department, Greenhills (Village of) Police Department, Miamisburg Police Department, Newark Division of Police, Knox County Sheriff's Office, Ohio Investigative Unit, Cleveland Clinic Police Department, Huber Heights Police Division, Archbold Police Department, Beaver Township Police Department, Clearcreek Township Police Department, Genoa Township Police Department, Grandview Heights Police Department, Highland Heights Police Department, Clark County Sheriff's Office, Mill Creek Metropark Police Department, Licking Memorial Hospital Police Department, and Metropolitan Park District of the Toledo Area. *Id.*

Commission.²⁷ After these steps have been completed, a hearing is held to make a final decision on accreditation.²⁸

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.”²⁹ Specifically, CALEA Standard 42.2.1 requires an accredited law enforcement agency to create a written directive that “establishes procedures to be used in criminal investigation” including interviews and interrogation, CALEA Standard 42.2. 2 requires law enforcement agencies to create a written directive that “establishes steps to be followed in conducting preliminary investigations,” including interviewing the complainant, witnesses and suspects, and CALEA Standard 42.2.3 requires the creation of a written directive that “establishes steps to be followed in conducting follow-up investigations . . . [including] identifying and apprehending suspects,”³⁰ which means that the sixty CALEA-accredited law enforcement agencies throughout the State of Ohio should have adopted such written directives.

C. Constitutional Standards and State Law Relevant to Identifications

Pre-trial witness identifications, such as those that take place during lineups, showups, and photo arrays, are governed by the constitutional due process guarantee of a fair trial.³¹ A due process violation occurs when the trial court allows testimony concerning pre-trial identification of the defendant where (1) the identification procedure used by law enforcement was impermissibly suggestive, and (2) under the totality of the circumstances, the suggestiveness gave rise to a very substantial likelihood of irreparable misidentification.³² In making the determination of whether, under the totality of the circumstances, the use of an impermissibly suggestive pre-trial identification procedure would lead to a very substantial likelihood of irreparable misidentification, Ohio courts consider the following factors: “(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness’s degree of attention, (3) the accuracy of the witness’s prior description of the criminal, and (4) the level of certainty demonstrated by the witness at the confrontation.”³³ It is well established that there is a “great potential”

²⁷ CALEA Online, The Law Enforcement Accreditation Process, available at <http://www.calea.org/Online/CALEAPrograms/Process/accdprocess.htm> (last visited Sept. 13, 2007).

²⁸ *Id.*

²⁹ 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].

³⁰ *Id.* at 42-3 (standard 42.2.3).

³¹ See *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Neil v. Biggers*, 409 U.S. 188, 196-99 (1972); see also *State v. Broom*, 533 N.E.2d 682, 692 (Ohio 1988) (following *Manson*); *State v. Waddy*, 588 N.E.2d 819, 830-831 (Ohio 1992) (superseded on other grounds by state constitutional amendment as stated in *State v. Smith*, 684 N.E.2d 668 (Ohio 1997)) (stating that due process requirement in pre-trial identifications applies to voice, as well as visual, identifications).

³² *Biggers*, 409 U.S. at 196-97; *Simmons v. United States*, 390 U.S. 377, 384 (1968); see also *Waddy*, 588 N.E.2d at 831.

³³ *Waddy*, 588 N.E.2d at 831 (finding that two factors indicated that voice identification was not likely to lead to a misidentification and that two factors indicated that the identification could lead to a

for misidentification when a witness identifies a stranger based upon a single, brief observation in a stressful situation.³⁴

1. Lineups

Post-indictment lineups are considered a critical part of proceedings, and consequently trigger the right to counsel.³⁵ However, a defendant is not entitled to counsel at a police lineup conducted before formal proceedings have been initiated.³⁶ Ohio courts have held that a permissible lineup does not require a defendant to be “surrounded by people nearly identical in appearance.”³⁷

2. Photo Lineups

“It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals.”³⁸ Photo identification procedures should not be unduly suggestive.³⁹ That is, a photo lineup should not be conducted in such a way as to highlight and elicit an identification of the suspect. A criminal defendant does not have the right to have an attorney present at a photographic lineup until after he or she is indicted or formally charged.⁴⁰ However, a defendant does have the right to show to the judge and jury any photographic evidence used in the case, to challenge the witnesses on cross-examination, and to argue to the judge or jury that the photo identification procedure was unduly suggestive and that any identification from it should be disregarded.⁴¹ “When a motion to suppress concerns photo identification procedures, the court must determine whether the photos or procedures used were ‘so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable [mis]identification.’”⁴²

3. Single Choice Identification Procedures

misidentification, thus, “on balance,” there was not a “very substantial” likelihood of misidentification); *see also* State v. Jells, 559 N.E.2d 464, 469 (Ohio 1990) (finding that witness had an independent opportunity to identify defendant to make a reliable identification other than in photo array in which photo of defendant was taken outdoors, obscuring defendant’s features, while photos of other men contained in photo array were taken indoors) (citing *Biggers*, 409 U.S. at 199-200).

³⁴ United States v. Russell, 532 F.2d 1063, 1066 (6th Cir. 1976).

³⁵ United States v. Wade, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967)

³⁶ United States v. Ash, 413 U.S. 300 (1973), *State v. Martin*, 483 N.E.2d 1157, 1163 (Ohio 1985)

³⁷ *State v. Murphy*, 747 N.E.2d 765, 790 (Ohio 2001).

³⁸ *Simmons v. United States*, 390 U.S. 377, 383 (1968); *State v. Jells*, 559 N.E.2d 464, 469 (Ohio 1990) (citing *State v. Perryman*, 358 N.E.2d 1040, 1046 (Ohio 1976), *cert granted, vacated on other grounds* by 438 U.S. 911 (1978)).

³⁹ *Manson v. Brathwaite*, 432 U.S. 98 (1977).

⁴⁰ *Ash*, 413 U.S. at 300.

⁴¹ *Id.*

⁴² *State v. Lott*, 555 N.E.2d 293, 308 (Ohio 1990) (quoting *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

The Ohio Supreme Court has condemned single choice identifications as suggestive. “We . . . agree that ‘[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.’”⁴³ However, “the ultimate focus in determining whether reversible error exists is not just on whether the practice was used, but on whether it was so suggestive as to create ‘a very substantial likelihood of misidentification.’”⁴⁴ The United States Court of Appeals for the Sixth Circuit has permitted a witness to make an initial identification of a defendant at trial, holding that while the in-court identification was impermissibly suggestive, the witness “did not hesitate in identifying [the defendant] as the man who robbed her” and the witness had ample opportunity to view the defendant during the offense.⁴⁵ The court found the in-court identification reliable even though the offense took place five years prior to this initial identification.⁴⁶ Also, if the suggestiveness of an identification is the result of non-state action, such as the witness being exposed to media reports and prior viewings of the defendant in court, it goes to the credibility of the witness’s testimony and the weight to be given to the identification, not its admissibility.⁴⁷

D. Constitutional Standards and State Law Relevant to Interrogations

The State of Ohio does not require law enforcement officers to record police interrogations or any confession resulting from an interrogation,⁴⁸ although a review of case law suggests that several law enforcement agencies may voluntarily record interrogations.⁴⁹

As with eyewitness identifications, Ohio courts determine the voluntariness of a confession by considering the “totality of the circumstances,”⁵⁰ surrounding it, including: (1) the age, mentality, and prior criminal experience of the accused; (2) the length, intensity, and frequency of the interrogation; (3) the existence of physical deprivation or mistreatment; and (4) the existence of threat or inducement.⁵¹ There are no statutory

⁴³ State v. Broom, 533 N.E.2d 682, 692 (Ohio 1998).

⁴⁴ State v. Gross, 776 N.E.2d 1061, 1077 (Ohio 2002).

⁴⁵ United States v. Hill, 967 F.2d 226, 232-33 (6 th Cir. 1992).

⁴⁶ *Id.*

⁴⁷ *Gross*, 776 N.E.2d at 1077. As long as the state shows that there were some factors apparent that would mitigate a very substantial likelihood of misidentification, the identification may be admitted into evidence and defense counsel is then free to attack the reliability and credibility of the witness’s identification. *Id.*; *Hill*, 967 F.2d at 233.

⁴⁸ State v. Smith, 684 N.E.2d 668, 686 (Ohio 1997) (“Neither the Ohio Constitution nor the United States Constitution requires that police interviews, or any ensuing confessions, be recorded by audio or video machines.”).

⁴⁹ State v. Benner, 533 N.E.2d 701, 711 (Ohio 1988); State v. Raglin, 699 N.E.2d 482, 491 (Ohio 1998); State v. Wassil, 2005 WL 3610436, *2-3 (Ohio Ct. App. 11th Dist. Dec. 29, 2005) (unreported opinion); State v. Salvatore, 2003 WL 723214, *6-7 (Ohio Ct. App. 10th Dist. Mar. 4, 2003) (unreported opinion); State v. Johnson, 2002 WL 31166939, *2 (Ohio Ct. App. 6th Dist. Sept. 30, 2002) (unreported opinion); State v. Slaughter, 2000 WL 492053, *3 (Ohio Ct. App. 1st Dist. Apr. 28, 2000) (unreported opinion); State v. Whitaker, 2000 WL 196644, *2 (Ohio Ct. App. 3d Dist. Feb. 22, 2000) (unreported opinion).

⁵⁰ State v. Treesh, 739 N.E.2d 749, 765 (Ohio 2001).

⁵¹ State v. Edwards, 358 N.E.2d 1051, 1059 (Ohio 1976) (death sentence vacated by *Edwards v. Ohio*, 438 U.S. 911 (1978)).

limits on the length of a permissible interrogation in Ohio,⁵² and while deceptive police practices do bear on the voluntariness of a statement, “standing alone, [deception] is not dispositive of the issue.”⁵³

⁵² See, e.g., *State v. Johnston*, 580 N.E.2d 1162, 1167-68 (Ohio Ct. App. 10th Dist. 1990) (holding that an eight and one-half hour interrogation, combined with evidence that the interrogation was conducted in an excessively rough and intimidating manner, invalidated confession obtained during interrogation). *But see State v. Green*, 738 N.E.2d 1208, 1226 (Ohio 2000) (finding that statements made after 12 hours of interrogation were voluntary where “[n]o evidence suggests that police physically abused [the defendant], threatened him, or made any promises during questioning,” appellant was eighteen years old, “[i]nterviews were sporadic, not continuous, [appellant] was given food and breaks,” appellant “never refused to answer questions, never asked for questioning to stop, and never asked for medical attention or a lawyer,” and “did not complain that he was tired, nor does any evidence indicate that he was tired”).

⁵³ *State v. Lynch*, 787 N.E.2d 1185, 1200 (Ohio 2003).

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).

Sixty Ohio law enforcement agencies have obtained certification by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA), an independent accrediting authority.⁵⁴ The CALEA standards, however, do not require certified agencies to adopt specific guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Instead, the standards allow the agencies latitude in determining how they will achieve compliance with each applicable CALEA standard. 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 suspects,⁵⁵ but provides no guidance as to what the contents of the directive should be.

Certainly individual law enforcement agencies could create specific guidelines that mirror the requirements of the American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (ABA Best Practices) in order to comply with the CALEA standards, but information sufficient to determine whether any Ohio law enforcement agencies, certified or otherwise, are in compliance with the ABA Best Practices was not available.⁵⁶

Regardless of whether a law enforcement agency has obtained certification or has adopted relevant standard operating procedures, all pre-trial identification procedures administered by law enforcement agencies ultimately are subject to constitutional due process limitations. Thus, in assessing compliance with each ABA Best Practice, it is necessary to discuss the relevant treatment by Ohio courts of certain actions by law enforcement officials in administering pre-trial identification procedures.

1. General Guidelines for Administering Lineups and Photospreads

- a. **The guidelines should require, whenever practicable, the person who conducts a lineup or photospread and all others present (except for defense counsel, when his or her presence is constitutionally**

⁵⁴ CALEA Online, Agency Search, *available at* <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Sept. 13, 2007) (using second search function and designating “US”; “OH”; “Law Enforcement Accreditation” as search criteria).

⁵⁵ CALEA STANDARDS, *supra* note 29 (Standard 42.2.3).

⁵⁶ Information on law enforcement investigative techniques is not considered public record. OHIO REV. CODE § 149.43(A)(1)(h) (West 2007).

required) should be unaware of which of the participants is the suspect.

Numerous law enforcement agencies in Ohio are certified by CALEA, which require these agencies to create a written directive that “establishes steps to be followed in conducting follow-up investigations,” including identifying suspects.⁵⁷ Although the CALEA standards do not specifically require that all those present at a pre-trial identification be unaware of which participant is the suspect, a law enforcement agency complying with the CALEA standards could create a guideline to require that, when practicable, the person who conducts a lineup or photospread should be unaware of which of the participants is the suspect.

A review of relevant case law in Ohio reveals that a variety of lineup protocols are administered by law enforcement agencies across the State. At least one Ohio Court has permitted admission of an identification from a “cattle call” lineup in which several witnesses are present to make an identification of a single perpetrator.⁵⁸ The court held that while there was a greater risk of misidentification during this sort of lineup, a later in-court identification of the defendant was reliable independent of the lineup.⁵⁹ Courts also have admitted identifications in which witnesses were shown the same six-person photo array two or three times until the witnesses made an identification.⁶⁰ An Ohio court also has admitted an identification in which police presented a photo array to a witness two months after the same photo array was previously presented to the witness; however, in the second array, the suspect’s photo had been updated to a more recent photo while all other foils remained the same.⁶¹

While Ohio courts do not require that the person who conducts a lineup or photospread be unaware of which of the participants is the suspect, and Ohio courts have allowed identifications into evidence when the police clearly knew who the suspect was during the lineup or photospread in question, the written guidelines of Ohio law enforcement agencies are not generally available,⁶² and therefore it was not possible to ascertain whether most law enforcement agencies in Ohio, certified or otherwise, have guidelines complying with this particular ABA Best Practice.

b. The guidelines should require that eyewitnesses 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.

⁵⁷ CALEA STANDARDS, *supra* note 29, (Standard 42-3).

⁵⁸ State v. Norman, 738 N.E.2d 403, 415 (Ohio Ct. App. 1st Dist. 1999).

⁵⁹ *Id.*

⁶⁰ State v. Aldridge, 1986 WL 5431, *1 (Ohio Ct. App. 2d Dist. May 6, 1986) (unreported opinion).

⁶¹ State v. Sanders, 1985 WL 9689, *1-2 (Ohio Ct. App. 11th Dist. Oct. 11, 1985) (unreported opinion).

⁶² Information on law enforcement investigative techniques is not considered public record. OHIO REV. CODE § 149.43(A)(1)(h) (West 2007).

The CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures instruct eyewitnesses that the perpetrator may or may not be in the lineup, that they should not assume the official administering the lineup knows who is the suspect, or that, although they need not identify anyone, any identification must be in their own words. A law enforcement agency complying with the CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice.

A review of Ohio case law indicates that some jurisdictions perform identifications by instructing the witness that the suspect may or may not be in the lineup or photo array presented. In one instance, a detective informed the witness prior to presenting her a photo array that:

[t]he photo array you are about view consists of six photographs in no particular order of importance. The subject of the investigation may or may not be included in the photographs. Look carefully at the photographs of all six, then advise the detective whether or not you recognize anyone. You are not required to select any of the photographs.⁶³

While the Ohio Supreme Court has held that a statement by law enforcement personnel telling the witness that the suspect is in the line-up or photospread, in conjunction with other factors, can render the lineup procedure impermissibly suggestive,⁶⁴ in some instances, the witness has been told that the suspect was in the lineup or photo array and a lower court has found this permissible.⁶⁵ Furthermore, even when a witness has participated in an improper pre-trial identification procedure a subsequent in-court identification is admissible if the totality of the circumstances demonstrates that the witness had an independent basis for making the in-court identification.⁶⁶

The Ohio Supreme Court's holding that a statement by law enforcement personnel to the witness that the suspect is in the line-up or photospread can render the lineup procedure

⁶³ State v. Albert, 2006 WL 3775879, *2 (Ohio App. Ct. 10th Dist. Dec. 26, 2006) (unreported opinion) (illustrating that the identification procedure was administered by a Columbus, Ohio Police Detective in Franklin County); *see also* State v. Blakely, 2006 WL 146223, *1 (Ohio Ct. App. 6th Dist. Jan. 20, 2006) (The “[witness] was told that the array may or may not contain a photo of the shooter.”).

⁶⁴ State v. Moody, 377 N.E.2d 1008, 1010-11 (Ohio 1978).

⁶⁵ *See, e.g.*, State v. Broadnax, 1995 WL 739595, *3 (Ohio Ct. App. 8th Dist. Dec. 14, 1995) (“[K]nowledge that the suspect is in the line-up, however, does not render a line-up unnecessarily suggestive.”); *see also* State v. Artis, 1994 WL 236282, *2 (Ohio Ct. App. 8th Dist. May 26, 1994) (“That the suspects arrested for the crime would be in the lineup is inherent in the situation and not impermissibly suggestive.”).

⁶⁶ State v. Waddy, 588 N.E.2d 819, 831 (Ohio 1992) (superseded on other grounds by state constitutional amendment as stated in State v. Smith, 684 N.E.2d 668 (Ohio 1997)); State v. Jells, 559 N.E.2d 464, 470 (Ohio 1990) (finding that witness had an independent opportunity to identify defendant to make a reliable identification other than in photo array in which photo of defendant was taken outdoors, obscuring defendant's features, while photos of other men contained in photo array were taken indoors) (citing Neil v. Biggers, 409 U.S. 188, 199-200 (1972)).

impermissibly suggestive is commendable. Despite this ruling however, trial courts have allowed at least two identifications into evidence when the law enforcement officer told the witness that the suspect was in the lineup or photospread. Because the written guidelines of Ohio law enforcement agencies are generally unavailable,⁶⁷ it was not possible to determine whether these two cases indicate official law enforcement policy or are aberrations and it could not be determined whether Ohio law enforcement agencies generally, certified or not, have adopted written guidelines in compliance with all aspects of this ABA Best Practice.

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.**

A law enforcement agency complying with the CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice. A review of relevant case law in Ohio demonstrates that law enforcement officials across the State sometimes prepare lineups or photo arrays containing five to six people,⁶⁸ although there is no minimum number of foils required by case law or statute to present a lineup or photo array to a witness.

Additionally, the United States Supreme Court and Ohio courts have recognized that the “practice of showing a suspect singly for the purposes of identification”—a showup—has been “widely condemned” as being unnecessarily suggestive and conducive to irreparable mistaken identifications that constitute a denial of due process of law.⁶⁹ However, the Ohio Supreme Court has held that the overriding concern is on “the reliability of the

⁶⁷ Information on law enforcement investigative techniques is not considered public record. OHIO REV. CODE § 149.43(A)(1)(h) (West 2007).

⁶⁸ See, e.g., *State v. Murphy*, 747 N.E.2d 765, 790 (Ohio 2001) (using six-person photo array for identification of a capital suspect); *State v. Wogenstahl*, 662 N.E.2d 311, 327 (Ohio 1996) (using six-person photo array for identification of a capital suspect); *State v. Watson*, 572 N.E.2d 97, 102 (Ohio 1991) (presenting to witnesses a photo array containing twelve pictures when there were two suspects for capital murder); *Broadnax*, 1995 WL 739595, at *2 (placing photograph of defendant in array with four other men); *State v. Webster*, 1992 WL 126282, *1 (Ohio Ct. App. 12th Dist. June 8, 1992) (unreported opinion) (using six-person photo array); *State v. Nix*, 2004 WL 2315035, *5 (Ohio Ct. App. 1st Dist. Oct. 15, 2004) (unreported opinion) (upholding trial court's finding that three or four lineup pictures sitting on a table while witness waited alone in a squad room at the police station was “probably even better than the typical six-photograph lineup sheet”); *State v. Pruitt*, 2003 WL 1871041, *6 (Ohio Ct. App. 11th Dist. Apr. 14, 2003) (using six-person photo).

⁶⁹ *Manson v. Brathwaite*, 432 U.S. 98, 104 (1977); *Stovall v. Denno*, 388 U.S. 293, 302 (1967); *State v. Gross*, 776 N.E.2d 1061, 1077 (Ohio 2002); *State v. Bunce*, 1980 WL 353611, *2 (Ohio Ct. App. 10th Dist. Aug. 7, 1980) (unreported opinion).

identification, *not* the identification procedures.”⁷⁰ Consequently, showup identifications have been admitted into evidence as reliable identifications in more than one capital case.⁷¹

The Ohio Supreme Court also has held that “[a] defendant in a lineup need not be surrounded by people nearly identical in appearance” and that “[e]ven significant dissimilarities of appearance or dress will not necessarily deny due process.”⁷² Furthermore, while some courts may evaluate the level of similarity between foil participants’ physical features, a review of relevant case law from varying jurisdictions in Ohio reveals that these evaluations generally fall in favor of the police officer’s choice of participants for the lineup or photo array, often citing that while the procedure may have been impermissibly suggestive, it was not unreliable.⁷³

While Ohio courts impose no requirement that lineups and photospreads use a sufficient number of foils or that foils be chosen for their similarity to the witness’s description of the perpetrator, the written guidelines of Ohio law enforcement agencies are not public⁷⁴, and therefore it could not be ascertained whether law enforcement agencies in Ohio, certified or otherwise, have guidelines complying with this particular ABA Best Practice.

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.**

⁷⁰ State v. Williams, 652 N.E. 2d 721, 730-31 (Ohio 1995) (presenting photo arrays to three witnesses, one array contained six pictures while the other two contained only three pictures).

⁷¹ See, e.g., *Gross*, 776 N.E.2d at 1061 (agreeing that the show-up identification was suggestive, but concluding that there was not a “very substantial likelihood of irreparable misidentification” due to the totality of the circumstances of the witnesses’ opportunity to view the suspect, the degree of attention of the witness at the time of the crime, and the witnesses’ level of certainty at the confrontation); see also *State v. Broom*, 533 N.E.2d 682, 692 (Ohio 1998).

⁷² *State v. Davis*, 666 N.E.2d 1099, 1105-06 (Ohio 1996) (finding that the lineup of suspects in a capital case was not impermissibly suggestive where all six individuals in the lineup were black males with facial hair but “the complexions of the men varied and none had a bushy, curly hairstyle like [the defendant’s]”).

⁷³ See, e.g., *State v. Carroll*, 2003 WL 22267147, *6 (Ohio Ct. App. 1st Dist. Oct. 3, 2003) (unreported opinion) (finding that in the three photographs shown to the witness in Hamilton County, the photo of the defendant was “substantially larger than [the other two individuals], and did not even remotely resemble either of them”); *Broadnax*, 1995 WL 739595, at *2 (unreported opinion) (finding that pre-trial identification in Cuyahoga County was not so unduly suggestive so as to violate due process although some of the photos featured foils wearing 1970s-style clothing, foils wore different styles of mustaches, had different skin tones, and only two suspect photographs, including defendant’s, had height charts displayed); *State v. Broom*, 1987 WL 11398, *4-5 (Ohio Ct. App. 8th Dist. May 21, 1987) (finding lineup procedure in Cuyahoga County not unduly suggestive although defendant was tallest participant and was dressed in orange prison uniform while other participants wore gold uniforms); *State v. Wright*, 1987 WL 11672, *4 (Ohio Ct. App. 8th Dist. Apr. 28, 1987) (finding that age difference of over twenty years between foils in lineup and defendant did not create substantial risk of misidentification).

⁷⁴ Information on law enforcement investigative techniques is not considered public record. OHIO REV. CODE § 149.43(A)(1)(h) (West 2007).

- 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.**

The CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures video or digitally record the witness's confidence statement and any law enforcement statements made to witnesses or, in the absence of video recording, photograph the lineup. A law enforcement agency complying with the CALEA standards, which require the agency to establish steps for identifying suspects, could create guidelines that comply with this ABA Best Practice.

Although a number of Ohio cases note that a videotape was entered into evidence and examined by the court to determine whether the procedure was impermissibly suggestive or that the witness identified a suspect via a videotaped lineup,⁷⁵ the State of Ohio does not require law enforcement agencies to record lineup procedures. Nor does it appear that the State of Ohio requires law enforcement agencies, in the absence of a video or digital recording, to take a photograph of the lineup procedure and record in detail how the entire procedure was administered.

While Ohio courts impose no requirement that police videotape or digitally video record lineup procedures, or that a photograph should be taken of each lineup and a detailed record made, we did not inspect the written guidelines of Ohio law enforcement agencies, and therefore were unable to ascertain whether law enforcement agencies in Ohio, certified or otherwise, have guidelines complying with this particular ABA Best Practice.

- 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.**

The CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures request, in a non-suggestive manner, that the witness indicate his/her level of confidence in any identification and document that statement accurately. A law enforcement agency complying with the CALEA standards, requiring

⁷⁵ See, e.g., *State v. Wogenstahl*, 662 N.E. 2d 311, 363 (Ohio 1996) (“Moreover, a videotape of the lineup reveals that it was conducted in an appropriate manner.”); *State v. Cook*, 1992 WL 74199, *2 (Ohio Ct. App. 1st Dist. Apr. 8, 1992) (unreported opinion) (identifying defendant from a videotape of a previous police lineup); see also *State v. Robertson*, 1990 WL 65658, *2 (Ohio Ct. App. 2d Dist. May 18, 1990) (unreported opinion).

the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice.

While Ohio courts emphasize a witness's "level of certainty" in determining whether an impermissibly suggestive identification may nonetheless be reliable and thus admissible into evidence,⁷⁶ there is no requirement that law enforcement require witness' to indicate their level of confidence in any identification and to document these statements. Because the written guidelines of Ohio law enforcement agencies are not public,⁷⁷ it was not possible to ascertain whether law enforcement agencies in Ohio, certified or otherwise, have guidelines complying with this particular ABA Best Practice.⁷⁸

4. Immediate Post-Lineup or Photospread Procedures

- a. The guidelines should require that police and prosecutors 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.**

The CALEA standards do not specifically require that certified agencies conducting pre-trial identification procedures avoid giving the witness feedback on whether he/she selected the proper suspect. A law enforcement agency complying with the CALEA standards, requiring the agency to establish steps for identifying suspects, could create a guideline that complies with this ABA Best Practice. While no reported instances in which law enforcement or prosecutors gave feedback to a witness on whether he/she selected the "right man" were found, in at least one instance, an Ohio court has disapproved of a "cattle call" lineup where several witnesses are asked to view a lineup simultaneously,⁷⁹ possibly permitting witnesses to confer with one another to verify their identification of a suspect.

However, Ohio law enforcement agency policies addressing this issue are not public⁸⁰ and therefore it was not possible to ascertain whether any law enforcement agencies in the State of Ohio have adopted policies or procedures which meet this ABA Best Practice.

Conclusion

⁷⁶ See *supra* note 33 and accompanying text (discussing the independent variables a court will consider under the totality of the circumstances to determine whether an impermissibly suggestive identification would lead to a very substantial likelihood of "irreparable misidentification").

⁷⁷ Information on law enforcement investigative techniques is not considered public record. OHIO REV. CODE § 149.43(A)(1)(h) (West 2007).

⁷⁸ The Ohio Assessment Team addressed questions concerning the lineup procedures described above to the Hamilton, Butler, Franklin, Cuyahoga, Allen, and Trumbull Sheriffs' Offices, however only the Butler County Sheriff's Office responded. See Notes on Answers to Ohio Law Enforcement Survey Questions (on file with author). In its response, it indicated that it did require witnesses to vocalize the certainty of the witness's identification. *Id.*

⁷⁹ *State v. Norman*, 738 N.E.2d 403, 415 (Ohio Ct. App. 1st Dist. 1999).

⁸⁰ Information on law enforcement investigative techniques is not considered public record. OHIO REV. CODE § 149.43(A)(1)(h) (West 2007).

Even though numerous law enforcement agencies should have adopted written directives to comply with the requirements of CALEA, the CALEA standards do not require agencies to adopt written directives as specific as the ABA Best Practices contained in Recommendation #1. Furthermore, the written directives adopted by Ohio law enforcement agencies are not public⁸¹ and thus it was not possible to assess whether they comply with Recommendation #1.

Based on this information, the Ohio Death Penalty Assessment Team recommends that the State of Ohio implement mandatory lineup procedures, utilizing national best practices, to protect against incorrect eyewitness identifications.

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.

The CALEA standards do not specifically require that certified law enforcement agencies conducting pre-trial identification procedures receive periodic training on how to implement guidelines for such procedures, including training on non-suggestive techniques for interviewing witnesses. A law enforcement agency complying with the CALEA standards that require the agency to establish “a written directive that requires each sworn officer [to] receive annual training on legal updates,” could create a training program that complies with Recommendation #2.⁸² For example, any peace officer candidate attending basic training in the State of Ohio will receive two hours of instruction on conducting lineups.⁸³ Additionally, the Ohio Peace Officer Training Academy’s Course Catalog for 2007, available to all peace officers in Ohio, offers a course entitled “Legal Update” on “recent legal decisions affecting the criminal justice system”⁸⁴ which may include training on conducting lineups and photospreads.

However, it was not possible to determine whether Ohio law enforcement agencies, certified or otherwise, are complying with Recommendation #2, or whether prosecutors are receiving periodic training in compliance with Recommendation #2.

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.

⁸¹ *Id.*

⁸² CALEA STANDARDS, *supra* note 29, at 33-4 (Standard 33.5.1).

⁸³ OPOT TRAINING REQUIREMENTS, *supra* note 16, at 3.

⁸⁴ OPOTA COURSE CATALOG 2007, *supra* note 20, at 120.

It was not possible to obtain sufficient information to assess whether law enforcement agencies and prosecutors in Ohio have established and periodically update their guidelines for conducting pre-trial identifications. Therefore, it could not be determined whether the State of Ohio is in compliance with the requirements of Recommendation #3.

D. Recommendation #4

Videotape the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of such custodial interrogations.

The Supreme Court of Ohio has held that “[n]either the Ohio Constitution nor the United States Constitution requires that police interviews, or any ensuing confessions, be recorded by audio or video machines.”⁸⁵ Despite this, as of March 22, 2007, nineteen law enforcement agencies in Ohio regularly record the entirety of all custodial interrogations.⁸⁶ These agencies use either audio or video recording equipment to record interviews of a person under arrest in an agency facility from the moment “Miranda”⁸⁷ warnings are given until the interview ends.⁸⁸ Furthermore, a review of relevant case law in Ohio demonstrates that a number of law enforcement agencies voluntarily record portions of interrogations or statements made to law enforcement.⁸⁹

⁸⁵ State v. Smith, 684 N.E.2d 668, 686 (Ohio 1997).

⁸⁶ Thomas Sullivan, *Departments That Currently Record a Majority of Custodial Interrogations*, Mar. 22, 2007 (on file with author). These law enforcement agencies are the Akron Police Department, Brown County Sheriff, Columbus Police Department, Dawson County Sheriff, Franklin Police Department, Garfield Heights Police Department, Grandview Heights Police Department, Hartford Police Department, Hudson Police Department, Millersburg Police Department, Ohio Board of Pharmacy, Ohio State University Police Department, Ontario Police Department, Reynoldsburg Police Department, Upper Arlington Police Department, Wapakoneta Police Department, Westerville Police Department, Westlake Police Department, and Worthington Police Department. *Id.*

⁸⁷ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that “the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination”).

⁸⁸ Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, 1 CENTER ON WRONGFUL CONVICTIONS SPEC. REP., at 5 (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf> (last visited Sept. 13, 2007). This report, however, does not include departments that conduct unrecorded interviews followed by recorded confessions or recordings made outside a police stations or lockup, such as at crime scenes or in squad cars. *Id.*

⁸⁹ See, e.g., *State v. Treesh*, 739 N.E.2d 749 (Ohio 2001); *State v. Benner*, 533 N.E.2d 701, 711 (Ohio 1988); *State v. Raglin*, 699 N.E.2d 482, 491 (Ohio 1998); *State v. Wassil*, 2005 WL 3610436, *2-3 (Ohio Ct. App. 11th Dist. Dec. 29, 2005) (unreported opinion); *State v. Salvatore*, 2003 WL 723214, *6-7 (Ohio Ct. App. 10th Dist. Mar. 4, 2003) (unreported opinion); *State v. Johnson*, 2002 WL 31166939, *1 (Ohio Ct. App. 6th Dist. Sept. 30, 2002) (unreported opinion); *State v. Slaughter*, 2000 WL 492053, *3 (Ohio Ct. App. 1st Dist. Apr. 28, 2000) (unreported opinion); *State v. Whitaker*, 2000 WL 196644, *2 (Ohio Ct. App. 3d Dist. Feb. 22, 2000) (unreported opinion). It is unclear to what extent the law enforcement agencies referenced in these cases are included in the list of law enforcement agencies that are known to record custodial interrogations. See *supra* note 86.

All the law enforcement agencies that regularly record the entirety of all custodial interrogations are to be commended. Unfortunately, in at least one case, an Ohio Court of Appeals held that it was not improper for law enforcement to “conduct[] preliminary interviews to help witnesses or suspects focus their statements” prior to recording a witness's or a suspect's statement, even when the officers have the ability to record the entire interrogation.⁹⁰ Law enforcement agencies that do not tape at all or tape only a portion of the custodial interrogation should adopt the ABA Best Practice and begin doing so.

Based on this information, the State of Ohio is only in partial compliance with Recommendation #4.

Based on this information, the Ohio Death Penalty Assessment Team recommends that the State of Ohio require all law enforcement agencies to videotape the entirety of custodial interrogations in homicide cases at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where videotaping is impractical, audiotape the entirety of the custodial interrogation.

E. Recommendation #5

Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.

The Office of the Ohio Attorney General received \$7.2 million to “maintain, upgrade, and modernize its law enforcement training, technology, and laboratory facilities,” in fiscal year 2003-2004, and received an additional \$11.6 million in fiscal year 2005-2006.⁹¹ However, it could not be determined whether this funding ensures development and updating of policies and procedures for identifications and interrogations. Therefore, it was not possible to determine whether the State of Ohio is in compliance with the requirements of Recommendation #5.

F. Recommendation #6

Courts should have the discretion to allow a properly qualified expert to testify both pre-trial and at trial on the factors affecting eyewitness accuracy.

⁹⁰ State v. Enfinger, 2004 WL 911433, *2 (Ohio Ct. App. 1st Dist. Apr. 30, 2004). In *Enfinger*, the law enforcement officer who testified in the case stated that “we are trying to find the truth, whatever that might be; that once we believe what we have would be the truth, or it got to the point in the interview when the individual says that there’s a statement I want to make in regard to this matter, then, we pull out the tape-recorder and record it.” *Id.* at *2.

⁹¹ OHIO OFFICE OF BUDGET AND MANAGEMENT, STATE OF OHIO EXECUTIVE BUDGET FOR FISCAL YEARS 2006 AND 2007, AT B-28 (as proposed) [hereinafter EXECUTIVE BUDGET FY 2006 AND 2007], available at <http://www.obm.ohio.gov/budget/operating/executive/0607/bb0607.pdf> (last visited Sept. 13, 2007).

In addressing whether a properly qualified expert may testify as to the accuracy of eyewitness testimony, the United States Court of Appeals for the Sixth Circuit has held that “such testimony might [be] relevant...and not only might...*assist*[] the jury, but might have refuted their otherwise common assumptions about the reliability of eyewitness identification.”⁹² The Ohio Supreme Court has ruled similarly and held that trial courts have broad discretion in determining the admissibility of expert testimony on eyewitness identification⁹³ and a trial court’s determination will not be overturned absent an abuse of discretion.⁹⁴ However, the Ohio Supreme Court also held that, although expert testimony on eyewitness identification is admissible “concerning the variables or factors that may impair the accuracy of a typical eyewitness identification,” a trial court does not abuse its discretion” in failing to appoint such an expert for an indigent defendant unless the defendant has demonstrated that there exists a “special identifiable need” for expert assistance such as the witness’s mental impairment.⁹⁵

Because the State of Ohio allows testimony about the factors affecting eyewitness accuracy under limited circumstances, it is in partial compliance with Recommendation #6.

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.

Ohio courts may provide a standard charge to the jury regarding “some things [the jury] may consider in weighing the testimony of identifying witness(es),” including:

- (1) Capacity of the witness, that is, the (age) (intelligence) (defective senses, if any), and the opportunity of the witness to observe;
- (2) The witness’s degree of attention at the time he observed the offender;
- (3) The accuracy of the witness’s prior descriptions (or identification, if any);
- (4) Whether the witness had occasion to observe the defendant in the past;
- (5) The interval time between the event and the identification; and
- (6) All surrounding circumstances under which the witness has identified the defendant (including deficiencies, if any, in lineup, photo display or one-on-one).⁹⁶

⁹² State v. Smith, 736 F.2d 1104, 1106 (6th Cir. 1984) (emphasis in original).

⁹³ *Id.*; State v. Buell, 489 N.E.2d 795, 804 (Ohio 1986).

⁹⁴ *Buell*, 489 N.E.2d at 804 (“In light of the substantial . . . evidence, it cannot be said that ‘it is more probable than not the [exclusion of expert testimony on the reliability of the eyewitness identification] affected the verdict.’”).

⁹⁵ State v. Broom, 533 N.E.2d 682 (Ohio 1998).

⁹⁶ 4 OHIO JURY INSTRUCTIONS 405.20.

The Ohio Jury Instructions also suggest that the jury be instructed that “[i]f, after examining the testimony of the identifying witness you are not convinced beyond a reasonable doubt that the defendant is the offender, you must find the defendant not guilty.”⁹⁷ However, the Ohio Supreme Court has held that “a court’s instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings.”⁹⁸ Therefore, the trial court has the discretion to determine if an instruction on the reliability of eyewitness testimony, or any part thereof, should be given to the jury, even if identity of the offender is the central issue presented to the jury.⁹⁹

Because an instruction on the reliability of eyewitness testimony may be excluded, Ohio is only in partial compliance with Recommendation #7.

⁹⁷ *Id.*

⁹⁸ *State v. Guster*, 421 N.E.2d 157, 160 (Ohio 1981).

⁹⁹ *Id.* at 161 (finding that trial court’s exclusion of a jury instruction on the reliability of eyewitness testimony was not an abuse of discretion, even though the appellant presented an alibi defense, because the facts demonstrated that the infirmities said to attach to eyewitness identification were not present in the case and that the issue of determining identity beyond a reasonable doubt was covered by other instructions).

CHAPTER FOUR

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

INTRODUCTION TO THE ISSUE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that crime laboratories and medical examiner offices, as well as forensic and medical examiners, 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 crime laboratories have increasingly been called into serious question.¹ While the majority of crime laboratories and medical examiner offices, along with the people who work in them, strive to do their work accurately and impartially, a troubling number of laboratory technicians have been accused and/or convicted of failing properly to 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. This has prompted internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, the re-examination of hundreds of cases, and the conviction of many innocent individuals.

The deficiencies in crime laboratories and the misconduct and incompetence of technicians have been attributed to the lack of proper training and supervision, lack of testing procedures or the failure to follow procedures, and inadequate funding.

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, crime labs and medical examiner offices must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided.

¹ See Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000); Paul C. Giannelli, *The Abuse Of Scientific Evidence of Criminal Cases: The Need For Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997); Fredric Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 1*, 28 CHAMPION 6 (2004); Fredric Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 2*, 28 CHAMPION 16 (2004).

I. FACTUAL DISCUSSION

A. *Crime Laboratories*

1. Ohio's System of Crime Laboratories

The Ohio Revised Code Annotated provides for the creation of the Bureau of Criminal Identification and Investigation (BCI), the State of Ohio's primary criminal investigative agency. The BCI is responsible for: (1) maintaining a staff of investigators and technicians skilled in the solution of crime; (2) keeping statistics and other necessary data; (3) assisting in the prevention of crime; and (4) engaging in activities that will aid law enforcement in solving crimes and controlling criminal activity.² The BCI is a division of the Office of the Ohio Attorney General; the superintendent of the BCI is appointed by the Attorney General of Ohio.³

The BCI is divided into the Identification, Investigation, and Crime Laboratory Divisions.⁴ The Crime Laboratory Division is split into the following units: (1) Chemistry; (2) Trace Evidence; (3) DNA and Serology, including use of Short Tandem Repeat (STR) testing and CODIS;⁵ (4) Firearms, including the National Integrated Ballistics Information Network (NIBIN);⁶ and (5) Documents.⁷ The BCI is headquartered in London, Ohio, and maintains crime laboratories in London, Bowling Green, Boardman, Cambridge, and Richfield.⁸ Local law-enforcement agencies may draw on BCI scientists and forensic specialists to analyze DNA, ballistics, and other physical evidence.⁹

² OHIO REV. CODE §§ 109.51, 109.52 (West 2007); *see also* Ohio Attorney General, BCI Identification Division, *available at* <http://www.ag.state.oh.us/le/investigation/identification.asp> (last visited Sept. 13, 2007).

³ OHIO REV. CODE § 109.51 (West 2007).

⁴ Ohio Attorney General, Bureau of Criminal Identification and Investigation, *available at* <http://www.ag.state.oh.us/le/investigation/bcii.asp> (last visited Sept. 13, 2007).

⁵ STR is an advanced DNA analysis methodology that can discern that a DNA sample is unique to one out of a quadrillion people. *See* Ohio Attorney General, BCI Crime Lab, *available at* <http://www.ag.state.oh.us/le/investigation/lab.asp> (last visited Sept. 13, 2007). BCI crime laboratories also participate in CODIS, the National Combined DNA Index System that contains digital profiles of DNA from violent offenders nationwide. *Id.*

⁶ NIBIN is a computerized ballistics imaging system that allows firearms technicians to acquire digital images of the marking made by a firearm on bullets or cartridges in previous instances for comparison to the case at bar. *See* BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, ATF'S NIBIN SYSTEM, *available at* <http://www.nibin.gov/nibin.pdf> (last visited Sept. 13, 2007).

⁷ Ohio Attorney General, BCI Crime Lab, *available at* <http://www.ag.state.oh.us/le/investigation/lab.asp> (last visited Sept. 13, 2007).

⁸ OHIO REV. CODE § 109.51 (West 2007); Ohio Attorney General, Bureau of Criminal Identification and Investigation, *available at* <http://www.ag.state.oh.us/le/investigation/bcii.asp> (last visited Sept. 13, 2007).

⁹ Ohio Attorney General, Bureau of Criminal Identification and Investigation, *available at* <http://www.ag.state.oh.us/le/investigation/bcii.asp> (last visited Sept. 13, 2007).

Additionally, Ohio has a number of independent crime laboratories that are housed in sheriff's departments, police departments, and coroner's offices across the State.¹⁰ Some of these laboratories are accredited and some are not.¹¹

Because the procedures for the collection, preservation, and testing of evidence adopted by BCI, local, and private laboratories are not readily available to the public, it is instructive to review the requirements of the accreditation program(s) through which Ohio's crime laboratories have obtained voluntary, national accreditation to understand the procedures, guidelines, standards, and methods used by some of the crime laboratories throughout the State.

2. Crime Laboratory Accreditation

The State of Ohio does not require the accreditation of crime laboratories. However, BCI and some local crime laboratories voluntarily have obtained accreditation through the national accreditation programs of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) Legacy and International accreditation programs, and Forensic Quality Services-International (FQS-I).¹²

a. ASCLD/LAB-*Legacy* Program Accreditation

All three of the BCI's crime laboratories, as well as eight local or regional crime laboratories in Ohio are accredited through the Legacy Program of the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).¹³ The

¹⁰ For example, the American Society of Crime Laboratory Directors indicates that there are at least eight local or regional crime laboratories in Ohio that are not affiliated with BCI. *See* Am. Soc'y of Crime Lab. Dirs./Lab Accreditation Bd., Accredited Laboratories, available at <http://www.ascld-lab.org/legacy/aslablegacylaboratories.html#OH> (last visited Sept. 13, 2007) (indicating crime laboratories in Canton-Stark County; Columbus, Cuyahoga County Coroner's Office; DNA Diagnostics Center in Fairfield, Ohio; Hamilton County Coroner's Office; Lake County (Regional); Mansfield, Ohio; and Miami Valley (Regional in Dayton, Ohio)).

¹¹ The accredited laboratories include the Columbus Police Crime Laboratory and the DNA Diagnostics Center – Forensic Department. The names of accredited crime laboratories are found on the accrediting organizations' websites. *See, e.g.*, Am. Soc'y of Crime Lab. Dirs./Lab Accreditation Bd.-*Legacy* (ASCLD/LAB-*Legacy*), Laboratories, available at <http://www.ascld-lab.org/legacy/aslablegacylaboratories.html> (last visited Sept. 13, 2007); Am. Soc'y of Crime Lab. Dirs./Lab Accreditation Bd.-*International* (ASCLD/LAB-*International*), International Directory of Accredited Laboratories, available at http://www.ascld-lab.org/cgi-bin/iso/csvsearch.pl?search=OH&order_by=lab&order=abc (last visited Sept. 13, 2007); and Forensic Quality Services (ISO/FQS-I), ISO/IEC 17025 Accredited Laboratories, available at http://www.forquality.org/fqs_I_Labs.htm (last visited Sept. 13, 2007).

¹² *See supra* note 11 and accompanying text.

¹³ ASCLD/LAB - *Legacy*, Laboratories, available at <http://www.ascld-lab.org/legacy/aslablegacylaboratories.html> (last visited Sept. 13, 2007). The accredited crime laboratories are as follows: (1) Canton-Stark County Crime Laboratory (Biology only) in Canton, OH; (2) Columbus Police Crime Laboratory, Columbus, OH; (3) Cuyahoga County Coroner's Office Forensic Laboratories in Cleveland, OH; (4) DNA Diagnostics Center in Fairfield, OH; (5) Hamilton County Coroner's Crime Laboratory in Cincinnati, OH; (6) Lake County Regional Forensic Crime Laboratory in Painesville, OH; (7) Mansfield Division of Police Forensic Science Laboratory in Mansfield, OH; (8) Miami Valley Regional Crime Laboratory in Dayton, OH; and the BCI Crime Laboratories in (9) London, OH, (10)

ASCLD/LAB 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.”¹⁴ The ASCLD/LAB-Legacy Program requires crime laboratories to demonstrate compliance with a number of established standards.¹⁵

i. Application Process for ASCLD/LAB-*Legacy* Accreditation

To obtain Legacy Program accreditation, a laboratory must submit an “Application for Accreditation,” documenting the organization of the laboratory; the laboratory mission statement, objectives, and budget; qualifications of staff; the existence of laboratory quality manual(s); procedures for handling and preserving evidence; procedures on case records; security procedures; and management/training courses taken by laboratory managers.¹⁶ In addition to the application, the laboratory must submit a “Grade Computation” and “Summation of Criteria Ratings,” which is based on the laboratory’s self-evaluation of whether it is in compliance with all of the criteria contained in the 2005 ASCLD/LAB Laboratory Accreditation Board Manual (Manual).¹⁷

ii. ASCLD/LAB-*Legacy* Accreditation Standards and Criteria

The Manual contains various standards and criteria which are assigned a rating of “Essential,” “Important,” or “Desirable.”¹⁸ In order to obtain accreditation, the “laboratory must achieve not less than 100% of the Essential,¹⁹ 75% of the Important,²⁰ and 50% of the Desirable²¹ criteria.”²² Some of the Essential criteria contained in the Manual require:

- (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;²³

Bowling Green, OH, and (11) Richfield, OH. *Id.* Additionally, the U.S. Food and Drug Administration Forensic Chemistry Center in Cincinnati, OH is accredited by ASCLD/LAB-*Legacy*. *Id.*

¹⁴ ASCLD/LAB-*LEGACY*, LABORATORY ACCREDITATION BOARD 2005 MANUAL 1 (on file with author) [hereinafter ASCLD/LAB-*LEGACY* 2005 MANUAL].

¹⁵ *Id.* at 13-60.

¹⁶ *Id.* at 69-74, app. 1.

¹⁷ *Id.* at 3, 77-84, app. 3.

¹⁸ *Id.* at 2.

¹⁹ 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.” *Id.*

²⁰ The *Manual* defines “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.” *Id.*

²¹ The *Manual* defines “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.*

²² ASCLD/LAB-*LEGACY* 2005 MANUAL, *supra* note 14, at 2.

²³ *Id.* at 14 (Standards 1.1.2.3 through 1.1.2.8).

- (2) A training program to develop the technical skills of employees in each applicable discipline and subdiscipline;²⁴
- (3) A chain of custody record that provides a comprehensive, documented history of evidence transfer over which the laboratory has control;²⁵
- (4) The proper storage of evidence to protect the integrity of the evidence;²⁶
- (5) A comprehensive quality manual;²⁷
- (6) The performance of an annual review of the laboratory's quality system;²⁸
- (7) The use of scientific procedures that are generally accepted in the field or supported by data gathered and recorded in a scientific manner;²⁹
- (8) The performance and documentation of administrative reviews of all reports issued;³⁰
- (9) The monitoring of the testimony of each examiner at least annually;³¹ and
- (10) A documented program of proficiency testing, measuring examiners' capabilities and the reliability of analytical results.³²

The Manual also contains Essential criteria on personnel qualifications, requiring examiners to have a specialized baccalaureate degree relevant to their crime laboratory specialty, experience/training commensurate with the examinations and testimony provided, and an understanding of the necessary instruments, methods, and procedures.³³ Additionally, the examiners must successfully complete a competency test prior to assuming casework and, thereafter, annual proficiency exams.³⁴

Once the laboratory has assessed its compliance with the ASCLD/LAB criteria and submitted a complete application, the ASCLD/LAB inspection team, headed by a team captain, will arrange an on-site inspection of the laboratory.³⁵

iii. On-Site Inspection, Decisions on Accreditation, and the Duration of Accreditation

The on-site inspection consists of interviewing analysts and reviewing a sample of case files, including all notes and data, generated by each analyst.³⁶ The inspection team will also interview all trainees to evaluate the laboratory's training program.³⁷ At the

²⁴ *Id.* at 18 (Standard 1.3.3.1).

²⁵ *Id.* at 20 (Standard 1.4.1.1).

²⁶ *Id.* at 20-22 (Standards 1.4.1.2 through 1.4.1.5).

²⁷ *Id.* at 24 (Standard 1.4.2.1).

²⁸ *Id.* at 28 (Standard 1.4.2.4).

²⁹ *Id.* (Standard 1.4.2.5).

³⁰ *Id.* at 35 (Standard 1.4.2.23).

³¹ *Id.* at 36 (Standard 1.4.2.24).

³² *Id.* at 37 (Standard 1.4.3.1).

³³ *Id.* at 42 (Standards 2.2.1, 2.2.2).

³⁴ *Id.* at 42 (Standards 2.2.3 through 2.2.4).

³⁵ *Id.* at 4.

³⁶ *Id.* at 6.

³⁷ *Id.*

conclusion of the inspection, the inspection team will meet with the laboratory director to review the findings and discuss any deficiencies.³⁸

The inspection team must provide a draft inspection report to the Executive Director of the ASCLD/LAB, who will then distribute the report to the “audit committee,” which is comprised of an ASCLD/LAB Board member, the Executive Director, at least three staff Inspectors, and the inspection team captain.³⁹ Decisions on accreditation must be made within twelve months of “the date of the laboratory’s first notification of an audit committee’s consideration of the draft inspection report.”⁴⁰ During that time period, the laboratory may correct any deficiencies identified by the inspection team during the on-site inspection.⁴¹

If the ASCLD/LAB Board grants accreditation to the laboratory, it will be 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.”⁴² After five years, the laboratory must apply for reaccreditation and undergo another on-site inspection.⁴³

b. ISO/IEC 17025 Accreditation

The International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC) have set standards for the competence of laboratories to carry out tests and calibrations, including sampling, which are set out in ISO/IEC 17025:2005.⁴⁴ Some Ohio crime laboratories have voluntarily sought ISO/IEC 17025:2005 accreditation through ASCLD/LAB-*International* or through Forensic Quality Services-International (FQS-I).⁴⁵ The following Ohio laboratories have received ISO/IEC 17025:2005 accreditation: (1) the Forensic Department of the DNA Diagnostics Center in Fairfield, Ohio, accredited through both ASCLD/LAB-*International* and FQS-I; (2) Columbus Police Crime Laboratory, accredited through ASCLD/LAB-*International*; and (3) Genetica DNA Laboratories in Cincinnati, Ohio accredited through FQS-I.⁴⁶

³⁸ *Id.* at 7.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 1.

⁴³ *Id.*

⁴⁴ ISO/IEC 17025, GENERAL REQUIREMENTS FOR THE COMPETENCE OF TESTING AND CALIBRATION LABORATORIES, at vi (2d ed. 2005) [hereinafter GENERAL REQUIREMENTS FOR THE COMPETENCE] (on file with author).

⁴⁵ See ASCLD/LAB-*International*, International Directory of Accredited Laboratories, available at http://www.ascl-d-lab.org/cgi-bin/iso/csvsearch.pl?search=OH&header=state&order_by=lab&order=abc (last visited Sept. 13, 2007); National Forensic Science Technology Center, Forensic Quality, Service-International Division, ISO/IEC Accredited Laboratories, available at http://www.forquality.org/fqs_I_Labs.htm (last visited Sept. 13, 2007).

⁴⁶ National Forensic Science Technology Center, Forensic Quality, Service-International Division, ISO/IEC Accredited Laboratories, available at http://www.forquality.org/fqs_I_Labs.htm (last visited Sept. 13, 2007).

i. Applying for ISO/IEC 17025:2005 Accreditation through ASCLD/LAB-*International*

In addition to obtaining ASCLD/LAB-Legacy Accreditation, the Columbus Police Crime Laboratory and the Forensic Department of the DNA Diagnostics Center have both obtained accreditation through the ASCLD/LAB-*International* Accreditation Program (ASCLD-LAB-*International*).⁴⁷ ASCLD/LAB-*International* is “a program of accreditation in which any crime laboratory may participate to demonstrate that its management, technical operations, and overall quality management system” meet ISO/IEC 17025: 2005 General Requirements for the Competence of Testing and Calibration Laboratories (ISO/IEC 17025)⁴⁸ and ASCLD/LAB-*International Supplemental Requirements for the Accreditation of Forensic Science Testing and Calibration Laboratories* (ASCLD/LAB-*International Supplemental Requirements*).⁴⁹ ISO/IEC 17025 “specifies the general requirements for the competence to carry out tests and/or calibrations, including sampling,”⁵⁰ and the ASCLD/LAB-*International Supplemental Requirements* contain “supplemental accreditation requirements for forensic science laboratories for the examination or analysis of evidence as it relates to legal proceedings.”⁵¹

The application process for the ASCLD/LAB-*International* Program is similar to the application process for the Legacy Program. Prior to submitting an application, the laboratory must conduct a comprehensive self-evaluation using the ASCLD/LAB-*International Field Assessment Guide*.⁵² Following the self-evaluation, the laboratory must implement, if necessary, any corrective actions to address any non-conformity.⁵³ Once any necessary corrective action has been taken, the laboratory may submit its formal application for accreditation using the ASCLD/LAB-*International Application for Accreditation*.⁵⁴

⁴⁷ See ASCLD/LAB-*International*, International Directory of Accredited Laboratories, available at http://www.ascl-d-lab.org/cgi-bin/iso/csvsearch.pl?search=OH&header=state&order_by=lab&order=abc (last visited Sept. 13, 2007).

⁴⁸ GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra*, note 44, at vi. Although the ASCLD/LAB-*International* Accreditation Program (2004) states that any lab seeking ASCLD/LAB-*International* accreditation must demonstrate conformance to the requirements in ISO/IEC 17025:1999, conformance is required to the ISO/IEC 17025, 2005 edition, for all laboratories seeking accreditation after May 15, 2005. Telephone interview by Sarah Turberville with Caprice Fowler, ASCLD/LAB-*International* in Garner, NC (Mar. 15, 2007). The Columbus Police Crime Laboratory was granted ASCLD/LAB-*International* accreditation on February 26, 2005 and has until April 2009 to meet the ISO/IEC 17025: 2005 requirements. *Id.*

⁴⁹ ASCLD/LAB-*INTERNATIONAL*, ASCLD/LAB-*INTERNATIONAL* ACCREDITATION PROGRAM 1 [hereinafter ASCLD/LAB-*INTERNATIONAL* ACCREDITATION PROGRAM], available at <http://www.ascl-d-lab.org/international/pdf/aslabinternprogramoverview.pdf> (last visited Sept. 13, 2007).

⁵⁰ GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 44, at 1.

⁵¹ ASCLD/LAB-*INTERNATIONAL*, SUPPLEMENTAL REQUIREMENTS FOR THE ACCREDITATION OF FORENSIC SCIENCE TESTING AND CALIBRATION LABORATORIES 2 (Ver. 2.1 2006) [hereinafter SUPPLEMENTAL REQUIREMENTS].

⁵² ASCLD/LAB-*INTERNATIONAL* ACCREDITATION PROGRAM, *supra* note 49, at 2-3.

⁵³ *Id.* at 3.

⁵⁴ *Id.*

Upon application or any time prior to the on-site visit, the laboratory also must submit a *Conformance File* to ASCLD/LAB, confirming compliance with all of the Management and Technical Requirements of ISO/IEC 17025 and all of the ASCLD/LAB-*International Supplemental Requirements*.⁵⁵ These requirements are similar to the requirements of the Legacy Program. For example, ISO/IEC 17025 requires the laboratory to have a quality manual,⁵⁶ a training program,⁵⁷ and laboratory personnel who are “qualified on the basis of appropriate education, training, experience, and/or demonstrated skills.”⁵⁸ Additionally, the ASCLD/LAB-*International Supplemental Requirements* specifically require the laboratory to have “a documented training program that will be used to train the individual in the knowledge, skills, and abilities needed to perform the testing.”⁵⁹ ISO/IEC 17025 and the ASCLD/LAB-*International Supplemental Requirements* also include extensive criteria governing appropriate testing and calibration methods.⁶⁰

Following submission of the *Conformance File*, ASCLD/LAB will perform an on-site visit.⁶¹ If ASCLD/LAB grants the laboratory’s accreditation request, the ASCLD/LAB-*International Program* accreditation certificate will specify the field(s), discipline(s), and sub-discipline(s) for which accreditation is granted.⁶² For example, the Columbus Police Crime Laboratory has been accredited in the areas of (1) Controlled substances; (2) Toxicology; (3) Biology (4) Trace Evidence; (5) Firearms/Toolmarks; (6) Latent Prints; and (7) Questioned Documents⁶³ while the Forensic Department of the DNA Diagnostics Center has been accredited in Biology only.⁶⁴

ii. Applying for ISO/IEC 17025:2005 Accreditation through Forensic Quality Services-International

Forensic Quality Services-International (FQS-I) is a division of the National Forensic Science Technology Center (NFSTC) “whose sole purpose is accreditation of forensic testing laboratories to ISO 17025” for “agencies which conduct testing in areas in which the results may have legal or regulatory implications.”⁶⁵ 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

⁵⁵ *Id.* at 3-4.

⁵⁶ GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 44, at 3 (Standards 4.2.1, 4.2.2).

⁵⁷ *Id.* at 11 (Standard 5.2).

⁵⁸ *Id.*

⁵⁹ SUPPLEMENTAL REQUIREMENTS, *supra* note 51, at 12 (Standard 5.2.1.1).

⁶⁰ *Id.* at 15-17 (Standards 5.4, 5.8 through 5.9); GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 44, at 12-15 (Standard 5.4).

⁶¹ ASCLD/LAB-INTERNATIONAL ACCREDITATION PROGRAM, *supra* note 49, at 5-6.

⁶² *Id.* at 4-5.

⁶³ ASCLD/LAB-INTERNATIONAL, SCOPE OF ACCREDITATION—COLUMBUS POLICE CRIME LABORATORY, available at <http://www.ascl-d-lab.org/international/scopes/ALI-011-T.pdf> (last visited Sept. 13, 2007).

⁶⁴ ASCLD/LAB-INTERNATIONAL, SCOPE OF ACCREDITATION--DNA DIAGNOSTICS CENTER, FORENSIC DEP’T., available at <http://www.ascl-d-lab.org/international/scopes/ALI-012-T.pdf> (last visited Sept. 13, 2007).

⁶⁵ FQS-I, GENERAL REQUIREMENTS FOR ACCREDITATION (GRA) 3 [hereinafter FQS-I GRA], available at http://www.forquality.org/FQS-I-%20Acc%20Docs/GRA_10-06.pdf (last visited Sept. 13, 2007).

accreditation “demonstrated by an agreed system of surveillance.”⁶⁶ The Forensic Department of the DNA Diagnostics Center in Fairfield, Ohio, and the Genetica DNA Laboratory in Cincinnati, Ohio, are accredited through FQS-I.⁶⁷

To apply for accreditation, the laboratory must be familiar with the FQS-I *General Requirements for Accreditation*;⁶⁸ *Forensic Requirements for Accreditation (FRA-1)*, which are supplemental requirements to the General Requirements;⁶⁹ and any applicable *Field Specific Requirements*, such as DNA (FRA-2),⁷⁰ for which the laboratory seeks accreditation.⁷¹ The applicant laboratory must submit self-assessment checklist for the *General Requirements for Accreditation* and the *Forensic Requirements for Accreditation*, a copy of the laboratory’s quality manual and relevant associated policies and procedures, and verification that the laboratory has met the pre-assessment proficiency test requirements of FQS-I.⁷²

Similar to ASCDL/LAB-*International* accreditation, laboratories seeking FQS-I accreditation must comport with the requirements contained within ISO/IEC 17025:2005.⁷³ Additionally, an applicant laboratory must comport with FQS-I’s supplemental requirements contained in *Forensic Requirements for Accreditation (FRA-1)*, and any additional Field Specific requirements as required of the particular accreditation program.⁷⁴ However, it appears that the FRA-1 requirements are predominately summaries of requirements contained within ISO/IEC 17025:2005.⁷⁵ Ohio laboratories that received field specific accreditation in DNA testing must comport with the requirements found in FRA-2, which include specialized standards relating to, among others, quality assurance,⁷⁶ evidence and sample control,⁷⁷ analytical procedures,⁷⁸ equipment calibration and maintenance,⁷⁹ proficiency testing,⁸⁰ corrective action,⁸¹ safety,⁸² and requirements on subcontractors to the laboratory.⁸³

⁶⁶ *Id.* at 3.

⁶⁷ FQS-I, Accredited Labs, available at http://www.forquality.org/fqs_I_Labs.htm (last visited Sept. 13, 2007).

⁶⁸ See FQS-I GRA, *supra* note 65, at 5.

⁶⁹ See FQS-I, FORENSIC REQUIREMENTS FOR ACCREDITATION (FRA-1) [hereinafter FQS-I FRA-1], available at http://www.forquality.org/FQS-I%20Acc%20Docs/FRA-1_06-07.pdf (last visited Sept. 13, 2007).

⁷⁰ See FQS-I, FORENSIC REQUIREMENTS FOR THOSE LABORATORIES THAT DO DNA TESTING (FRA-2) [hereinafter FQS-I FRA-2], available at <http://www.forquality.org/FQS-I%20Acc%20Docs/FQS-I-FRA-2.pdf> (last visited Sept. 13, 2007).

⁷¹ FQS-I GRA, *supra* note 65, at 5.

⁷² *Id.* at 6.

⁷³ See *supra* note 56-60 and accompanying text on the requirements of ISO/IEC 17025:2005.

⁷⁴ FQS-I GRA, *supra* note 65, at 5.

⁷⁵ FQS-I FRA-1, *supra* note 69, at 7.

⁷⁶ FQS-I FRA-2, *supra* note 70, at 12.

⁷⁷ *Id.* at 27-28.

⁷⁸ *Id.* at 32-36.

⁷⁹ *Id.* at 37.

⁸⁰ *Id.* at 42-44.

⁸¹ *Id.* at 45.

⁸² *Id.* at 48.

⁸³ *Id.* at 49-50.

FQS-I appoints a qualified technical assessor(s) to evaluate material collected from the applicant laboratory and to perform an on-site inspection.⁸⁴ At the assessment, the laboratory must have sufficient and appropriate test records and samples available for review by the assessment team that have been tested in accordance with the policies and procedures established by the laboratory.⁸⁵

After the assessment, the assessment team will meet with laboratory management and present to laboratory management a “draft written or oral report on the conformance of the applicant laboratory with the accreditation requirements.”⁸⁶ The assessment team and laboratory management will finalize a draft written report to submit to the FQS-I Manager of Accreditations that will identify: (1) “Non-conformances,” i.e. areas where a laboratory does not conform to accreditation standards; (2) “Concerns,” i.e. 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],” i.e. practices of the laboratory that are commendable or that may present opportunities for improvement.⁸⁷ Prior to a decision on accreditation, the laboratory director must provide evidence of successful implementation of measures to resolve non-conformances identified during the on-site assessment and provide a response to all concerns noted in the assessment report.⁸⁸

Upon reviewing the final written assessment and responses to non-conformances and concerns, the Manager of Accreditations decides whether to grant FQS-I accreditation to the laboratory.⁸⁹ If accreditation is granted, the duration period for the accreditation is normally twenty-four months, but may be up to five years.⁹⁰ If accreditation is for twenty-four months, conformance to accreditation standards will be monitored for one year; if a longer period accreditation is granted, FQS-I will require one or more on-site surveillance audits.⁹¹ For laboratories conducting DNA analysis and for which the period of accreditation is greater than twenty-four months, such as those accredited in Ohio, maintenance of accreditation is conditional on on-site surveillance that meets FRA-2 audit requirements.⁹²

B. Medical Examiner Offices

1. County Coroner’s Offices

a. Qualification Requirements for County Coroners

⁸⁴ FQS-I GRA, *supra* note 65, at 6.

⁸⁵ *Id.* at 7.

⁸⁶ *Id.*

⁸⁷ *Id.* at 8.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 9.

⁹¹ *Id.*

⁹² *Id.* at 10; *see also* FQS-I FRA-2, *supra* note 70, at 46-47.

The State of Ohio does not have a chief medical examiner, but instead requires that each of Ohio's eighty-eight counties elect a coroner every four years.⁹³ To be eligible for the office of the county coroner, an individual must be "a physician who has been licensed to practice as a physician [in Ohio] for a period of at least two years immediately preceding election or appointment as a coroner, and who is in good standing in the person's profession, or is a person who was serving as a coroner on Oct 12, 1945."⁹⁴

Additionally, coroners are required to take training courses before commencing the term of office and while serving their term of office.⁹⁵ Each newly elected coroner must attend and successfully complete sixteen hours of continuing education at programs sponsored by the Ohio State Coroner's Association before commencing his/her term of office.⁹⁶ During the four-year term, every coroner must attend and successfully complete thirty-two hours of continuing education programs, twenty-four of which must be completed at state-wide meetings, and eight of which must be completed at regional meetings.⁹⁷

Additionally, each coroner has the power to appoint deputy coroners, pathologists, stenographers, secretaries, clerks, custodians, investigators, or other employees in the private practice of medicine for assistance.⁹⁸

b. Powers and Duties of the Coroner

In each county, the coroner is the official custodian of the morgue.⁹⁹ The coroner must be notified of any case in which a person dies:

- (1) as a result of criminal or violent means;
- (2) by casualty;
- (3) by suicide;
- (4) in a suspicious or unusual manner;
- (5) suddenly when apparently in good health, including a child under the age of two; or
- (6) who is mentally retarded or developmentally disabled, regardless of the circumstances.¹⁰⁰

⁹³ OHIO REV. CODE § 313.01 (West 2007). The Medical Examiner's Office of Summit County, Ohio serves as that county's coroner office. See Centers for Disease Control and Prevention, Death Investigation Summaries, available at <http://www.cdc.gov/epo/dphsi/mecisp/summaries.htm> (last visited Sept. 13, 2007); see also OHIO STATE CORONERS ASSOCIATION, 2005 MEMBERSHIP ROSTER, available at http://www.odh.ohio.gov/ASSETS/43D50651A16F46E5A57A2E4538A450C8/coroner_roster.pdf (last visited Sept. 13, 2007).

⁹⁴ OHIO REV. CODE § 313.02(A) (West 2007). If a vacancy occurs in the coroner's office for any cause during the four-year term, a new coroner is appointed. OHIO REV. CODE § 305.02(B) (West 2007).

⁹⁵ OHIO REV. CODE § 313.02(B)(1), (B)(2) (West 2007). If a coroner is appointed, the coroner must complete sixteen hours of continuing education within ninety days of appointment. *Id.*

⁹⁶ OHIO REV. CODE § 313.02(B)(1) (West 2007).

⁹⁷ OHIO REV. CODE § 313.02(B)(2) (West 2007).

⁹⁸ OHIO REV. CODE § 313.05(B) (West 2007).

⁹⁹ OHIO REV. CODE § 313.08(A) (West 2007).

¹⁰⁰ OHIO REV. CODE § 313.12(A) (West 2007).

The coroner or deputy coroner must perform an autopsy in any case in which a child under the age of two dies suddenly when in apparent good health.¹⁰¹ In all other cases, the coroner, deputy coroner, or pathologist will perform an autopsy if the coroner, deputy coroner, or pathologist believes an autopsy is necessary.¹⁰² In any case, if it is determined that an autopsy is against the deceased's religious beliefs, the coroner will not conduct an autopsy on the deceased.¹⁰³ In performing an autopsy, the coroner works with law enforcement to gather facts concerning the time, place, manner, and circumstances of the death.¹⁰⁴

The coroner also is charged with (1) collecting evidence, including DNA, to uncover the identity of unidentified deceased persons,¹⁰⁵ and (2) keeping records, including completion of death certificates in all cases coming under his/her jurisdiction.¹⁰⁶

When the identity of a deceased person is unknown, the county coroner must do the following prior to disposing of the body: (1) take fingerprints of the deceased person (2) take one or more photographs of the deceased person; (3) in a medically approved manner, collect a DNA specimen from the deceased; and (4) promptly forward all fingerprints, photographs, and DNA specimens to the Ohio Bureau of Criminal Identification and Investigation.¹⁰⁷ However, in all instances in which the coroner has custody over an unidentified deceased person's body after April 5, 2007, all county coroners must "make a reasonable attempt to promptly identify the body or remains of a deceased person"¹⁰⁸ and if the coroner is unable to identify the body within thirty days, he/she must inform the Ohio Bureau of Criminal Identification and Investigation that the body remains are in the county morgue and also must forward a DNA specimen to the BCI.¹⁰⁹ The coroner also must report the record of any death to the prosecuting attorney if, in the judgment of the coroner or prosecuting attorney, further investigation is advisable.¹¹⁰

2. Accreditation of Ohio County Coroner's Offices

The State of Ohio does not require county coroner's offices to receive accreditation, although, as stated above, newly-elected coroners are required to receive sixteen hours of continuing education prior to commencing office and all coroners, once in office, are

¹⁰¹ OHIO REV. CODE § 313.121(B) (West 2007).

¹⁰² OHIO REV. CODE § 313.131(B) (West 2007).

¹⁰³ *Id.*

¹⁰⁴ OHIO REV. CODE § 313.12(A) (West 2007); *see also* OHIO REV. CODE § 313.08(C), (D) (West 2007).

¹⁰⁵ OHIO REV. CODE § 313.08(A)-(D) (West 2007).

¹⁰⁶ OHIO REV. CODE § 313.09 (West 2007).

¹⁰⁷ OHIO REV. CODE § 313.08(E)(1)-(4) (West 2007).

¹⁰⁸ OHIO REV. CODE § 313.08(B) (West 2007) (effective Apr. 5, 2007); H.B. 571, 126th Gen. Assem., Reg. Sess. (Ohio 2006).

¹⁰⁹ OHIO REV. CODE § 313.08(C), (E) (West 2007) (effective Apr. 5, 2007); H.B. 571, 126th Gen. Assem., Reg. Sess. (Ohio 2006).

¹¹⁰ OHIO REV. CODE § 313.09 (West 2007).

required to complete thirty-two hours of continuing education over the course of his/her four-year term of office.¹¹¹

a. National Association of Medical Examiner Accreditation

Four county coroner offices have received voluntary accreditation through the National Association of Medical Examiners (NAME): (1) Montgomery County Coroner Office in Dayton, Ohio; (2) Hamilton County Coroner Office in Cincinnati, Ohio; (3) Summit County Medical Examiner's Office in Akron, Ohio; and (4) Greene County Coroner's Office in Xenia, Ohio.¹¹²

NAME accreditation is an endorsement that "the office...provides an adequate environment for a medical examiner in which to practice his or her profession and provides reasonable assurances that the office...well serves its jurisdiction."¹¹³ NAME is a peer review system and its standards "represent minimum standards for an adequate medicolegal system, not guidelines."¹¹⁴ NAME standards are found in the *Accreditation Checklist*, which requires medical examiner offices, or in the case of Ohio, coroner's offices to answer "yes," "no," or "not applicable" to series of questions divided into "Phase I" and "Phase II" categories.¹¹⁵ Phase I specifies standards that are not absolutely essential requirements; Phase II standards are considered essential--any deficiency in any Phase II category "may seriously impact the work or adversely affect the health and safety of the public or agency staff."¹¹⁶ A medical examiner office cannot have more than fifteen deficiencies in Phase I categories and no Phase II deficiencies.¹¹⁷ Some of the Phase II requirements are as follows:

- (1) Existence of a written and implemented policy or standard operating procedure covering facility security;¹¹⁸
- (2) If the office has a computerized management system, an appropriate system must be in place to prevent intrusion, unauthorized release of information, or alteration of data;¹¹⁹

¹¹¹ OHIO REV. CODE § 313.02(B)(1), (2) (West 2007).

¹¹² National Association of Medical Examiners (NAME), NAME Accredited Offices, *available at* http://thename.org/index.php?option=com_content&task=view&id=67&Itemid=69 (last visited Sept. 13, 2007).

¹¹³ NATIONAL ASSOCIATION OF MEDICAL EXAMINERS (NAME), INSPECTION & ACCREDITATION POLICIES AND PROCEDURES MANUAL 1 [hereinafter NAME MANUAL], *available at* http://thename.org/index.php?option=com_docman&task=doc_download&gid=25&Itemid=26&mode=view (last visited Sept. 13, 2007).

¹¹⁴ *Id.* at 1.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 2.

¹¹⁸ NATIONAL ASSOCIATION OF MEDICAL EXAMINERS (NAME), NAME ACCREDITATION CHECKLIST 5 (2004) [hereinafter NAME ACCREDITATION CHECKLIST], *available at* http://thename.org/index.php?option=com_docman&task=doc_download&gid=27&Itemid=26&mode=view (last visited Sept. 13, 2007).

¹¹⁹ *Id.* at 5.

- (3) Existence of a written and implemented procedure for discipline and removal of staff for cause;¹²⁰
- (4) The chief medical examiner or Coroner's autopsy surgeon must be certified in Forensic Pathology by the American Board of Pathology and must be licensed to practice medicine;¹²¹
- (5) Numerical limitations on the number of autopsies staff are permitted to perform each year;¹²²
- (6) The medical examiner or medical investigator must respond to the scene in cases deemed necessary by the chief medical examiner;¹²³
- (7) Body handling procedures must ensure the integrity of evidence by the use of sealed body bags or other effective means;¹²⁴
- (8) Existence of a written and implemented procedure on evidence and specimen disposition and destruction;¹²⁵
- (9) Proper labeling and packaging of all specimen and autopsy tissue collected;¹²⁶
- (10) Forms for chain of custody and the medical examiner must be able to assure integrity of the chain of custody of evidentiary items;¹²⁷
- (11) Assurance that every death certificate's conclusion reflects the findings and reasoning of the autopsy surgeon;¹²⁸
- (12) All case reports must be retained in the care, custody, and control of the office;¹²⁹ and
- (13) Existence of an implemented procedure on quality assurance.¹³⁰

The office first must perform a self-inspection using the NAME Accreditation Checklist and may request NAME to perform an external audit into the office's death investigation system or a pre-inspection consultation.¹³¹ Once NAME receives the office's application, NAME will appoint an Inspector to conduct an on-site inspection of the medical examiner office.¹³² The on-site inspection will confirm or refute the laboratory's report in the *Self-Inspection Checklist*.¹³³ At the conclusion of the inspection, the Inspector meets with the chief medical examiner and staff members in a "summation conference" at which time the Inspector reports all deficiencies found at the

¹²⁰ *Id.* at 6.

¹²¹ *Id.* at 7.

¹²² *Id.* at 8.

¹²³ *Id.* at 12.

¹²⁴ *Id.* at 13.

¹²⁵ *Id.* at 15.

¹²⁶ *Id.* at 15.

¹²⁷ *Id.* at 17.

¹²⁸ *Id.* at 23.

¹²⁹ *Id.* at 25.

¹³⁰ *Id.* at 27.

¹³¹ NAME MANUAL, *supra* note 113, at 4.

¹³² *Id.* at 5-6.

¹³³ *Id.*

office and reported in the inspection report.¹³⁴ A copy of all deficiencies documented on the inspection report will be left with the office.¹³⁵

The Chair of the NAME Standards, Inspection, and Accreditation Committee will review the inspection report to determine the accreditation status of the medical examiner's office.¹³⁶ Full accreditation is conferred on an office if NAME determines that the office has no more than fifteen Phase I deficiencies and no Phase II deficiencies.¹³⁷ Full accreditation is conferred for a period of five years.¹³⁸ Provisional accreditation may also be conferred for a period of one year.¹³⁹ NAME also has instituted an appeals process for objections to the Inspector's findings.¹⁴⁰

b. American Board of Forensic Toxicology (ABFT) Accreditation

The objective of American Board of Forensic Toxicology is to “establish, enhance, and maintain standards of qualification for those laboratories that practice Postmortem Forensic Toxicology or Human Performance Toxicology, and to accredit as qualified laboratories those applicants who comply with the requirements of the Board.”¹⁴¹ In order to obtain accreditation through ABFT, laboratories must comply with “professional standards, as assessed by peer review, including an on-site inspection, and successful achievement in one or more proficiency testing programs recognized by [ABFT].”¹⁴² According to the ABFT website, the Office of the Cuyahoga County Coroner is accredited by ABFT.¹⁴³

i. Application for Forensic Toxicology Accreditation through ABFT

Applicants for ABFT accreditation must be actively engaged in the practice of Postmortem Toxicology and/or Human Performance Toxicology.¹⁴⁴ To obtain accreditation, the laboratory must submit (1) a completed application form and self-evaluation checklist; (2) relevant proficiency test results for the past twelve months for at least one alcohol and one non-alcohol (i.e. drug) proficiency testing program (and must

¹³⁴ *Id.* at 8.

¹³⁵ *Id.*

¹³⁶ *Id.* at 9.

¹³⁷ *Id.* at 9-10.

¹³⁸ *Id.* at 10.

¹³⁹ *Id.* If a medical examiner office has fewer than twenty-five Phase I deficiencies and fewer than five Phase II deficiencies, provisional accreditation may be conferred for twelve months and extended for up to four years if the Accreditation Committee is satisfied that there have been ongoing efforts to address deficiencies to achieve full accreditation. *Id.*

¹⁴⁰ NAME MANUAL, *supra* note 113, at 11.

¹⁴¹ Am. Bd. of Forensic Toxicology, Welcome, *available at* <http://www.abft.org> (last visited Sept. 13, 2007).

¹⁴² *Id.*

¹⁴³ Am. Bd. of Forensic Toxicology, Laboratories, *available at* <http://www.abft.org/Labs.asp> (last visited Sept. 13, 2007). The Cuyahoga Coroners office appears to act as a coroner office and a crime laboratory.

¹⁴⁴ Am. Bd. of Forensic Toxicology, Laboratory Accreditation, *available at* <http://www.abft.org/LabAccreditation.asp> (last visited Sept. 13, 2007).

include evidence of corrective action where program criteria were not met); and (3) a litigation package for a case involving a positive blood alcohol result and a case involving one positive, quantitative blood drug result.¹⁴⁵ Acceptable performance in these areas will be determined by the Accreditation Committee.¹⁴⁶ Areas of testing within the laboratory other than Postmortem Forensic Toxicology and Human Performance Toxicology are not evaluated by ABFT.¹⁴⁷

Completed applications are reviewed by a five-member Accreditation Committee of ABFT to assess whether the laboratory is ready to submit to an on-site inspection.¹⁴⁸ If there are deficiencies which need to be addressed prior to an on-site inspection, the laboratory will be contacted and must take corrective action within six months, or the laboratory's application for accreditation will be considered withdrawn.¹⁴⁹

ii. On-Site Inspection, Decision of Accreditation, and Duration of Accreditation

An inspection team, comprised of two or three members, will conduct an on-site inspection of the laboratory for, at a minimum, one eight-hour day and up to three days, depending upon caseload and complexity.¹⁵⁰ Self-evaluation and on-site inspection are conducted by use of a check-list of questions designated as either "Essential", "Important", or "Desirable."¹⁵¹ To obtain accreditation, a laboratory must satisfy all Essential questions, satisfy at least 90 percent of the Important questions, and satisfy at least 75 percent of the Desirable questions.¹⁵² Some of the many Essential criteria are as follows:¹⁵³

¹⁴⁵ AM. BD. OF FORENSIC TOXICOLOGY, TOXICOLOGY LABORATORY ACCREDITATION PROGRAM, PROGRAM OUTLINE 2-3 [hereinafter ABFT PROGRAM OUTLINE], available at <http://www.abft.org/documents/ABFT%20Accreditation%20Program%20Outline.pdf> (last visited Sept. 13, 2007).

¹⁴⁶ If the Accreditation Committee determines "acceptable performance," it will be based, in part, on: (1) no false positives; (2) ethanol within +/- S.D. of the participant mean or +/- 10% weighed-in target; for drugs the challenges should be within +/- 2 S.D. of the participant mean or +/- 30% weighed-in target for drugs. *Id.* at 3. Corrective action must be documented for false negatives and other deficiencies, appropriate for the stated mission of the laboratory. *Id.* The Accreditation Committee has the discretion to accept proficiency tests outside these ranges "if the laboratory can demonstrate that appropriate steps have been taken, and that the errors are not systematic and unlikely to reoccur." *Id.*

¹⁴⁷ Am. Bd. of Forensic Toxicology, Laboratory Accreditation, available at <http://www.abft.org/LabAccreditation.asp> (last visited Sept. 13, 2007).

¹⁴⁸ Am. Bd. of Forensic Toxicology, Application for Laboratory Accreditation, available at <http://www.abft.org/ProcedureAccred.asp> (last visited Sept. 13, 2007).

¹⁴⁹ *Id.*

¹⁵⁰ ABFT PROGRAM OUTLINE, *supra* note 145, at 3.

¹⁵¹ *Id.* at 4. The checklist for self-evaluation and on-site inspection are virtually identical.

¹⁵² *Id.*

¹⁵³ ABFT's Accreditation Checklist is contained in both the AM. BD. OF FORENSIC TOXICOLOGY, TOXICOLOGY LABORATORY ACCREDITATION PROGRAM, SELF-EVALUATION CHECKLIST, available at <http://www.abft.org/documents/ABFT%20Self%20Evaluation%20Checklist.doc> (last visited Sept. 13, 2007), and the AM. BD. OF FORENSIC TOXICOLOGY, FORENSIC TOXICOLOGY LABORATORY ACCREDITATION MANUAL, available at <http://www.abft.org/documents/ABFT%20Laboratory%20Manual.pdf> (last visited Sept. 13, 2007). This report will cite the later ABFT FORENSIC TOXICOLOGY LABORATORY ACCREDITATION MANUAL [hereinafter ABFT ACCREDITATION MANUAL].

- (1) Experience and academic qualifications for the laboratory director and adequate training of other personnel;¹⁵⁴
- (2) Existence of a standard operating procedure manual for the laboratory;¹⁵⁵
- (3) Proper labeling procedures of laboratory specimens;¹⁵⁶
- (4) Security of the laboratory during working and non-working hours;¹⁵⁷
- (5) Day-to-day quality assurance and quality control of the laboratory;¹⁵⁸
- (6) Maintenance of records of testing data;¹⁵⁹ and
- (7) Existence of a safety manual.¹⁶⁰

After inspection, a “closing conference” will be conducted, however, Inspectors may not indicate whether the laboratory passed or failed the inspection.¹⁶¹ Inspection reports are then reviewed by the Accreditation Committee and the laboratory will be notified if any corrective action needs to be taken prior to the granting of accreditation.¹⁶²

Once accreditation is granted, ABFT accreditation is for a period of two years if the laboratory satisfactorily completes a self-evaluation and proficiency test summaries within the first twelve months.¹⁶³

¹⁵⁴ ABFT ACCREDITATION MANUAL, *supra* note 153, at 4-5.

¹⁵⁵ *Id.* at 8.

¹⁵⁶ *Id.* at 10.

¹⁵⁷ *Id.* at 13.

¹⁵⁸ *Id.* at 16-19.

¹⁵⁹ *Id.* at 28.

¹⁶⁰ *Id.* at 40.

¹⁶¹ ABFT PROGRAM OUTLINE, *supra* note 145, at 4.

¹⁶² *Id.* at 5.

¹⁶³ *Id.* at 5-6.

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.

Crime Laboratories

The State of Ohio does not require the accreditation of crime laboratories. However, a number of crime laboratories in the State have obtained voluntary accreditation through various national accreditation organizations. The American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) *Legacy* Program has accredited all three of the Ohio Bureau of Criminal Identification and Investigation's (BCI) crime laboratories, as well as the following local and regional crime laboratories: (1) Canton-Stark County Crime Laboratory (Biology only) in Canton, Ohio; (2) Columbus Police Crime Laboratory, Columbus, Ohio; (3) Cuyahoga County Coroner's Office Forensic Laboratories in Cleveland, Ohio; (4) DNA Diagnostics Center in Fairfield, Ohio; (5) Hamilton County Coroner's Crime Laboratory in Cincinnati, Ohio; (6) Lake County Regional Forensic Crime Laboratory in Painesville, Ohio; (7) Mansfield Division of Police Forensic Science Laboratory in Mansfield, Ohio; and (8) Miami Valley Regional Crime Laboratory in Dayton, Ohio.¹⁶⁴ The Columbus Police Crime Laboratory and the DNA Diagnostics Center have also obtained ISO/IEC 17025:2005 accreditation through ASCLD/LAB-*International*; the DNA Diagnostics Center and Genetica DNA Laboratories in Cincinnati, Ohio have obtained ISO/IEC 17025:2005 accreditation through Forensic Quality Services-International (FQS-I).¹⁶⁵

As a prerequisite for accreditation, all programs require laboratories to take measures to ensure the validity, reliability and timely analysis of forensic evidence. For example, the ASCLD/LAB-*Legacy* Program requires the laboratory to have clearly written procedures for handling and preserving the integrity of evidence; preparing, storing, securing and disposing of case records and reports; and for maintaining and calibrating equipment.¹⁶⁶

The requirements contained within ISO/IEC 17025:2005, the ASCLD/LAB-*International Supplemental Requirements*, FQS-I's *Forensic Requirements for Accreditation*, and the American Board of Forensic Toxicologist's Accreditation Program require laboratories to

¹⁶⁴ ASCLD/LAB-*Legacy*, Laboratories, available at <http://www.ascl-d-lab.org/legacy/aslablegacylaboratories.html> (last visited Sept. 13, 2007). Additionally, the U.S. Food and Drug Administration Forensic Chemistry Center in Cincinnati, OH is accredited by ASCLD/LAB-*Legacy*. *Id.*

¹⁶⁵ See ASCLD/LAB-*International*, International Directory of Accredited Laboratories, available at http://www.ascl-d-lab.org/cgi-bin/iso/csvsearch.pl?search=OH&header=state&order_by=lab&order=abc (last visited Sept. 13, 2007); Forensic Quality Services-International, ISO/IEC Accredited Laboratories, available at http://www.forquality.org/fqs_I_Labs.htm (last visited Sept. 13, 2007).

¹⁶⁶ ASCLD/LAB-*LEGACY* 2005 MANUAL, *supra* note 14, at 13-60 (on file with author).

establish similar procedures for identifying, collecting, indexing, accessing, filing, storing, maintaining, and disposing of quality and technical reports.¹⁶⁷ All programs require these procedures to be included in the laboratory's quality manual or otherwise documented and readily available for review by laboratory personnel,¹⁶⁸ although none of these accreditation programs require laboratories to publish their procedures.

All accreditation programs also require laboratory personnel to possess certain qualifications. The *ASCLD/LAB Laboratory Accreditation Board 2005 Manual*, for example, requires each examiner to have a specialized baccalaureate degree relevant to his/her crime laboratory specialty, experience/training commensurate with the examinations and testimony required, and an understanding of the necessary instruments, methods, and procedures.¹⁶⁹ The examiners also must successfully complete a competency test prior to assuming casework responsibility and successfully complete annual proficiency tests.¹⁷⁰ ISO/IEC 17025:2005 and the American Board of Forensic Toxicologists maintain similar requirements for accreditation.¹⁷¹

It is commendable that the BCI and nine local, regional, and private crime laboratories are accredited by various national crime laboratory accreditation organizations. However, at least three crime laboratories in the State of Ohio remain unaccredited. Notably, the crime laboratory at the Cleveland Police Department, the county which has the greatest number of capital case prosecutions, is unaccredited. The Ohio State Highway Patrol Crime Laboratory, as well as the State Fire Marshall Forensic Laboratory, also operate without any nationally-recognized accreditation.

Despite the fact that many state crime laboratories are accredited, the Columbus Police Department's Crime Laboratory is the only state-operated laboratory primarily handling criminal cases whose accreditation requires mandatory compliance with 100 percent of the requirements for quality management systems and technical operations of

¹⁶⁷ GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 44, at 10-23 (on file with author); SUPPLEMENTAL REQUIREMENTS, *supra* note 51, at 8-23 (on file with author); ABFT ACCREDITATION MANUAL, *supra* note 153, at 2-39.

¹⁶⁸ ASCLD/LAB-LEGACY 2005 MANUAL, *supra* note 14, at 14; GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 44, at 12; SUPPLEMENTAL REQUIREMENTS, *supra* note 51, at 15. The ISO/IEC 17025:2005 program specifically requires the laboratory quality manual to "include or make reference to the supporting procedures including technical procedures." GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 44, at 3. Similarly, the ASCLD/LAB-Legacy program requires the quality manual to contain or reference the documents or policies/procedures pertaining, but not limited to: (1) control and maintenance of documentation of case records and procedure manuals; (2) validation of test procedures used; (3) handling evidence; (4) use of standards and controls in the laboratory; (5) calibration and maintenance of equipment; (6) practices for ensuring continued competence of examiners; and (7) taking corrective action whenever analytical discrepancies are detected. ASCLD/LAB-LEGACY 2005 MANUAL, *supra* note 14, at 24-25.

¹⁶⁹ ASCLD/LAB-LEGACY 2005 MANUAL, *supra* note 14, at 37-46.

¹⁷⁰ *Id.*; GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 44, at 11; SUPPLEMENTAL REQUIREMENTS, *supra* note 51, at 6-7; ABFT ACCREDITATION MANUAL, *supra* note 153, at 2-6.

¹⁷¹ See GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 44, at 11 (describing training program required for laboratory personnel and relevant knowledge, education, and experience required of personnel); ABFT ACCREDITATION MANUAL, *supra* note 153, at 4-5 (describing credentials required of the laboratory director as well as "appropriate" training requirements of forensic toxicologists).

laboratories.¹⁷² For the majority of accredited crime laboratories in Ohio, accreditation by ASCLD/LAB-*Legacy* alone cannot ensure the validity, reliability, and timely analysis of forensic evidence. Only 59 percent of the ASCLD/LAB-*Legacy* Manual requirements are considered mandatory for accreditation.¹⁷³ Furthermore, membership of the ASCLD/LAB-*Legacy* delegate assembly consists solely of laboratory directors from ASCLD/LAB accredited laboratories, effectively making any inspection of an Ohio laboratory a peer review by other accredited laboratory directors,¹⁷⁴ which, in turn, can affect the impartiality of the accreditation process.

It is clear that crime laboratories can and do make critical errors. Congress enacted the Paul Coverdell Forensic Sciences Improvement Grant Program (Coverdell Grant Program) to “improve quality, timeliness, and credibility of forensic sciences services for criminal justice purposes.”¹⁷⁵ Under the authority of the Coverdell Grant Program, the Department of Justice provides funds to state and local governments to assist crime laboratories and medical examiner offices with improving the following areas: Education and Training, Accreditation/Certification, Equipment/Supplies, Facilities/Renovation, and Staffing.¹⁷⁶ In order to qualify for Coverdell funds, state or local governments had to show they had “developed a program for improving the quality and timeliness of forensic science or medical examiner services.”¹⁷⁷ In addition, applicants had to use “generally accepted laboratory practices and procedures as established by accrediting organizations or appropriate certifying bodies.”¹⁷⁸ To further ensure the reliability and credibility of forensic tests conducted by Coverdell grant recipients,¹⁷⁹ Congress added a further eligibility requirement in 2004 when it passed the Justice for All Act, amending the Coverdell Grant Program and requiring grant applicants to certify that:

¹⁷² See generally GENERAL REQUIREMENTS FOR THE COMPETENCE, *supra* note 44.

¹⁷³ ASCLD/LAB-*LEGACY* 2005 MANUAL, *supra* note 14, at 84, app. 3.

¹⁷⁴ Arvizu, *supra* note 1, at 18, 20-21.

¹⁷⁵ Paul Coverdell National Forensic Sciences Improvement Act of 2000, Pub. L. No. 106-561, codified at 42 U.S.C. 3797(j), *et seq.*

¹⁷⁶ National Institute of Justice, Coverdell National Forensic Sciences Improvement Grant Program, available at <http://www.ojp.usdoj.gov/nij/topics/forensics/nfsia/> (last visited Sept. 13, 2007).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Indeed, the legislative history of the Justice for All Act reveals testimony before Congress in which Peter Neufeld of The Innocence Project argued for independent external investigation mechanisms and observed:

One way vigilance can be achieved is by utilizing some of the same quality assurance measures we employ in other institutions where health, safety, and security are at stake. When the Challenger crashed and NASA initially suggested an internal audit, Congress would not allow it. When the Enron scandal broke, the nation would not accept yet another audit from Arthur Anderson. In fact, whenever there is evidence of serious misconduct affecting the public, an independent external audit is obligatory. One of the few notable exceptions to this fundamental principle, I am afraid, has been the state and local criminal justice system.

Advancing Justice Through Forensic DNA Technology, Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary, House of Representatives, Serial No. 46, 108th Cong. 36 (2003) (statement of Peter Neufeld, Co-Founder and Director of The Innocence Project).

[A] government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.¹⁸⁰

As entities within the State of Ohio have received Coverdell funding in recent years,¹⁸¹ the State should have in a place an external auditing process that, if needed, investigates the State of Ohio's crime laboratories.

One noteworthy incidence of improper conduct at the Cleveland Police forensic laboratory—a laboratory not accredited by any nationally recognized accreditation organization—underscores the need for accreditation and procedural transparency by crime laboratories in the State. Joseph Serowik, a forensic analyst at the Cleveland Police Department, was fired from the police department after it was revealed that he testified falsely about hair analysis that he performed in a criminal case that led to a rape conviction and thirteen-year sentence of an innocent defendant.¹⁸² In addition to false testimony provided by Serowik, he “was allowed to conduct hair examinations without proper education, training, supervision, or protocols,” and Serowik's supervisor had no expertise in hair analysis or serology.¹⁸³

Serowik's flawed techniques raised questions over the validity of his testimony in over 100 cases in which he testified since he began work at the Cleveland Police Department in 1987.¹⁸⁴ As a condition of the lawsuit settlement brought by Michael Green, who was

¹⁸⁰ Justice for All Act of 2004, Pub. L. No. 108-405. A 2005 review conducted by the Department of Justice Office of the Inspector General (OIG) concluded that the National Institute of Justice (NIJ), the DOJ agency tasked with administering the grant program, did not enforce the independent external investigation requirement. UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, REVIEW OF THE OFFICE OF JUSTICE PROGRAMS' FORENSIC SCIENCE IMPROVEMENT GRANT PROGRAM, at i, 21 (Dec. 2005), available at <http://www.usdoj.gov/oig/reports/OJP/e0602/final.pdf> (last visited Sept. 13, 2007). So long as grant applicants signed the certification that there was a government entity or process in place to conduct independent external investigations into allegations of misconduct, the NIJ disbursed the funds. *Id.* The OIG criticized the NIJ for failing to instruct the grant applicants on what kinds of agencies or processes would suffice under the requirement. *Id.* at 9, 21.

¹⁸¹ See, e.g., U.S. Dep't. of Justice, Office of Justice Programs, NIJ Awards in 2006–Ohio, available at http://www.ojp.usdoj.gov/nij/awards/2006_solicitation.htm (last visited Sept. 13, 2007); U.S. Dep't. of Justice, Office of Justice Programs, NIJ Awards in 2005–Ohio, available at http://www.ojp.usdoj.gov/nij/awards/2005_solicitation.htm (last visited Sept. 13, 2007). These entities include the Ohio Office of the Attorney General, the City of Columbus, Cuyahoga County Coroners' Office, University of Cincinnati, Ohio Office of Criminal Justice Services, Ohio Department of Rehabilitation and Correction, Ohio Attorney General Bureau of Criminal Identification and Investigation, Ohio State University, and Cleveland Police. *Id.*

¹⁸² Mark Gillispie, *Experts Fault Job Done by Police Lab Tech, Boss*, PLAIN DEALER (Cleveland, Ohio), June 16, 2004, at A1.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

wrongfully convicted due to Serowik's testimony, the City of Cleveland agreed to review the work performed by Serowik and his colleagues from 1987 through 2004.¹⁸⁵ As of February 2007, the audit of the Cleveland Police Department's practices has resulted in a request for two new murder trials for defendants whose convictions were based on faulty testimony. Furthermore, the police laboratory now sends items for DNA testing to the BCI, rather than conducting such testing in-house.¹⁸⁶ The full report of the audit, which began in 2004, has not yet been released.¹⁸⁷

Coroner Offices

Like crime laboratories, the State of Ohio does not require county coroner offices to be accredited. Only three of Ohio's eighty-eight county coroner offices have voluntarily obtained accreditation through the National Association of Medical Examiners (NAME), and only the Cuyahoga County Coroner Office has obtained accreditation through the American Board of Forensic Toxicologists (ABFT).¹⁸⁸ As a prerequisite for accreditation, NAME and ABFT each require medical examiner offices to adopt and implement standardized procedures to ensure the validity, reliability, and timely analysis of forensic evidence.¹⁸⁹

Additionally, the Ohio Revised Code Annotated sets forth qualification and training standards for newly-elected county coroners, as well as for all coroners serving their four-year term.

To be eligible for the office of the county coroner, an individual must be "a physician who has been licensed to practice as a physician in [Ohio] for a period of at least two years immediately preceding election or appointment as a coroner, and who is in good standing in the person's profession, or is a person who was serving as a coroner on Oct. 12, 1945."¹⁹⁰ County coroners also may appoint licensed physicians as deputy coroners, who must be in good standing in their profession, one of whom may be designated "chief deputy coroner."¹⁹¹ The Code also permits the county coroner to appoint pathologists as deputy coroners, who are permitted to perform autopsies, make pathological and chemical examinations, and "perform other duties as directed by the coroner or recommended by the prosecuting attorney."¹⁹² The county coroner also may contract for

¹⁸⁵ *Id.*

¹⁸⁶ Joe Milicia, *Lab Audit: Cleveland Juries Not Misled*, WASH. POST, Feb. 17, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/17/AR2007021700900.html> (last visited Sept. 13, 2007).

¹⁸⁷ *Id.*

¹⁸⁸ Am. Bd. of Forensic Toxicology, Laboratories, available at <http://www.abft.org/Labs.asp> (last visited Sept. 13, 2007). However, the Office of the Cuyahoga County Coroner does not indicate that it has obtained ABFT accreditation.

¹⁸⁹ NAME ACCREDITATION CHECKLIST, *supra* note 118, at 5-27; ABFT ACCREDITATION MANUAL, *supra* note 153.

¹⁹⁰ OHIO REV. CODE § 313.02(A) (West 2007).

¹⁹¹ OHIO REV. CODE § 313.05(A)(1) (West 2007).

¹⁹² *Id.*

the services of a deputy coroner to aid the coroner in performance of his/her statutory duties and powers.¹⁹³

The Ohio Revised Code Annotated requires that each newly elected coroner attend and successfully complete sixteen hours of continuing education before commencing his/her term of office.¹⁹⁴ During every county coroner's four-year term of office, he/she must attend and successfully complete thirty-two hours of continuing education programs, twenty-four of which must be completed at state-wide meetings, and eight of which must be completed at regional meetings.¹⁹⁵ The State of Ohio has tasked the Ohio State Coroners Association with overseeing the thirty-two hours of continuing education required of all elected coroners in the State of Ohio.¹⁹⁶

The Ohio Revised Code Annotated provides that the Public Health Council of the Ohio Department of Health must adopt rules to establish a protocol governing the performance of autopsies on a child who died under two years of age when in apparent good health;¹⁹⁷ however, the Code does not establish standards for the performance of autopsies or death investigations in other cases. While the Code requires that fingerprints, photographs, and DNA specimens be taken of an unidentified person in the custody of the County Coroner,¹⁹⁸ the State of Ohio does not mandate the protocol or procedure to be followed when conducting these procedures.

Conclusion

Although the State of Ohio does not require crime laboratories and county coroner offices to obtain accreditation, all of the Ohio Bureau of Criminal Identification and Investigation's crime laboratories, several local and regional crime laboratories, and three coroner offices in the State have voluntarily obtained accreditation. The State also requires all county coroners to be licensed physicians and has instituted a continuing education requirement of county coroners. Accordingly, the State of Ohio is in partial compliance with Recommendation #1.

B. Recommendation #2

Crime laboratories and medical examiner offices should be adequately funded.

Proper funding is needed to ensure that crime laboratories and coroner offices maintain the state-of-art 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.

¹⁹³ OHIO REV. CODE § 313.05(A)(1) (West 2007).

¹⁹⁴ OHIO REV. CODE § 313.02(B)(1) (West 2007).

¹⁹⁵ OHIO REV. CODE § 313.02(B)(2) (West 2007).

¹⁹⁶ *Id.*

¹⁹⁷ OHIO REV. CODE § 313.121 (West 2007); *see also* OHIO ADMIN. CODE § 3701-5-14 (2007) ("Coroner's protocol").

¹⁹⁸ OHIO REV. CODE § 313.08 (West 2007).

Crime Laboratory

The State of Ohio's annual Operating Budget designates the annual funds to be provided to the Office of the Attorney General, and the Attorney General's Office then provides funding to BCI,¹⁹⁹ which handle evidence testing for law enforcement agencies not served by metropolitan or regional crime laboratories.²⁰⁰ Additionally, a portion of the funds received by the State from the nationwide Tobacco Master Settlement Agreement²⁰¹ are designated annually to Ohio's Law Enforcement Improvements Trust Fund to "maintain, upgrade, and modernize law enforcement training, technology, and laboratory facilities of the Attorney General."²⁰² In fiscal year 2006-2007, the Ohio General Assembly appropriated \$169,999,139 to the Attorney General's Office²⁰³ and the Governor's Office recommended that over \$47 million of this funding be directed to law enforcement in the State.²⁰⁴ In fiscal years 2005 and 2006, the Law Enforcement Improvements Trust Fund provided over \$11 million to Office of the Attorney General.²⁰⁵ In previous fiscal years, from 2003 to 2004, the Law Enforcement Improvements Trust Fund provided over \$9 million to the Attorney General's Office, part of which was used for "laboratory and technical enhancements at [the BCI]," including "system upgrades of the Automated Fingerprint Identification System, illicit drug identification services, DNA analysis chemicals and services, and continued training enhancement."²⁰⁶ However, we were unable to determine the exact amount of funding provided to BCI in general by the Attorney General's Office, nor were we able to determine the exact amount of funding provided to the Crime Laboratory Services of BCI.

Even with the funding provided to BCI crime laboratories, increased caseloads have resulted in backlogs in Ohio's crime laboratories and have affected the work performed at crime laboratories. The Ohio Attorney General's Office reported in 2002 that there was a backlog of 3,068 cases in the State's crime laboratories for which DNA testing needed to be performed.²⁰⁷ Additionally, in 2000, it was reported that BCI's crime laboratories had

¹⁹⁹ See, e.g., OHIO OFFICE OF BUDGET AND MANAGEMENT, STATE OF OHIO EXECUTIVE BUDGET FOR FISCAL YEARS 2006 AND 2007, at 270-271 (as proposed) [hereinafter EXECUTIVE BUDGET FY 2006 AND 2007], available at <http://www.lbo.state.oh.us/fiscal/budget/BudgetInDetail/BID126/BudgetInDetail-HB66-EN.pdf> (last visited Sept. 13, 2007); see also H.B. 66, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (enacted).

²⁰⁰ STATE OF OHIO ATTORNEY GENERAL, OHIO BUREAU OF CRIMINAL IDENTIFICATION AND INVESTIGATION 2003-2004 REPORT 5, [hereinafter BCI 2003-2004 REPORT], available at http://www.ag.state.oh.us/le/investigation/pubs/bci_annual_report_03-04.pdf (last visited Sept. 13, 2007).

²⁰¹ The Tobacco Master Settlement Agreement was signed by forty-six states, five U.S. territories, and the District of Columbia with the nation's largest tobacco manufacturers in 1998. OHIO OFFICE OF BUDGET AND MANAGEMENT, STATE OF OHIO EXECUTIVE BUDGET FOR FISCAL YEARS 2005 AND 2006, OHIO'S TOBACCO FUNDS 1 [hereinafter OHIO'S TOBACCO FUNDS FY 2005-2006], available at http://obm.ohio.gov/budget/tobacco/0506_tobacco_budget.pdf (last visited Sept. 13, 2007).

²⁰² *Id.* at 1-2, 14.

²⁰³ H.B. 66, 126th Gen. Assem., Reg. Sess. (Ohio 2005) (enacted).

²⁰⁴ EXECUTIVE BUDGET FY 2006 AND 2007, *supra* note 199, at Attorney General 2-3.

²⁰⁵ OHIO'S TOBACCO FUNDS FY 2005-2006, *supra* note 201, at 14.

²⁰⁶ *Id.*

²⁰⁷ Wes Hills, *Lag in Funds Stalls Rape Inquiries, Angers Victims*, DAYTON DAILY NEWS, Mar. 10, 2002, at 1A.

decreased the number of instances in which it conducted trace evidence analysis. For example, Dale Laux, a twenty-year veteran at one of BCI's crime laboratories testified at a rape trial in 2000 that he opted not to perform trace analysis on hair samples found at the scene of the crime, stating that the laboratory had scaled back due to the volume of work it received and that the laboratory could not be as thorough as it once was.²⁰⁸

Since this development, the State of Ohio has attempted to rectify the situation in several ways. For example, a number of Ohio local and state law enforcement entities have received federal funding to improve the efficiency of crime laboratory work and eliminate the backlog of cases lingering in crime laboratories in the State. The Department of Justice's "Capacity Enhancement Program," which provides grants to state crime laboratories that conduct DNA analysis to improve laboratory infrastructure and analysis capacity so that DNA samples can be processed efficiently and cost-effectively,²⁰⁹ has awarded over \$4 million to various Ohio crime laboratory and law enforcement entities from 2004 through 2006.²¹⁰ Additionally, the Department of Justice's "Forensic Casework Backlog Reduction Program," which awards federal money to analyze backlogged forensic DNA casework samples from forcible rape and murder cases,²¹¹ awarded over \$3.9 million to Ohio crime laboratories and law enforcement entities from 2004 to 2006.²¹²

Crime laboratories and law enforcement entities in the State of Ohio also have received federal Paul Coverdell Forensic Science Improvement grants to improve the quality, timeliness, and credibility of forensic science services performed in the State, totaling over \$1.5 million between fiscal years 2004 and 2006.²¹³

The Ohio Attorney General's 2003-2004 annual report stated that the Ohio Attorney General increased the number of DNA analysts on staff at the BCI's crime laboratories

²⁰⁸ James Ewinger, *Lab Practices Questioned: Analyst Testifies Some Evidence May Be Withheld*, PLAIN DEALER (Cleveland, Ohio), August 18, 2000, 1B.

²⁰⁹ See President's DNA Initiative, Capacity Enhancement Funding Chart, available at <http://www.dna.gov/funding/labcapacity/capfunding/> (last visited Sept. 13, 2007).

²¹⁰ *Id.* Between 2004 and 2006, the following grants have been awarded to Ohio crime laboratories and law enforcement entities by the Capacity Enhancement Program: (1) \$322,555 to the City of Columbus; (2) \$256,623 to the City of Mansfield; (3) \$448,380 to the Cuyahoga County Coroner Office; (4) \$221,994 to Hamilton County; (5) \$97,610 to the Lake County Crime Laboratory; (6) \$1,287,466 to Montgomery County; and (7) \$1,472,259 to the Ohio Attorney General/Bureau of Criminal Identification and Investigation. *Id.*

²¹¹ See President's DNA Initiative, Forensic Casework DNA Backlog Reduction: Funding Chart, available at <http://www.dna.gov/funding/casework/fcfunding/> (last visited Sept. 13, 2007).

²¹² *Id.* Between 2004 and 2006, the following grants have been awarded to Ohio crime laboratories and law enforcement entities by the Forensic Casework Backlog Reduction Program: (1) \$262,427 to the Cuyahoga County Coroner Office; (2) \$200,979 to the Mansfield Police Department; (3) \$846,821 to Montgomery County (Miami Valley Regional Crime Laboratory); and (4) \$2,619,947 to the Ohio Attorney General/Bureau of Criminal Identification and Investigation. *Id.*

²¹³ See U.S. Dep't. of Justice, Office of Justice Programs FY 2004, Ohio, available at <http://www.ojp.usdoj.gov/fy2004grants/map/oh.htm> (last visited Sept. 13, 2007); Nat'l Inst. of Justice, NIJ Awards in FY 2005, available at http://www.ojp.usdoj.gov/nij/awards/2005_solicitation.htm (last visited Sept. 13, 2006); Nat'l Inst. of Justice, NIJ Awards in FY 2006, available at http://www.ojp.usdoj.gov/nij/awards/2006_solicitation.htm (last visited Sept. 13, 2007).

and added an additional 1.3 million in funding in 2003, which dramatically decreased the amount of time between evidence receipt and laboratory analysis from 2002 to 2004.²¹⁴ The annual report also stated that in April 2005, the Ohio Attorney General announced that fifty law enforcement agencies would receive a portion of \$2 million in federal grant money to upgrade their electronic fingerprinting systems.²¹⁵

The Ohio Attorney General's most recent report on the Bureau of Criminal Identification and Investigation indicates that the BCI's crime laboratories have reported increased use of the Bureau's Chemistry, Trace Evidence, and DNA/serology Units from 2003 to 2004.²¹⁶ Total reports from BCI's Chemistry Unit, which examines physical evidence and narcotics, increased 23.5 percent from 2003 to 2004; however, the number of overtime hours for the unit decreased in 2004 due to the addition of one forensic scientist and the completed training of two others.²¹⁷ All pieces of evidence submitted to the Chemistry Unit were analyzed within thirty days after submission in 2004.²¹⁸

Approved reports from BCI's Trace Evidence Unit, which examines materials transferred from one source at a crime scene to another--such as hair and clothing fibers--increased from 836 in 2003 to 921 in 2004.²¹⁹ However, the delay between evidence submission and testing decreased from 92 days in 2003 to 72 days in 2004.²²⁰ The Unit's gun shot residue report statistics, kept for the first time in 2004, reported a delay between evidence submission and analysis of 44 days.²²¹ The Unit's Latent Print section, with approved reports totaling 5,059 in 2004, reported a delay between evidence submission and analysis of 41 days.²²²

Finally, the DNA/Serology Unit of BCI increased the number of reports from 2,352 in 2003 to 3,550 in 2004 – an increase of 51 percent.²²³ However, due to an increase in funding and personnel in 2003, the average time from evidence receipt to final report improved from 151 days in 2002 to 65 days in 2003, and to 40 days in 2004.²²⁴

Coroner Offices

Each individual county in Ohio determines the compensation of county coroners and funding for the coroner's laboratory equipment and personnel. Pursuant to the Ohio Revised Code Annotated, in counties where no coroner's laboratory has been established or where the coroner's laboratory does not have the equipment or personnel to perform autopsies pursuant to state law, the coroner may request that a coroner of a county in

²¹⁴ BCI 2003-2004 REPORT, *supra* note 200, at 30.

²¹⁵ *Id.* at 16.

²¹⁶ *Id.* at 24-30.

²¹⁷ *Id.* at 24. Reports increased from 11,546 in 2003 to 14,336 in 2004. *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.* at 26.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 30.

²²⁴ *Id.*

which such a laboratory is established perform necessary laboratory examinations.²²⁵ A coroner office performing such an examination may not charge more than the actual cost of such examinations and fees derived from this service must be kept in a special fund and used to purchase necessary supplies and equipment for the laboratory.²²⁶

We were able to determine the funding levels for some larger counties' coroner offices in the State of Ohio. Cuyahoga County, encompassing Cleveland, Ohio, will provide its Coroner Office with \$8,382,267 in 2007. However, as permitted under Ohio law, the Coroner Office will receive supplemental income by performing autopsies and other laboratory testing for other counties, as well as paternity testing on a contractual basis in 2007.²²⁷ In 2006, the Cuyahoga County Coroner Office received \$551,211 for performing laboratory services for other counties.²²⁸ The Cuyahoga County Coroner Office also has received \$710,807 in federal funding between 2004 and 2006 from both the Department of Justice's Capacity Enhancement Program and the Forensic Casework DNA Backlog Reduction Program.²²⁹

Hamilton County, encompassing Cincinnati, Ohio, budgeted \$3,816,812 for its Coroner Office in 2006; the Coroner's Office also stated that it would receive an additional \$260,000 in out-of-county fees for laboratory services performed for other counties.²³⁰ The Hamilton County Coroner Office also reported in 2005 that 97 percent of autopsy reports were completed within six weeks after the reported death in that year.²³¹ Franklin County, which encompasses Columbus, Ohio, provided \$3,238,534 to its Coroner's Office in 2007.²³²

Conclusion

While federal, state and local funding of crime laboratories and coroner offices has increased over the years to alleviate backlogs, update equipment, and retain qualified personnel, we were unable to obtain sufficient information to appropriately assess the amount and/or adequacy of funding to crime laboratories and coroner offices in Ohio, and therefore we cannot determine whether the State of Ohio is in compliance with Recommendation #2.

²²⁵ OHIO REV. CODE § 313.16 (West 2007).

²²⁶ *Id.*

²²⁷ Telephone interview by Sarah Turberville with Frances C. McEntee, Senior Budget Analyst, Cuyahoga County Office of Budget and Management, Cleveland, Ohio (Mar. 27, 2007).

²²⁸ *Id.*

²²⁹ See President's DNA Initiative, Capacity Enhancement Funding Chart, Ohio, available at <http://www.dna.gov/funding/labcapacity/capfunding/> (last visited Sept. 13, 2007); President's DNA Initiative, Forensic Casework DNA Backlog Reduction: Funding Chart, Ohio, available at <http://www.dna.gov/funding/casework/fcfunding/> (last visited Sept. 13, 2007).

²³⁰ HAMILTON COUNTY, OHIO, 2006 HAMILTON COUNTY BUDGET 113, 348 [hereinafter 2006 HAMILTON COUNTY BUDGET], available at <http://www.hamiltoncountyohio.gov/administrator/bsi/budget.asp> (last visited Sept. 13, 2007).

²³¹ *Id.* at 359-360.

²³² Franklin County Office of Management and Budget, Coroner, Agency Overview, 2007 Final Budget, available at http://www.franklincountyohio.gov/commissioners/budget/apps/07-budget/agencyOverview_final.cfm?49 (last visited Sept. 13, 2007).

CHAPTER FIVE

PROSECUTORIAL PROFESSIONALISM

INTRODUCTION TO THE ISSUE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversary system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused as well as 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. He/she 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, one cannot ignore the existence of prosecutorial misconduct and the impact it has on innocent lives and society at large. Between 1970 and 2004, individual judges and appellate court panels across the nation 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 and/or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.² The causes of prosecutorial misconduct range from an individual's desire to obtain a conviction at any cost to lack of proper training, inadequate supervision, insufficient resources, and excessive workloads.

In order to curtail prosecutorial misconduct and to reduce the number of wrongly convicted individuals, federal, state, and local governments must provide adequate funding to prosecutors' offices, adopt standards to ensure manageable workloads for prosecutors, and require that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the

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/> (last visited Sept. 13, 2007).

² *Id.*; see also Innocence Project, *Police and Prosecutorial Misconduct*, at <http://www.innocenceproject.org/understand/Government-Misconduct.php> (last visited Sept. 13, 2007).

police or prosecution. Perhaps most importantly, there must be meaningful sanctions, both criminal and civil, against prosecutors who engage in misconduct.

I. FACTUAL DISCUSSION

A. *Prosecution Offices*

1. County Prosecuting Attorneys

The State of Ohio is divided into eighty-eight counties,³ each of which elects a prosecuting attorney every four years.⁴ The prosecuting attorney may engage in the private practice of law while in his/her term of office, as long as he/she provides notification to the Board of County Commissioners of his/her intent to engage in private practice while in office.⁵

a. Responsibilities of Prosecuting Attorney

The prosecuting attorney “may inquire into the commission of crimes within the county” and must “prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party.”⁶ In addition to prosecuting cases, the prosecuting attorney must:

- (1) Serve as the legal adviser of the Board of County Commissioners, Board of Elections, and all other county and/or township officers and boards;⁷
- (2) In conjunction with the Attorney General, prosecute cases in the Ohio Supreme Court;⁸
- (3) In every case of a conviction, execute the fines and costs, or costs only, issued in conjunction with that conviction and pay to the county treasurer all moneys belonging to the State or county which come into the prosecuting attorney’s possession;⁹
- (4) Make a certified statement to the Board of County Commissioners specifying, among other things, the number of criminal prosecutions pursued to final conviction and sentence, during the preceding year, including the name of parties to the action, the amount of fines assessed in each case, the number of recognizances forfeited, the amount of money collected in each case, and in all cases in which an indictment for aggravated murder was presented:
 - (a) The number of fires occurring for which it was determined that there was evidence sufficient to charge a person with aggravated arson or arson;

³ See Ohio Dep’t. of Transportation, 2007-2009 Ohio Official Transportation Map, *available at* <http://www.dot.state.oh.us/map1/ohiomap/default.asp> (last visited on May 25, 2007).

⁴ OHIO REV. CODE § 309.01 (West 2007).

⁵ OHIO REV. CODE § 325.11(B) (West 2007).

⁶ OHIO REV. CODE § 309.08 (West 2007).

⁷ OHIO REV. CODE § 309.09(A), (B) (West 2007). Note that if a township has adopted a limited home rule government, it may choose not to contract with the prosecuting attorney to serve as the township law director. OHIO REV. CODE § 309.09 cmt. (West 2007)

⁸ OHIO REV. CODE § 309.08(A) (West 2007).

⁹ OHIO REV. CODE § 309.08(A) (West 2007).

- (b) The number of cases under section 2929.02 and 2929.03 of the Ohio Rev. Code, relative to murder and aggravated murder, presented by the prosecuting attorney to grand jury for indictment;
 - (c) The number of murder and aggravated murder indictments returned by the grand jury;
 - (d) The number of murder and aggravated murder cases prosecuted by indictment or bill of information by the prosecuting attorney;
 - (e) The number of murder and aggravated murder cases resulting in final conviction and sentence and the number of cases resulting in acquittals; and
 - (f) The number of murder and aggravated murder cases dismissed or terminated without final adjudication as to guilt or innocence;¹⁰ and
- (5) When required by the Attorney General, transmit a report to the Attorney General of all crimes prosecuted by indictment or information in his/her county for the year.¹¹

Ohio law also permits a prosecuting attorney to:

- (1) Participate as a member of the investigatory staff of an organized crime task force in an investigation of organized criminal activity pursuant to section 177.01 to 177.03 of the Ohio Rev. Code;¹²
- (2) Pay a reward to a person who has volunteered any tip or information to a law in enforcement agency in the county concerning a drug-related offense;¹³
- (3) Appoint secret service officers to assist the prosecutor in the collection and discovery of evidence to be used in criminal trials and “matters of a criminal nature;”¹⁴
- (4) In the prosecuting attorney’s discretion and with approval of the County Board of Commissioners, contract to serve as the legal adviser of
 - (a) A joint fire district;¹⁵
 - (b) A joint ambulance district;¹⁶
 - (c) A joint emergency medical services district;¹⁷ and/or
 - (d) A fire and ambulance district;¹⁸

¹⁰ OHIO REV. CODE § 309.16(2)(a)-(f) (West 2007).

¹¹ OHIO REV. CODE § 309.15 (West 2007). The prosecuting attorney’s annual report to the Ohio Attorney General must include, for all felonies prosecuted in the county, the (1) number convicted; (2) the number acquitted; (3) the amount of costs incurred; and (4) the amount of costs collected; additionally, for all misdemeanors prosecuted in the county, the annual report must include (5) the amount of fines imposed and (6) the amount of fines collected. *Id.*

¹² OHIO REV. CODE § 309.08(A) (West 2007).

¹³ OHIO REV. CODE § 309.08(B) (West 2007).

¹⁴ OHIO REV. CODE § 309.07 (West 2007).

¹⁵ OHIO REV. CODE § 309.09(E) (West 2007).

¹⁶ OHIO REV. CODE § 309.09(F) (West 2007).

¹⁷ OHIO REV. CODE § 309.09(G) (West 2007).

¹⁸ OHIO REV. CODE § 309.09(H) (West 2007).

- (5) Serve as counsel for the County School Board, County Hospital Board of Trustees, and/or the County Library Board of Trustees;¹⁹ and
- (6) Protect public funds whenever public moneys have been illegally used or misapplied and file a civil action to recover such moneys and/or pursue damages in a court of competent jurisdiction on behalf of the State.²⁰

The prosecuting attorney also may appoint any assistants, clerks, or stenographers “who are necessary for the proper performance of the duties” of the prosecutor’s office and “may appoint, as an assistant prosecuting attorney, clerk stenographer, or other employee, a person who is an associate or partner of, or who is employed by, the prosecuting attorney or an assistant prosecuting attorney in the private practice of law in a partnership, professional association, or other law business arrangement.”²¹

b. Funding for County Prosecuting Attorneys’ Offices

Individual counties provide funding for the county’s prosecuting attorney.²² The salary of the prosecuting attorney is determined by the population of the county in which the prosecuting attorney serves.²³ In 2001, for example, the prosecutor for a county with a population between one and 20,000 residents would earn an annual salary of \$78,952 and the prosecutor for a county with over one million residents would earn an annual salary of \$103,480.²⁴ If the county’s prosecuting attorney engages in the private practice of law while in office, he/she will be compensated at a lower rate.²⁵

Ohio law also provides that the judge(s) of the court of common pleas fix an aggregate sum to be expended for the incoming year for the compensation of assistants, clerks, and stenographers for the prosecuting attorney’s office.²⁶ Furthermore, Ohio law requires that prosecuting attorneys receive additional county funds for “expenses the prosecuting attorney may incur in the performance of the prosecuting attorney’s official duties and in furtherance of justice.”²⁷ For counties with a population over 70,000, this amount must be equal to one-half of the official salary of the prosecuting attorney;²⁸ for counties with a population of 70,000 or less, the amount must be equal to one-half of the official salary

¹⁹ OHIO REV. CODE § 309.10 (West 2007). However, if the prosecuting attorney contracts to serve as counsel for any of these county entities, payment for his/her services must be compensated by the county entity for which the prosecutor has contracted to work. *Id.*

²⁰ OHIO REV. CODE § 309.12 (West 2007).

²¹ OHIO REV. CODE § 309.06(A) (West 2007).

²² OHIO REV. CODE § 325.01 (West 2007).

²³ OHIO REV. CODE § 325.11(A) (West 2007).

²⁴ *Id.* The compensation of prosecuting attorneys is adjusted annually to increase by the consumer price index, or by three percent, whichever is less. OHIO REV. CODE § 325.18(C) (West 2007).

²⁵ In 2001, for example, a prosecuting attorney in a county with a population between one and 20,000 residents who also engages in private practice would earn an annual salary of \$46,245 and the prosecutor in private practice in a county with over one million residents would earn an annual salary of \$73,709. OHIO REV. CODE § 325.18(C) (West 2007).

²⁶ OHIO REV. CODE § 309.06(A) (West 2007).

²⁷ OHIO REV. CODE § 325.12(A), (B) (West 2007).

²⁸ OHIO REV. CODE § 325.12(A) (West 2007).

specified for a prosecuting attorney who engages in a private practice.²⁹ Additionally, a prosecuting attorney may make application to the court of common pleas for additional funds, not in excess of \$10,000 per year, for investigating and prosecuting crimes when “in the opinion of the prosecuting attorney, an emergency exists by reason of unusual prevalence of crime or when it appears to be probable that criminal efforts are being made to obstruct the due administration of justice.”³⁰ Prosecuting attorneys also have the aid, without burden on their budgets, of all law enforcement agencies in their jurisdiction, the coroner’s office, and the Ohio Bureau of Criminal Investigation, including crime labs, and state and local forensic mental health services.

The following amounts were appropriated by counties to each county’s Office of the Prosecuting Attorney:³¹

- (1) Cuyahoga County appropriated \$24,557,162 to the Prosecuting Attorney’s Office in 2007;³²
- (2) Franklin County appropriated \$15,611,999 to the Prosecuting Attorney’s Office in 2007;³³
- (3) Hamilton County appropriated \$9,307,165 to the Prosecuting Attorney’s Office for criminal prosecutions in 2007;³⁴ and
- (4) Allen County appropriated \$899,509 to the Prosecuting Attorney’s Office in 2006.³⁵

Counties experience additional costs during capital prosecutions. For example, the total expenditure for the arrest, prosecution, and execution of Wilford Berry, the first person executed in Ohio since 1963, were estimated to be more than \$1.2 million dollars.³⁶ During the nine-year legal battle from trial to execution, the Ohio Attorney General’s office and the Cuyahoga Prosecuting Attorney’s Office cumulatively spent almost \$900,000 in Berry’s case.³⁷ The costs to Hamilton County for the case of John W. Byrd, Jr. amounted to \$768,795, including defense costs of \$534,051, prosecution costs of

²⁹ OHIO REV. CODE § 325.12(B) (West 2007).

³⁰ OHIO REV. CODE § 325.13 (West 2007).

³¹ Unless otherwise stated, the budget figures included in this Chapter include funds provided for an entire county prosecution office, including criminal and civil prosecutions.

³² CUYAHOGA COUNTY OFFICE BUDGET & MANAGEMENT, 2007 ADOPTED BUDGET PLAN, at DP-42, available at <http://obm.cuyahogacounty.us/PDF/2007BudgetPlan.pdf> (last visited Sept. 13, 2007).

³³ FRANKLIN COUNTY BOARD OF COMMISSIONERS, PUBLIC EXPENSES FOR FISCAL YEAR 2006, available at <http://www.franklincountyohio.gov/commissioners/budget/content/07budget/pdf/total-expenditures.pdf> (last visited Sept. 13, 2007).

³⁴ HAMILTON COUNTY OFFICE OF BUDGET AND STRATEGIC INITIATIVES, 2007 HAMILTON COUNTY BUDGET 359, available at <http://www.hamiltoncountyohio.gov/administrator/bsi/budget/Hamilton%20County%20Budget%2007.pdf> (last visited Sept. 13, 2007).

³⁵ ALLEN COUNTY AUDITOR, FINANCIAL STATEMENTS, FINANCIAL STATEMENTS FOR THE YEAR ENDED DECEMBER 31, 2006 AND 2005 at 12, available at http://www.co.allen.oh.us/auditor/pdfs/2006_4thQtrFinancialReport.pdf (last visited Sept. 13, 2007).

³⁶ Jon Craig, *Taxpayers’ Cost in Jay D. Scott Case Exceeds \$500,000*, COLUMBUS DISPATCH (Ohio), July 28, 2001, at A1.

³⁷ *Id.*

\$64,084, and execution costs of \$6,660.³⁸ Additionally, rural counties may be especially burdened during capital prosecutions. For example, the capital trial of Gregory McKnight in Vinton County “basically shut down the court system” because all other cases were stopped for three weeks since the county had only one prosecutor and one judge.³⁹ Similarly, the month-long capital trial of Gerald Hand in Delaware County caused a backlog of felony indictments which lasted for six months after the trial’s completion.⁴⁰

2. Office of the Ohio Attorney General

The State of Ohio holds an election for Attorney General every four years.⁴¹ The Attorney General serves as “the chief law officer for the state,”⁴² and is required to, among other things:

- (1) Appear for the State in the trial and argument of all civil and criminal causes in the Ohio Supreme Court in which the State is directly or indirectly interested;⁴³
- (2) When required by the General Assembly or Governor, appear for the State in any court or tribunal in a cause in which the State is a party, or in which the State is directly interested;⁴⁴
- (3) Upon written request of the Governor, prosecute any person indicted for a crime;⁴⁵
- (4) When requested, give legal advice to a state officer, board, commission, or the warden of a state correctional institution, among others, in all matters relating to their official duties;⁴⁶
- (5) When so required by resolution, give his/her written opinion on questions of law to either house of the General Assembly;⁴⁷
- (6) When requested, advise the prosecuting attorneys of the several counties with respect to their duties in all complaints, suits, and controversies in which the State is or may be a party;⁴⁸
- (7) Upon receipt of written request by any officer or employee, represent and defend the officer or employee in any civil action instituted against the officer or employee;⁴⁹
- (8) Appoint the Superintendent of the Bureau of Criminal Identification and Investigation;⁵⁰ and

³⁸ *Id.*

³⁹ Kate Roberts, *Capital Cases Hard for Smaller Counties: Expense, Manpower at Issue*, CINCINNATI ENQUIRER (Ohio), May 8, 2005.

⁴⁰ *Id.*

⁴¹ OHIO REV. CODE. ANN. § 109.01 (West 2007).

⁴² OHIO REV. CODE. ANN. § 109.02 (West 2007).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ OHIO REV. CODE. ANN. § 109.12 (West 2007).

⁴⁷ OHIO REV. CODE. ANN. § 109.13 (West 2007).

⁴⁸ OHIO REV. CODE. ANN. § 109.14 (West 2007).

⁴⁹ OHIO REV. CODE. ANN. § 109.361 (West 2007) (except in cases where the State is the plaintiff).

- (9) Annually prepare or cause to be prepared a capital case status report on all individuals who were sentenced to death in the State of Ohio on or after Oct. 19, 1981, to be completed no later than the first day of April each year.⁵¹

Ohio law also permits the Attorney General to perform the following functions:

- (1) Appoint a first assistant attorney general, a chief counsel, and assistant attorneys general to serve for the term for which the Attorney General is elected;⁵²
- (2) Appoint special counsel to represent the State in civil actions, criminal prosecutions, or other proceedings in which the State is a party or directly interested;⁵³ and
- (3) Adopt and promulgate any or all rules and regulations recommended by the Ohio Peace Officer Training Commission, including the basic training requirements for all peace officers in the State of Ohio.⁵⁴

The Attorney General of Ohio also defends death penalty appeals and “compiles a ‘brief bank’ of sample responses to the most common death penalty appeal petitions.”⁵⁵

B. The Ohio Rules of Professional Conduct

The Ohio Rules of Professional Conduct address the professional and ethical responsibilities of all attorneys, including the Attorney General and prosecuting attorneys.

1. Professional and Ethical Responsibilities of Prosecutors

The Ohio Rules of Professional Conduct (the rules) 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 such as making a reasonable effort to assure that the defendant is accorded justice and that guilt is decided upon the basis of sufficient evidence.”⁵⁶ To ensure that these obligations are satisfied, Rule 3.8 requires a prosecutor in a criminal case to comply with a number of guidelines, including:

- (1) Refraining from pursuing or prosecuting a charge that the prosecutor knows is not supported by probable cause;

⁵⁰ OHIO REV. CODE. ANN. § 109.51 (West 2007).

⁵¹ OHIO REV. CODE. ANN. § 109.97(B) (West 2007). The information that must be contained within the annual capital case report is found in section 109-97(C) of the Ohio Revised Code.

⁵² OHIO REV. CODE. ANN. § 109.03 (West 2007).

⁵³ OHIO REV. CODE. ANN. § 109.07 (West 2007).

⁵⁴ OHIO REV. CODE. ANN. § 109.74 (West 2007).

⁵⁵ Attorney General of Ohio, Capital Crimes, *available at* <http://www.ag.state.oh.us/le/prosecuting/capital/index.asp> (last visited Sept. 13, 2007).

⁵⁶ OHIO RULES OF PROF'L CONDUCT R. 3.8 cmt. 1.

- (2) Making 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 all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
- (3) Refraining from subpoenaing a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes all of the following apply: (a) the information sought is not protected from disclosure by an applicable privilege; (b) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (c) there is no other feasible alternative to obtain the information.⁵⁷

Prosecutors in Ohio also must comply with the rules applicable to all lawyers in Ohio, including limitations on pre-trial publicity that have a substantial likelihood of materially prejudicing a proceeding⁵⁸ and prohibitions on communicating with an individual the lawyer knows to be represented by counsel.⁵⁹ The rules also require all attorneys, including prosecutors, to report certain professional misconduct.⁶⁰ Rule 8.3 specifically states that “[a] lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.”⁶¹ Additionally, a prosecutor’s knowing disregard for his/her obligations under applicable law or “a systemic abuse of prosecutorial discretion” also may constitute a violation of the rules.⁶²

2. Investigating Prosecutorial Misconduct and Disciplining Members of the Bar

Members of the Ohio State Bar Association, including prosecutors, can be subjected to professional investigation and discipline. Any person who has an ethics complaint against an Ohio lawyer for violating a rule of the Ohio Rules of Professional Conduct may report it for investigation.⁶³ Additionally, the Code of Judicial Conduct requires that “[a] judge who has knowledge that a lawyer has committed a violation of the Code of Professional Responsibility shall report the violation to a tribunal or other authority empowered to investigate or act upon the violation.”⁶⁴ The willful violation of the Ohio

⁵⁷ OHIO RULES OF PROF’L CONDUCT R. 3.8(a)-(e).

⁵⁸ OHIO RULES OF PROF’L CONDUCT R. 3.6

⁵⁹ OHIO RULES OF PROF’L CONDUCT R. 4.2

⁶⁰ OHIO RULES OF PROF’L CONDUCT R. 8.3.

⁶¹ *Id.*

⁶² OHIO RULES OF PROF’L CONDUCT R. 3.8 cmt. 1.

⁶³ See Supreme Court of Ohio, Board of Commissioners on Grievances & Discipline FAQ, at <http://www.sconet.state.oh.us/BOC/faq/default.asp> (last visited Sept. 13, 2007).

⁶⁴ OHIO CODE OF JUD. CONDUCT, Canon 3(D)(2). If asked, the judge having knowledge of the violation must reveal it to “a tribunal or other authority empowered to investigate or act upon the violation.” OHIO CODE OF JUD. CONDUCT, Canon 3(D)(3).

Rules of Professional Conduct by any attorney, including prosecutors, may result in public reprimand, suspension, probation, or disbarment from the practice of law.⁶⁵

Complaints about any attorney may be filed with the Office of Disciplinary Counsel or an approved local bar association's Certified Grievance Committee.⁶⁶ Local bar associations' Certified Grievance Committees and the Office of Disciplinary Counsel's Disciplinary Counsel are responsible for investigating grievances involving alleged misconduct by attorneys and grievances with regard to mental illness.⁶⁷

If a Certified Grievance Committee determines that the alleged misconduct under investigation is "sufficiently serious and complex," the chair of the Grievance Committee may request assistance from the Disciplinary Counsel.⁶⁸ The Disciplinary Counsel must investigate all matters contained in the request and report the results of the investigation to the committee that requested it.⁶⁹ Certified Grievance Committees and the Disciplinary Counsel may file a complaint with the Board of Commissioners on Grievances and Discipline in cases where it finds probable cause to believe that misconduct has occurred or that a condition of mental illness exists.⁷⁰

Rule V of the Supreme Court Rules for the Government of the Bar of Ohio creates the Board of Commissioners on Grievances and Discipline (Board) which has jurisdiction to hear grievances involving alleged misconduct by attorneys.⁷¹ The Board has exclusive jurisdiction to hear grievances:

- (1) Concerning complaints of misconduct that are alleged to have been committed by an attorney;
- (2) Concerning allegations as to the mental illness of any attorney;
- (3) Relating to petitions for reinstatement as an attorney; and
- (4) Upon reference by the Supreme Court, concerning conduct by an attorney affecting any proceeding under the Supreme Court Rules for the Government of the Bar of Ohio, where the acts allegedly constitute a contempt of the Supreme Court or a breach of the rules, but did not take place in the presence of the Supreme Court or a member of the Supreme Court, whether by willful disobedience of any order or judgment of the

⁶⁵ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(B).

⁶⁶ See Supreme Court of Ohio, Board of Commissioners on Grievances & Discipline FAQ, at <http://www.sconet.state.oh.us/BOC/faq/default.asp> (last visited Sept. 13, 2007). A Certified Grievance Committee must be an organized committee of the Ohio State Bar Association or of one or more local bar associations in Ohio that permits the membership of any attorney practicing within the geographic area served by that association without reference to the attorney's area of practice, special interest, or other criteria. With the exception of Cuyahoga County, a county may only have one Certified Grievance Committee. A Certified Grievance Committee, once certified by the Board of Commissioners on Grievances and Discipline, may investigate allegations of misconduct by attorneys and mental illness affecting attorneys and initiate complaints as a result of its investigations. *Id.*

⁶⁷ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(4)(C).

⁶⁸ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(4)(B).

⁶⁹ *Id.*

⁷⁰ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(4)(C).

⁷¹ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(2)(A).

Supreme Court, an order or subpoena issued by the Board of Commissioners, or by interference with any officer of the Supreme Court in the prosecution of any duty, or otherwise.⁷²

The Board has 28 members, including seventeen attorneys admitted to practice in Ohio, seven active or voluntarily retired judges, and four non-attorney members.⁷³ The members of the Board are appointed for three-year terms by the justices of the Supreme Court.⁷⁴

The Board does not conduct the initial investigation into the alleged misconduct and may refer any matter filed with it to a Certified Grievance Committee or the Disciplinary Counsel.⁷⁵ All complaints are kept confidential until there is sufficient evidence of wrongdoing to file a formal complaint of misconduct with the Board.⁷⁶ Upon receiving a complaint from a Certified Grievance Committee or the Disciplinary Counsel, the complaint and investigatory materials will be sent to a probable cause panel for review.⁷⁷ The panel must make an independent determination, based solely on the complaint and investigation materials, of whether probable cause exists for the filing of a complaint.⁷⁸ The panel must issue an order certifying the complaint to the Board or dismissing the complaint and investigation.⁷⁹

If the panel finds that probable cause exists, a hearing panel will be appointed⁸⁰ and a formal hearing will be held on the complaint.⁸¹ If the hearing panel unanimously finds that the evidence is insufficient to support a charge or count of misconduct, the panel may order that the complaint be dismissed.⁸² Alternatively, the hearing panel may submit its findings of fact and dismissal recommendations for review and action by the full Board.⁸³

If the hearing panel determines, by clear and convincing evidence, that the respondent is guilty of misconduct and that public reprimand, suspension for a period of six months to two years, probation, suspension for an indefinite period, or disbarment is merited, the

⁷² SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(2)(B).

⁷³ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(1)(A).

⁷⁴ *Id.*

⁷⁵ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(4)(A).

⁷⁶ Telephone Interview by Halli Brownfield with Telephone Representative of the Office of Disciplinary Counsel (May 23, 2005) (on file with author).

⁷⁷ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(D)(1).

⁷⁸ *Id.*

⁷⁹ *Id.* The decision of the probable cause panel may be appealed to the full Board by the Disciplinary Counsel or Certified Grievance Committee. In this situation, the Board must review the investigation and make an independent determination as to whether probable cause exists for the filing of a complaint. The board will issue an order certifying the complaint or dismissing it. There is no appeal from the decision of the Board. SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(D)(2).

⁸⁰ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(D)(3).

⁸¹ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(G).

⁸² SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(H).

⁸³ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(I).

hearing panel must file its certified report of the proceedings and its findings of facts and recommendations with the Secretary of the Board.⁸⁴

After the Board conducts its review, it may refer the matter to the hearing panel for further hearing, order a further hearing before the Board, or proceed on the certified report before the hearing panel.⁸⁵ After the final review, the Board may dismiss the complaint or find that the respondent is guilty of misconduct.⁸⁶ If the Board determines that discipline is merited, the Board must file a final certified report of its proceedings with the Clerk of the Supreme Court.⁸⁷

Once the Board files its final report with the Supreme Court, the Supreme Court must issue an order to the respondent to show cause why the report of the Board should not be confirmed and a disciplinary order entered.⁸⁸ After a hearing on objections, or if no objections are filed, the Supreme Court will enter an order.⁸⁹ If the Court rejects a sanction recommended in the certified report, the Court will remand the matter to the Board for another hearing.⁹⁰

C. Relevant Prosecutorial Responsibilities

1. Discretionary Responsibilities of Prosecutor

a. Filing of Indictment

In order for the State of Ohio to seek the death penalty, the indictment or count in the indictment charging the accused with aggravated murder must specify one or more of the aggravating circumstances delineated in section 2929.04 of the Ohio Rev. Code.⁹¹ Ohio law sets out the form in which a death penalty specification should be included within the aggravated murder indictment;⁹² however, there is no requirement that the prosecution file with the court a notice of intent to seek the death penalty.

Prosecutors in Ohio have unfettered discretion to seek the death penalty in any aggravated murder case.⁹³ However, the State may, by leave of court and in open court, file a dismissal of an indictment, which will withdraw the death-eligible indictment and

⁸⁴ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(J).

⁸⁵ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(K).

⁸⁶ *Id.*

⁸⁷ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(L).

⁸⁸ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(8)(A).

⁸⁹ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(8)(D).

⁹⁰ *Id.*

⁹¹ OHIO REV. CODE § 2941.14(B) (West 2007). If more than one aggravating circumstance is specified to an indictment or count, or if an aggravating circumstance is specified to a count in an indictment containing more than one count, each aggravating circumstance must be separately numbered as a specification and identified as to which count it applies. *Id.*

⁹² *See* OHIO REV. CODE § 2941.14(C) (West 2007).

⁹³ *State v. Jenkins*, 473 N.E.2d 264, 274 (Ohio 1984) (*citing* *Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (“Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable”).

end the prosecution.⁹⁴ Dismissal of an indictment or entry of a *nolle prosequi*, prior to the attachment of double jeopardy, does not prevent the State from securing a later indictment of the defendant for the same offense.⁹⁵ Additionally, if the State amends the indictment, the defendant is entitled to a discharge of the jury.⁹⁶ If a jury is already impaneled in the case, the defendant is entitled to a reasonable continuance, unless it is apparent that the defendant has not been prejudiced or misled by the defect in the indictment, or that his/her rights will be fully protected by proceeding with a postponement of the trial with the same or a different jury.⁹⁷

b. Plea Agreements

While a defendant has no constitutional right to a plea negotiation,⁹⁸ Ohio law does permit a prosecutor to enter into plea negotiations with the defendant.⁹⁹ In fact, in 2005, the Associated Press found that “nearly half of the 1,936 capital punishment cases [in the State of Ohio] ended with a plea bargain.”¹⁰⁰

The Ohio Rules of Criminal Procedure require that “[i]f a plea is the result of a plea bargain, the underlying reason must be stated in open court;” however, the court may refuse to accept a plea of guilty or no contest and enter a plea of not guilty on behalf of the defendant.¹⁰¹ In addition, “the prosecutor in a case, to the extent practicable, shall confer with the victim in the case. . . before agreeing to a negotiated plea for that defendant. . .”¹⁰² However, a prosecutor’s failure to confer with a victim as required under the statute does not affect the validity of the agreement between the prosecution and the defendant.¹⁰³ The court also cannot accept a plea of guilty or no contest in a felony case without first addressing the defendant personally to ensure that the defendant pleaded guilty knowingly and voluntarily.¹⁰⁴ If the indictment contains one or more specifications, and a plea of guilty or no contest to the charge and is accepted, the court

⁹⁴ OHIO R. CRIM. P. 48(A).

⁹⁵ See *id.*; OHIO REV. CODE § 2941.33 (West 2007); see also *State v. Johnson*, 588 N.E.2d 224, 227 (Ohio Ct. App. 9th Dist. 1990) (citing *Sander v. Ohio*, 365 F. Supp. 1251 (S.D. Ohio 1973)). We note, however, that in at least two counties in Ohio, prosecutors stated that it was uncommon for the prosecution to reverse its decision to seek the death penalty. See Telephone Interview by Halli Brownfield with Ken Bailey, Senior Trial Attorney, Trumbull County Prosecuting Attorney’s Office (June 13, 2005); Telephone Interview by Halli Brownfield with Bill Breyer, Chief Assistant, Hamilton County Prosecuting Attorney’s Office (June 15, 2005).

⁹⁶ OHIO REV. CODE § 2941.30 (West 2007).

⁹⁷ *Id.*

⁹⁸ *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.”).

⁹⁹ OHIO R. CRIM. P. 11(F).

¹⁰⁰ See Andrew Welsh-Huggins, *Death Penalty is Applied Unevenly for Ohioans*, PLAIN DEALER (Cleveland, Ohio), May 7, 2005, at A1. The number of negotiated guilty pleas includes 131 cases in which the crime involved two or more victims and 25 cases in which the defendant pleaded guilty to the aggravated murder of at least 3 victims. *Id.*

¹⁰¹ OHIO R. CRIM. P. 11(G).

¹⁰² OHIO REV. CODE § 2930.06(A) (West 2007).

¹⁰³ *Id.*

¹⁰⁴ OHIO R. CRIM. P. 11(C)(2)(a)-(c).

may dismiss the capital specifications and impose sentence accordingly, in the interests of justice.¹⁰⁵

c. Capital Indictments, Plea Agreements, and Death Sentences between 1982 and 2005

An analysis of the rates at which capital indictments resulted in death sentences in counties throughout the State of Ohio offers a glimpse into how prosecutors' offices exercise discretion in seeking the death penalty.

Between 1982 and 2005, prosecuting attorneys in Ohio presented 2,752 capital indictments in eighty-two of Ohio's eighty-eight counties.¹⁰⁶ The majority, or sixty percent, of all capital indictments between 1982 and 2005 came from three of Ohio's counties: (1) Cuyahoga County (Cleveland), 1035 indictments (37.6 percent of all capital indictments); (2) Franklin County (Columbus), 484 indictments (17.5 percent of all capital indictments); and (3) Hamilton County (Cincinnati), 154 indictments (5.5 percent of all capital indictments).¹⁰⁷

Of the 2,752 indictments, 290 cases ultimately resulted in a death sentence, representing a death sentencing rate of 10.5 percent of all cases in which a capital indictment was filed.¹⁰⁸ Four of Ohio's counties constituted over 50 percent of all death sentences in the State:

- (1) Cuyahoga County (Cleveland) at 58 death sentences (20 percent of all death sentences);
- (2) Hamilton County (Cincinnati) at 58 death sentences (20 percent of all death sentences);
- (3) Lucas County (Toledo) at 22 death sentences (7.5 percent of all death sentences); and

¹⁰⁵ OHIO R. CRIM. P. 11(C)(3).

¹⁰⁶ See Office of the Ohio Public Defender, Capital Indictments and Dispositions 2000-2005, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited on Sept. 13, 2007); Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author). Capital indictments were not sought in the following counties: (1) Defiance; (2) Harrison; (3) Holmes; (4) Morgan; (5) Paulding, and (6) Wyandot. *Id.*

¹⁰⁷ See Office of the Ohio Public Defender, Capital Indictments and Dispositions 2000-2005, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited on Sept. 13, 2007); Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author).

¹⁰⁸ See OFFICE OF THE OHIO PUBLIC DEFENDER, FORMER DEATH ROW RESIDENTS UNDER 1981 LAW (May 2, 2007) [hereinafter FORMER DEATH ROW RESIDENTS], available at http://www.opd.ohio.gov/dp/dp_form.pdf (last visited Sept. 13, 2007); OFFICE OF THE OHIO PUBLIC DEFENDER, NUMBER OF DEATH SENTENCES PER COUNTY (May 2, 2007) [hereinafter DEATH SENTENCES PER COUNTY], available at http://www.opd.ohio.gov/dp/dp_per%20county.pdf (last visited Sept. 13, 2007); OFFICE OF THE OHIO PUBLIC DEFENDER, DEATH ROW RESIDENTS BY COUNTY (May 2, 2007) [hereinafter RESIDENTS BY COUNTY], available at http://www.opd.ohio.gov/dp/dp_cnty.pdf (last visited Sept. 13, 2007). The 2,752 indictments represent the number of death sentences presented, not the number of individuals sentenced to death in the State of Ohio. *Id.*

- (4) Franklin County (Columbus) at 19 death sentences (6.5 percent of all death sentences).¹⁰⁹

Some counties in Ohio had death sentencing rates higher than the State's overall average of 10.53 percent. Four counties in Ohio had death sentencing rates of fifty percent of the number of capital indictments presented in the county between 1982 and 2005, including Licking County in which ten capital indictments resulted in five death sentences.¹¹⁰ No county had death sentencing rates greater than fifty percent of the number of capital indictments presented between 1982 and 2005.¹¹¹

There were also thirty-four counties in which, while capital indictments were filed, no death sentences were handed down, representing a death sentencing rate of zero percent.¹¹² For example:

- (1) Coshocton County, where twelve capital indictments resulted in no death sentences;
- (2) Fairfield County, where ten capital indictments resulted in no death sentences; and
- (3) Wayne County, where thirteen capital indictments resulted in no death sentences.¹¹³

Additionally, in the Ohio counties in which the highest number of capital indictments were presented between 1981 and 2005, these indictments resulted in death sentences at the following rates (in alphabetical order): (1) Cuyahoga County (Cleveland) had 1,035 capital indictments that resulted in 58 death sentences, a death sentencing rate of 6 percent; (2) Franklin County (Columbus) had 484 capital indictments that resulted in 19 death sentences, a rate of 4 percent; (3) Hamilton County (Cincinnati) had 154 capital indictments that resulted in 58 death sentences, a rate of 38 percent; (4) Lucas County (Toledo) had 109 indictments that resulted in 22 death sentences, a rate of 20 percent; and

¹⁰⁹ See FORMER DEATH ROW RESIDENTS, *supra* note 108; DEATH SENTENCES PER COUNTY, *supra* note 108; RESIDENTS BY COUNTY, *supra* note 108.

¹¹⁰ See Office of the Ohio Public Defender, Capital Indictments and Dispositions 2000-2005, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007); Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author). Three other counties in Ohio had death sentencing rates of fifty percent of capital indictments presented between 1982 and 2005: Belmont County (six capital indictments, three death sentences); Crawford County (two capital indictments, one death sentence); and Knox County (two capital indictments, one death sentence). *Id.*

¹¹¹ See Office of the Ohio Public Defender, Capital Indictments and Dispositions 2000-2005, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007); Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author).

¹¹² See Office of the Ohio Public Defender, Capital Indictments and Dispositions 2000-2005, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007); Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author).

¹¹³ See Office of the Ohio Public Defender, Capital Indictments and Dispositions 2000-2005, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007); Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author).

(5) Summit County (Akron) had 90 capital indictments that resulted 12 death sentences, a rate of 13 percent.¹¹⁴

Finally, between 2000 and 2005, there were 536 capital indictments and 501 total dispositions – i.e. instances in which an individual received a verdict of guilty or not guilty as a result of a jury trial, trial by a three-judge panel, or a plea agreement.¹¹⁵ Of the 501 total dispositions, 226 resulted in plea agreements to a sentence of less than death, meaning that 45 percent of all dispositions for a capitally indicted offense between the year 2000 and 2005 were the result of a plea agreement.¹¹⁶

3. Discovery

a. Discovery Requirements

The state is required under the Constitution of the United States to disclose “evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”¹¹⁷ “[N]ondisclosure by a prosecutor violates due process.”¹¹⁸ Evidence which must be disclosed includes exculpatory, mitigating, and impeachment evidence,¹¹⁹ “regardless of the whether the evidence was specifically, generally, or not at all requested by the defense.”¹²⁰ The prosecutor is under a duty to reveal any deal or agreement where leniency has been promised to a state witness in exchange for that witness’s testimony.¹²¹ However, while a defendant is permitted to cross-examine a witness about any plea arrangements that have been reached, when there is no “concrete deal” for a plea agreement, the defendant is not permitted under Ohio law to introduce extrinsic evidence of a speculative “deal.”¹²² “Evidence known to the police and not the prosecutor” is

¹¹⁴ See Office of the Ohio Public Defender, Capital Indictments and Dispositions 2000-2005, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007); FORMER DEATH ROW RESIDENTS, *supra* note 108; DEATH SENTENCES PER COUNTY, *supra* note 108; RESIDENTS BY COUNTY, *supra* note 108; Office of the Ohio Public Defender, Capital Indictment Index 1981-1999 (on file with author).

¹¹⁵ Office of the Ohio Public Defender, Capital Indictment and Disposition Statistics 2000-2005, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007). However, we cannot make an accurate comparison of the number of capital indictments presented in a given year to the number of plea agreements made in a given year because a period of over one year may have elapsed between the time of indictment and the time of disposition for each capital offense.

¹¹⁶ Office of the Ohio Public Defender, Capital Indictment and Disposition Statistics 2000-2005, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007).

¹¹⁷ *Brady v. Maryland*, 373 U.S. 83, 87 (1963)

¹¹⁸ *Id.* at 86.

¹¹⁹ *State v. Keene*, 693 N.E.2d 246, 253 (Ohio 1998).

¹²⁰ *State v. Johnston*, 529 N.E.2d 898, 911 (Ohio 1988) (citing *United States v. Bagley*, 473 U.S. 667, 676 (1985)).

¹²¹ *State v. Gavin*, 365 N.E.2d 1263, 1267 (Ohio 1977) (“The jury was entitled to know whether [the witness] had or hoped for a promise of leniency in his own case for the tailoring of his testimony to suit the State’s proof in the case on trial.”); *see also State v. Reynolds*, 2002 WL 46988, *12-13 (Ohio Ct. App. 7th Dist. Jan. 8, 2002) (unreported opinion).

¹²² *State v. Rodriguez*, 509 N.E.2d 952, 955 (Ohio Ct. App. 9th Dist. 1986) (holding that “while . . . it may have been proper for the court to permit evidence of the speculative “deal” [with the witness/co-defendant],

included within the *Brady* duty to disclose.¹²³ The prosecutor is obligated to reveal the fact that perjured testimony has been used¹²⁴ and then to reveal the truth.¹²⁵ Furthermore, “when police or prosecutors conceal significant exculpatory or impeaching material in the State’s possession, it is ordinarily incumbent on the State to set the record straight.”¹²⁶

In addition to requiring disclosure of evidence favorable to the defendant,¹²⁷ Rule 16 of the Ohio Rules of Criminal Procedure requires the prosecutor to make the following material and information available to the defendant upon written motion:

- (1) Any statement of the defendant or a co-defendant, upon motion of the defendant, including any of the following which are available to or are within the possession, custody, or control of the State, or the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney:
 - (a) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;
 - (b) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer; and/or
 - (c) Recorded testimony of the defendant or co-defendant before a grand jury;¹²⁸
- (2) The defendant's prior record which is available to or within the possession, custody or control of the State;¹²⁹
- (3) Any documents and tangible objects available to or within the possession, custody or control of the State, and which (1) are material to the preparation of the defendant’s defense; (2) are intended for use by the prosecuting attorney as evidence at the trial; or (3) were obtained from or belong to the defendant;¹³⁰
- (4) Any reports of examination and tests, including any results or reports of physical or mental examinations and/or scientific tests or experiments, made in connection with the particular case, or copies thereof, which are available to or within the possession, custody, or control of the State, and

we cannot find prejudicial error in its exclusion,” although co-defendant’s counsel acknowledged that charges against the co-defendant would be dismissed after his testimony).

¹²³ State v. Connor, 2000 WL 263397, *3 (Ohio Ct. App. 8th Dist. Mar. 9, 2000) (citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995)).

¹²⁴ *Mooney v. Holohan*, 294 U.S. 103 (1935).

¹²⁵ *Napue v. Illinois*, 360 U.S. 264 (1959)

¹²⁶ *Banks v. Dretke*, 540 U.S. 668, 675-76 (1999)

¹²⁷ See OHIO R. CRIM. P. 16(B)(1)(f) (stating that disclosure of evidence favorable to defendant requires that upon motion of the defendant before trial, the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment).

¹²⁸ OHIO R. CRIM. P. 16(B)(1)(a).

¹²⁹ OHIO R. CRIM. P. 16(B)(1)(b).

¹³⁰ OHIO R. CRIM. P. 16(B)(1)(c).

- the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney;¹³¹
- (5) All witness names and addresses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness(es), if such record is within the knowledge of the prosecuting attorney;¹³² and
 - (6) On motion of the defendant, *in camera* inspection of any witness's statement, requiring that upon completion of a witness's direct examination at trial, the court shall conduct an *in camera* inspection of the witness's written or recorded statement with the defense attorney and prosecuting attorney present and participating to determine the existence of inconsistencies, if any, between the testimony of the witness and the prior statement.¹³³ If the court determines that inconsistencies exist, the statement shall be given to the defense attorney for use in cross-examination of the witness as to the inconsistencies.¹³⁴ However, if the court determines that inconsistencies do not exist, the statement shall not be given to the defense attorney and he/she will not be permitted to cross-examine or comment thereon.¹³⁵

The State is not required to disclose or allow inspection of any reports, memoranda, or other internal documents made by the prosecuting attorney or his agents in connection with the investigation or prosecution of the case, or of statements made by witnesses or prospective witnesses to state agents.¹³⁶ The Ohio Supreme Court also has prohibited the use of public records requests to obtain discovery in post-conviction proceedings.¹³⁷

¹³¹ OHIO R. CRIM. P. 16(B)(1)(d).

¹³² OHIO R. CRIM. P. 16(B)(1)(e). Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. *Id.*

¹³³ OHIO R. CRIM. P. 16(B)(1)(g). Whenever the defense attorney is not given the entire statement, it shall be preserved in the record of the court to be made available to the appellate court in the event of an appeal. *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ OHIO R. CRIM. P. 16 (B)(2).

¹³⁷ *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 96 (Ohio 1994) (“[W]e hold that a defendant in a criminal case who has exhausted the direct appeals of her or his conviction may not avail herself or himself of [section 149.43 relating to disclosure of public records] to support a petition for post-conviction relief.”) (later codified at OHIO REV. CODE ANN. § 149.43(B)(4) (2005)). Section 149.43(B)(4) states that:

A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

Notably, some county prosecution offices permit open file discovery, affording the defendant access to discovery in addition to that permitted under Rule 16.¹³⁸ However, a prosecuting attorney's practice of permitting open file discovery does not create a *right* to such discovery,¹³⁹ although it is within the trial court's discretion to order discovery beyond the requirements of Rule 16.¹⁴⁰

The State has a reciprocal right to move for discovery of documents and tangible objects,¹⁴¹ reports of examinations and tests,¹⁴² and witness names and addresses,¹⁴³ whenever the defense moves for discovery of such items within the possession of the prosecution, as described above.¹⁴⁴ The State also is entitled to an *in camera* inspection of a witness's statement following direct examination, under the same parameters provided for the defense to review such testimony, for use during cross-examination if any inconsistencies exist between the witness's testimony on direct examination and any prior statement.¹⁴⁵

However, the State is not entitled to disclosure of any reports, memoranda, or other internal documents made by the defense attorney or his agents in connection with the investigation or defense of the case, or of statements made by witnesses or prospective witnesses to the defense attorney or his agents.¹⁴⁶

b. Challenges to Discovery Violations

Rule 16 of the Ohio Rules of Criminal Procedure provides that “[i]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may make such other order as it deems just under the circumstances.”¹⁴⁷ The trial court must inquire into the circumstances surrounding a discovery violation and, when deciding whether to impose a sanction, must impose the least severe sanction that is consistent with the purpose of the

¹³⁸ Trumbull and Franklin Counties, for example, generally permit open file discovery, while Hamilton does not offer any more discovery than that required by Rule 16. See Telephone Interview by Halli Brownfield with Ken Bailey, Senior Trial Attorney, Trumbull County Prosecuting Attorney's Office (June 13, 2005); Telephone Interview by Halli Brownfield with Bill Breyer, Chief Assistant, Hamilton County Prosecuting Attorney's Office (June 15, 2005); Telephone Interview by Halli Brownfield with Ed Morgan, First Assistant Prosecutor, Criminal Division, Franklin County Prosecuting Attorney's Office (June 20, 2005).

¹³⁹ State v. Caldwell, 1991 WL 259529, *2-3 (Ohio Ct. App. 9th Dist. Dec. 4, 1991); see also State v. Carter, 1983 WL 4053, *2 (Ohio Ct. App. 9th Dist. Apr. 13, 1983).

¹⁴⁰ State v. Landrum, 559 N.E.2d 710, 725 (Ohio 1990) (permitting trial court in death penalty cases to allow defense counsel to review prosecution witness statements before cross-examination even though defense counsel had no right to do so under Rule 16).

¹⁴¹ OHIO R. CRIM. P. 16(C)(1)(a).

¹⁴² OHIO R. CRIM. P. 16(C)(1)(b).

¹⁴³ OHIO R. CRIM. P. 16(C)(1)(c).

¹⁴⁴ See *supra* notes 130-132 and accompanying text.

¹⁴⁵ OHIO R. CRIM. P. 16(C)(1)(d).

¹⁴⁶ OHIO R. CRIM. P. 16(C)(2).

¹⁴⁷ OHIO R. CRIM. P. 16(E)(3).

rules of discovery.¹⁴⁸ Nonetheless, the trial court retains broad discretion in determining the proper sanction for a violation of Rule 16.¹⁴⁹

Additionally, when the prosecution suppressed or failed to disclose evidence which was material and exculpatory as to guilt or punishment, the defendant may obtain relief for this *Brady* violation--regardless of whether the evidence was specifically, generally, or not at all requested by the defense.¹⁵⁰ Suppressed evidence is material only when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."¹⁵¹ The prosecution's failure to disclose *Brady* evidence that is material to guilt will result in a new trial;¹⁵² the prosecution's failure to disclose evidence material during the mitigation phase will result in a new sentencing hearing.¹⁵³

4. Limitations on Arguments

a. Substantive Limitations

While each party in a criminal case is "granted a certain amount of latitude in closing argument,"¹⁵⁴ the Ohio Supreme Court has held that certain limitations exist on a prosecutor's argument during trial and at sentencing.

For example, it is impermissible for the prosecutor to comment on the defendant's failure to testify, as such comment violates the defendant's Fifth Amendment right against self-compelled incrimination.¹⁵⁵ The court will find that a prosecutor's statement violated the defendant's Fifth Amendment rights if "the language used was manifestly intended," or if the language "was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify."¹⁵⁶ It is also impermissible for a prosecutor to comment that the defendant lacked an alibi,¹⁵⁷ nor may a prosecutor, either during *voir dire* or closing argument, discuss possible defenses that were not argued by defense counsel.¹⁵⁸

¹⁴⁸ State v. Palivoda, 2006 WL 3544825, *3 (Ohio Ct. App. 11th Dist. Dec. 8, 2006) (citing Lakewood v. Papadelis, 511 N.E.2d 1138, 1141 (Ohio 1987)).

¹⁴⁹ See, e.g., State v. Pettway, 2004 WL 1902585 (Ohio Ct. App. 8th Dist. Aug. 26, 2004) (upholding the trial court's ruling that the defense was prohibited from impeaching the victim by use of the victim's personal journals when the defense had not disclosed this evidence to the prosecution prior to trial).

¹⁵⁰ State v. Johnston, 529 N.E.2d 898, 911 (Ohio 1988).

¹⁵¹ *Id.* at 911. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Id.*

¹⁵² *Id.* at 913.

¹⁵³ See, e.g., State v. Allen, 1998 WL 289418, *5 (Ohio Ct. App. 8th Dist. June 4, 1998) (unreported opinion).

¹⁵⁴ State v. Thompson, 514 N.E.2d 407, 420 (Ohio 1987).

¹⁵⁵ State v. Fears, 715 N.E.2d 136 (Ohio 1999); U.S. CONST. amend V.

¹⁵⁶ *Fears*, 715 N.E.2d at 146.

¹⁵⁷ State v. Smith, 720 N.E.2d 149, 153 (Ohio Ct. App. 1st Dist. 1998).

¹⁵⁸ *Fears*, 715 N.E.2d at 145.

When the trial court has determined that information in the possession of a defense expert is not subject to discovery, a prosecutor is prohibited from presenting argument to the jury that the expert has wrongfully withheld pertinent information from the State.¹⁵⁹ Both the prosecution and defense are prohibited from commenting on the fact that an individual named in the opposing party's witness list was not called to testify.¹⁶⁰ The Ohio Supreme Court also has found it impermissible for a prosecutor to make reference to taxpayer contributions to the expense of the trial, such as court payment for services of a defense expert.¹⁶¹

Furthermore, it is improper for an attorney "to express [before the jury] his or her personal belief or opinion as to the credibility of a witness,"¹⁶² nor may a prosecutor express to the jury that defense counsel believes his/her client to be guilty, such as defense counsel is "paid to get him off the hook."¹⁶³ Also, while the prosecution is entitled to "some latitude and freedom of expression" in summation, "[a] prosecutor may not express his personal opinion about the guilt of the accused, unless he bases that opinion on the evidence presented in court."¹⁶⁴ The prosecutor may call for justice and ask the jury to "do their duty" at summation, but he/she may not ask the jury to "send a message" to the community with its verdict.¹⁶⁵

During the penalty phase of a capital trial, the prosecutor is prohibited from commenting on any non-statutory aggravating factor in front of the jury.¹⁶⁶ Nor may the prosecutor "turn the non-existence of a mitigating factor, such as remorse, into an aggravating circumstance"¹⁶⁷ or refute potential mitigating factors that the defense has not first placed at issue.¹⁶⁸

The prosecutor also must refrain from conduct that will inflame the passions of the jury, such as the recurring use of gruesome photographs and graphic descriptions of the offense during the penalty phase, as such conduct "creat[es] a climate in which the jury [] herein was unable to dispassionately weigh the aggravating circumstances against the mitigating factors."¹⁶⁹ The prosecutor also is prohibited from expressing his/her personal opinion that the death penalty is the "right decision" to make.¹⁷⁰

¹⁵⁹ *Id.*

¹⁶⁰ *See* OHIO R. CRIM. P. 16(B)(4), (C)(3).

¹⁶¹ *Fears*, 715 N.E.2d at 144.

¹⁶² *State v. Williams*, 679 N.E.2d 646, 657 (Ohio 1997).

¹⁶³ *State v. Keenan*, 613 N.E.2d 203, 208 (1993).

¹⁶⁴ *Id.* at 206-207.

¹⁶⁵ *State v. Bey*, 709 N.E.2d 484, 493 (Ohio 1999); *see also* *State v. Grimes*, 2005 WL 120064, *3-4 (Ohio Ct. App. 1st Dist. Jan. 21, 2005). In *Grimes*, the Court of Appeals found that standing alone, the prosecutor's comments to the jury that "[l]adies and gentlemen, you can make a difference. You can send a message loud and clear back to the hood that this city is not going to tolerate this violence" would warrant a reversal of the defendant's conviction. *Id.* However, in light of overwhelming evidence of the defendant's guilt and the trial court's curative instruction, the defendant was not denied a fair trial. *Id.*

¹⁶⁶ *State v. Combs*, 581 N.E.2d 1071, 1077 (Ohio 1991).

¹⁶⁷ *State v. Fears*, 715 N.E.2d 136, 144 (Ohio 1999).

¹⁶⁸ *State v. Tyler*, 553 N.E.2d 576, 596 (Ohio 1990).

¹⁶⁹ *State v. Thompson*, 514 N.E.2d 407, 420-21 (Ohio 1987).

¹⁷⁰ *State v. Smith*, 780 N.E.2d 221, 234 (Ohio 2002).

Under Ohio law, it is the trial court's responsibility to ultimately decide the penalty to be imposed upon the defendant;¹⁷¹ therefore, the Ohio Supreme Court has held that it is permissible for the prosecutor to inform the jury that it is their duty to make a *recommendation* to the court on the penalty to be imposed. However, the Ohio Supreme Court has refused to adopt a *per se* rule concerning comments directed at the jury's role in the penalty phase of the trial and has "repeatedly stated that 'because of the risk of diminishing jury responsibility,' [the Ohio Supreme Court] prefers that in the future no reference be made to the jury regarding the finality of their decision."¹⁷² Furthermore, Ohio prosecutors are prohibited from making reference to the possibility of the defendant receiving parole if the jury sentences the defendant to any sentence less than death.¹⁷³

b. Challenges to Prosecutorial Arguments

The Ohio Supreme Court has held that "a death sentence need not be reversed on constitutional grounds even when prosecutorial comment is 'undesirable or even universally condemned[,] unless the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"¹⁷⁴ In determining whether the impropriety denied the defendant of a fair trial, the court will consider (1) the likelihood that the remarks would mislead the jury or prejudice the accused; (2) whether the remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally presented to the jury; and (4) whether other evidence against the defendant was substantial.¹⁷⁵

If an objection was made at trial to a prosecutor's statement, the reviewing court will analyze the alleged misconduct under a harmless error¹⁷⁶ standard of review.¹⁷⁷ However, when there was no objection to the prosecutor's argument(s) at trial, the challenge to the prosecutor's arguments must be analyzed according to the plain-error standard of review on appeal.¹⁷⁸

¹⁷¹ See OHIO REV. CODE § 2929.03(D) (West 2007).

¹⁷² State v. Rogers, 504 N.E.2d 52, 57-58 (Ohio 1986).

¹⁷³ State v. DePew, 528 N.E.2d 542, 555 (Ohio 1988). However, the prosecutor is permitted to make a brief "corrective statement" of law when defense counsel "invites" such a response in making a misstatement of the law or the role of the jury. State v. Hicks, 538 N.E.2d 1030, 1036 (Ohio 1989).

¹⁷⁴ State v. Hill, 661 N.E.2d 1068, 1077 (Ohio 1996) (quoting Darden v. Wainwright, 477 U.S. 168, 181 (1986)); see also State v. Fears, 715 N.E.2d 136, 143 (Ohio 1999) (citing State v. Apanovitch, 514 N.E.2d 394, 400 (Ohio 1987)).

¹⁷⁵ Joseph v. Coyle, 469 F.3d 441, 473 (6th Cir. 2006).

¹⁷⁶ Harmless error is "any error, defect, irregularity, or variance which does not affect substantial rights" and "shall be disregarded." OHIO R. CRIM. P. 52(A) (2005).

¹⁷⁷ See State v. Clemons, 696 N.E.2d 1009, 1021-22 (Ohio 1998) (holding that the prosecutor's comments that the defense attorney was just doing his job were improper but found that in light of evidence of overwhelming guilt, the misconduct was harmless error); State v. Ahmed, 813 N.E.2d 637, 662 (Ohio 2004) (holding that prosecutor's comment that "maybe someday, when I'm retired and gone from here, they might consider executing somebody" was harmless error in light of the immediate defense objection and instruction by the judge to disregard the comment).

¹⁷⁸ "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." OHIO R. CRIM. P. 52(B).

Despite what have sometimes been highly impermissible remarks throughout a capital trial, in the vast majority of cases, the Ohio Supreme Court has held that such impermissible commentary by prosecutors did not affect substantial rights of the defendant in light of the overwhelming evidence of guilt.¹⁷⁹

¹⁷⁹ See, e.g., *Fears*, 715 N.E.2d at 146. In *Fears*, the Court admonished:

Although we are greatly disturbed by [the prosecutors'] lack of restraint and their willingness to utter such inflammatory remarks, we cannot say that these comments constitute reversible error. The evidence of guilt in this case is so overwhelming that none of the prosecutors' comments, even if error, amounted to reversible error. Upon review of the entire record, we find that none of the alleged instances of misconduct that occurred affected the fairness of the trial If this kind of activity continues, it is just a matter of time before it affects the outcome of a trial.

Id.; see also *State v. Thompson*, 514 N.E.2d 407, 411 (Ohio 1987) (finding that prosecutor's closing argument that "[t]he only other thing that is missing in this case is a complete and total confession to the crime by the defendant. Why doesn't he tell us what happened and make it easier on himself. He doesn't want to admit the actual killing" were improper, but did not warrant reversing the conviction due to overwhelming evidence of the defendant's guilt); *State v. Hill*, 661 N.E.2d 1068, 1077 (Ohio 1996) (holding that prosecutor's reference to the nature and circumstances of the crime as aggravating circumstances was improper, but not reversible error because the trial court correctly instructed the jury as to the precise aggravating circumstances); *State v. Lynch*, 787 N.E.2d 1185, 1209 (Ohio 2003) (holding that while the prosecutor's closing arguments urging the jury to consider how the victim felt as she was dying were improper, the comments did not affect the outcome of the trial in light of the four aggravating circumstances that the appellant had been found guilty of and the lack of "compelling" mitigating evidence); *Clemons*, 696 N.E.2d at 1021-22 (holding that the prosecutor's comments that the defense attorney was just doing his job were improper but found that in light of evidence of overwhelming guilt, the misconduct was harmless error); *Ahmed*, 813 N.E.2d at 662 (holding that prosecutor's comment that "maybe someday, when I'm retired and gone from here, they might consider executing somebody" was harmless error in light of the immediate defense objection and instruction by the judge to disregard the comment). Notably, the Ohio Supreme Court held that there was evidence of prosecutorial misconduct in 111 of 150 capital cases between 1984 and 2004, but that such misconduct was either harmless or was not plain error.

II. ANALYSIS

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.

The State of Ohio does not require prosecuting attorney offices to have written policies governing the exercise of prosecutorial discretion. The State of Ohio, however, has adopted the Ohio Rules of Professional Conduct (the Rules), which address prosecutorial discretion in the context of the role and responsibilities of prosecutors.¹⁸⁰ The Rules describe the prosecutor's role as that of a "minister of justice and not simply that of an advocate."¹⁸¹ The Rules also prohibit a prosecutor from "pursu[ing] or prosecut[ing] a charge that the prosecutor *knows* is not supported by probable cause" or from failing to disclose to the defense "all evidence or information *known* to the prosecutor that tends to negate the guilt of the accused or that mitigates the offense, and, in connection with sentencing, fail[ing] to disclose to the defense all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by order of the *tribunal*."¹⁸²

The State of Ohio gives prosecutors unfettered discretion to seek the death penalty by seeking a capital indictment for any murder that meets one or more of ten statutory aggravating factors, described at section 2929.04 of the Ohio Rev. Code.¹⁸³ While some prosecution offices, including those in Trumbull, Portage, and Mahoning Counties, decide collectively, among attorneys working for the office, whether to seek the death penalty,¹⁸⁴ other counties leave the decision to the sole discretion of the elected prosecuting attorney.¹⁸⁵

For example, in Cuyahoga County, a death penalty review team of seven assistant prosecutors will examine the case and recommend to the Cuyahoga prosecuting attorney whether a plea offer should be extended that would allow the defendant to avoid the possibility of a death sentence, however, the decision ultimately lies with the prosecuting attorney.¹⁸⁶

¹⁸⁰ OHIO RULES OF PROF'L CONDUCT R. 3.8.

¹⁸¹ OHIO RULES OF PROF'L CONDUCT R. 3.8 cmt.

¹⁸² OHIO RULES OF PROF'L CONDUCT R. 3.8(a), (d).

¹⁸³ OHIO REV.CODE § 2929.04 (West 2007).

¹⁸⁴ Telephone Interview by Halli Brownfield with Ken Bailey, Senior Trial Attorney, Trumbull County Prosecutor's Office (June 13, 2005). In Franklin County, the elected prosecutor, the first assistant prosecutor, and the chief counsel of the grand jury are each involved in the decision to seek the death penalty. Telephone Interview by Halli Brownfield with Ed Morgan, First Assistant Prosecutor, Criminal Division, Franklin County Prosecutor's Office (June 20, 2005).

¹⁸⁵ Telephone Interview by Halli Brownfield with Bill Breyer, Chief Assistant, Hamilton County Prosecutor's Office (June 15, 2005).

¹⁸⁶ Karl Turner, *Death Penalty Sought in Slaying of Pastor; Church Wants Justice With No Execution*, PLAIN DEALER (Cleveland, Ohio), Jan. 14, 2003, at A1, available at

In Montgomery County, prior to seeking an indictment from a grand jury, prosecutors seeking the death penalty in a particular case send a letter informing defense counsel that the State seeks any information that would mitigate against the death penalty.¹⁸⁷ The Montgomery prosecuting attorney's office also gives "intensive scrutiny" to each death-eligible case which has resulted in "divert[ing] some cases from the path to execution before they got started."¹⁸⁸

However, prosecutor offices in Ohio vary as to the factors that the office will consider in deciding whether to seek the death penalty. For example, some prosecution offices have stated that cases warranting the death penalty are the "worst of the worst,"¹⁸⁹ while other offices have stated that it will seek the death penalty in every case in which the offense fits at least one death penalty specification.¹⁹⁰ Prosecution offices also may take into consideration whether the facts surrounding the case indicate overwhelming evidence of guilt.¹⁹¹ The Ohio Rev. Code requires that a prosecutor, "to the extent practicable," consult with the victim in the case before amending or dismissing an indictment, deciding whether or not to agree to a negotiated plea, and prior to trial of the defendant by a judge or jury.¹⁹² While prosecution offices may take into account the wishes of the victim's family and other third parties who are in opposition to the state seeking the death penalty, such offices may decide to seek the death penalty despite the wishes of the victim's family and third parties.¹⁹³ And at least one prosecutor's office has considered the

<http://www.cleveland.com/priest/index.ssf/?/priest/more/104254034752230.html> (last visited Sept. 13, 2007).

¹⁸⁷ Rob Modic, *Death Penalty Cases Get Closer Look*, DAYTON DAILY NEWS (Ohio), May 8, 2005, at A24.

¹⁸⁸ *Id.*

¹⁸⁹ See Telephone Interview by Halli Brownfield with Ken Bailey, Senior Trial Attorney, Trumbull County Prosecutor's Office (June 13, 2005) (on file with author); Telephone Interview by Halli Brownfield with Bill Breyer, Chief Assistant, Hamilton County Prosecutor's Office (June 15, 2005) (on file with author); see also Janice Morse, *Five Butler Cases Could Bring Death Sentences*, CINCINNATI ENQUIRER (Ohio), June 7, 2004, at 1B (quoting Butler County prosecutor Robin Piper, "[s]ome murderers forfeit their right to exist because their crimes are so heinous. If you don't like the death penalty, then get the law changed and I won't seek it anymore.").

¹⁹⁰ Telephone Interview by Halli Brownfield with Ed Morgan, First Assistant Prosecutor, Criminal Division, Franklin County Prosecuting Attorney's Office (June 20, 2005) (on file with author). The Hamilton County Prosecuting Attorney, Joseph Deters, "has stated that he will seek a death penalty indictment in every case that fits the statutory parameters." Joseph Deters, Address at the University of Cincinnati College of Law (Feb. 22, 1997) (quoted in S. Adele Shank, *The Death Penalty in Ohio: Fairness, Reliability, and Justice at Risk – A Report on Reforms on Ohio's Use of the Death Penalty Since the 1997 Ohio State Bar Association Recommendations Were Made*, 63 OHIO ST. L.J. 371, 383 (2002)).

¹⁹¹ See Telephone Interview by Halli Brownfield with Ken Bailey, Senior Trial Attorney, Trumbull County Prosecuting Attorney's Office (June 13, 2005) (on file with author); Telephone Interview by Halli Brownfield with Bill Breyer, Chief Assistant, Hamilton County Prosecuting Attorney's Office (June 15, 2005) (on file with author); see also Mark Curnutte, *Area Known for Tough Stance*, CINCINNATI ENQUIRER (Ohio), Feb. 18, 1999, at 1A (quoting former Hamilton County Prosecuting Attorney Joseph Deters stating that "[g]uilt has to be overwhelming. In 99% of the cases, there is a confession" in the cases in which the Hamilton County Prosecuting Attorney seeks the death penalty).

¹⁹² OHIO REV. CODE § 2930.06(A) (West 2007).

¹⁹³ For example, Hamilton County Prosecuting Attorney, Mike Allen, stated "he has received emotional pleas from families who urge him to avoid seeking execution because they want to avoid feeling re-

identity and character of the victim in its consideration as to whether or not to seek the death penalty, stating that the prosecutor would “think twice” about indicting a defendant on a capital charge if the victim was the “scum of the earth” and if the crime involved drugs.¹⁹⁴

Furthermore, some prosecution offices in Ohio have admittedly indicted defendants on capital charges in cases in which facts do not support the death penalty in order to coerce the defendant into accepting a plea bargain for a lesser crime.¹⁹⁵ For example, one prosecutor stated that “[w]hen a case comes in, and we know there’s no way we’re going to convince a jury to sentence a guy to death, we’ll still charge that way because of the flexibility.”¹⁹⁶ In 1993, a Cuyahoga County prosecuting attorney, when questioned about the practice of over-indicting in order to obtain plea bargains, said it would not happen “anymore.”¹⁹⁷ However, at least one prosecutor in Hamilton County has stated that “it was immoral to use the death penalty as a plea-bargaining tool”¹⁹⁸—and the relatively few instances of plea bargains in Hamilton County bear out this belief.¹⁹⁹

Indeed, evidence of the number of capital indictments, compared to the number of death sentences in capital cases, provides some insight into the degree to which prosecutorial discretion is exercised in charging decisions across the State of Ohio. For example, in 2005, the *Cleveland Plain-Dealer* found that in Cuyahoga County, just 8 percent of offenders charged with a capital offense received a death sentence, while 43 percent of capital-charged offenders in Hamilton County received a death sentence.²⁰⁰

Additionally, the Ohio Death Penalty Assessment Team found that in the Ohio counties in which the highest number of capital indictments were presented between 1981 and 2005, these indictments resulted in death sentences at the following rates (in alphabetical order): (1) Cuyahoga County (Cleveland) had 1,035 capital indictments that resulted in 58 death sentences, a death sentencing rate of 6 percent; (2) Franklin County (Columbus) had 484 capital indictments that resulted in 19 death sentences, a rate of 4 percent; (3) Hamilton County (Cincinnati) had 154 capital indictments that resulted in 58 death

victimized during years of appeals.” Morse, *supra* note 189; *see also* Turner, *supra* note 186. Cuyahoga County Prosecuting Attorney Bill Mason stated that he had sought the death penalty against a man who shot and killed a Franciscan friar in his rectory and then set fire to it, despite the objections of Catholic leaders who oppose the death penalty. *Id.* Mason said the circumstances warranted the death penalty despite the church’s feelings on capital punishment, “I’m completely aware of where the Catholic Church stands on the death penalty, but I feel it is important to treat each case fairly and equally.” *Id.*

¹⁹⁴ Telephone Interview by Halli Brownfield with Ken Bailey, Senior Trial Attorney, Trumbull County Prosecuting Attorney’s Office (June 13, 2005).

¹⁹⁵ Shank, *supra* note 190, at 382.

¹⁹⁶ Jim Nichols, *Law Change Could Keep Murderers Behind Bars Longer*, PLAIN DEALER (Cleveland, Ohio), Mar. 27, 2005, at B4 (quoting Cuyahoga County Prosecutor Bill Mason).

¹⁹⁷ Shank, *supra* note 190, at 383.

¹⁹⁸ *See* Curnutte, *supra* note 191. “Once a capital case indictment is handed down, prosecutors will rarely consider plea-bargain agreements for a reduced sentence.” *Id.* For example, the appellate supervisor in the Cuyahoga County Public Defender’s Office, Donald Green said, “[f]or the most part, our prosecutors have been more willing to deal. The last few years, it’s been someone who shoots a police officer, the brutal or famous killers who no way would get a break.” *Id.*

¹⁹⁹ *See* Factual Discussion, *supra* note 116 and accompanying text.

²⁰⁰ *See* Welsh-Huggins, *supra* note 100.

sentences, a rate of 38 percent; (4) Lucas County (Toledo) had 109 indictments that resulted in 22 death sentences, a rate of 20 percent; and (5) Summit County (Akron) had 90 capital indictments that resulted in 12 death sentences, a rate of 13 percent.²⁰¹

While a varying number of factors may influence the frequency with which a capitally indicted defendant is sentenced to death, it is apparent that great disparity exists across the State of Ohio. Coupled with the fact that there appear to be widely varying protocols and practices governing a prosecutor's decision to seek the death penalty, it is questionable whether all prosecutors in the State of Ohio are exercising their discretion in a way that ensures fair, efficient, and effective enforcement of criminal law. It was not possible to ascertain whether any of Ohio's county prosecuting attorneys have adopted written policies addressing prosecutorial discretion in seeking the death penalty and thus it could not be determined whether the State of Ohio is in compliance with the requirements of Recommendation #1.

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.

Although individual prosecution offices may evaluate witness's statements prior to deciding whether to seek the death penalty,²⁰² the State of Ohio does not require each prosecuting attorney's office to 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.

The State of Ohio permits juries to consider and assess the reliability of confessions and testimony from snitches, informants, and other witnesses that receive a benefit for that testimony. The *Ohio Jury Instructions* identify factors to be considered in assessing the reliability of a witness's testimony. For example, the general instruction pertaining to witness credibility states that:

- (1) You are the sole judges of the facts, the credibility of the witnesses and the weight of the evidence;

²⁰¹ See Office of the Ohio Public Defender, *Capital Indictments and Dispositions 2000-2005*, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007); FORMER DEATH ROW RESIDENTS, *supra* note 108; DEATH SENTENCES PER COUNTY, *supra* note 108; RESIDENTS BY COUNTY, *supra* note 108.; Office of the Ohio Public Defender, *Capital Indictment Index 1981-1999* (on file with author).

²⁰² For example, Ed Morgan of the Franklin County Prosecuting Attorney's Office stated that there is no requirement regarding the type of evidence the office must possess in order to prosecute someone for a capital crime, adding that the best evidence is scientific and that his office looks at the quality of a witness and will take into account if the witness is a "pot-head," "crack-head," or alcoholic. Telephone Interview by Halli Brownfield with Ed Morgan, First Assistant Prosecutor, Criminal Division, Franklin County Prosecuting Attorney's Office (June 20, 2005) (on file with author).

- (2) To weigh the evidence, you must consider the credibility of the witnesses (including the defendant). You will apply the tests of truthfulness which you apply in your daily lives;
- (3) These tests include the appearance of each witness upon the stand; his[/her] manner of testifying; the reasonableness of the testimony; the opportunity [s/]he had to see, hear and know the things concerning which [s/]he testified; his[/her] accuracy of memory; frankness or lack of it; intelligence; interest and bias, if any; together with all the facts and circumstances surrounding the testimony. Applying these tests, you will assign the testimony of each witness such weight as you deem proper;
- (4) You are not required to believe the testimony of any witness simply because he or she was under oath. You may believe or disbelieve all or any part of the testimony of any witness. It is your province to determine what testimony is worthy of belief and what testimony is not worthy of belief.²⁰³

If applicable, an instruction may also be given to the jury on “some things [the jury] may consider in weighing the testimony of identifying witness(es),” including:

- (1) Capacity of the witness, that is, the (age) (intelligence) (defective senses, if any), and the opportunity of the witness to observe;
- (2) The witness’s degree of attention at the time he observed the offender;
- (3) The accuracy of the witness’s prior descriptions (or identification, if any);
- (4) Whether the witness had occasion to observe the defendant in the past;
- (5) The interval time between the event and the identification; and
- (6) All surrounding circumstances under which the witness has identified the defendant (including deficiencies, if any, in lineup, photo display or one-on-one).²⁰⁴

Additionally, the *Ohio Jury Instructions* recommend that the trial court instruct the jury that testimony of an accomplice to the offense be examined “with great caution” and “with grave suspicion,” because the accomplice’s self-interest in testifying may affect the witness’s credibility.²⁰⁵

Although the Ohio jury instructions may remind the jury that it must judge the credibility of each witness, other rules of the Ohio courts limit the defendant’s ability to impeach a witness based on the witness’s bias and/or self-interest.

²⁰³ 4 OHIO JURY INSTRUCTIONS 405.20. This jury instruction, or parts thereof, should be given only if applicable to the facts at issue. 4 OHIO JURY INSTRUCTIONS 405.20 cmt; *see also* 4 OHIO JURY INSTRUCTIONS 503.011(18).

²⁰⁴ 4 OHIO JURY INSTRUCTIONS 405.20.

²⁰⁵ 4 OHIO JURY INSTRUCTIONS 405.41.

For example, the Ohio Rules of Criminal Procedure limit the degree to which a witness may be cross-examined by the opposing party based on the witness's prior inconsistent statement. After completion of a witness's direct examination and on motion of the defendant, the trial court must conduct an *in camera* inspection of the witness's testimony, in the presence and with the participation of defense counsel and the prosecuting attorney, to determine the existence of any inconsistencies between the witness's testimony and any prior statement.²⁰⁶ Defense counsel may cross-examine and/or comment on any inconsistencies in the witness's direct testimony and a prior statement only if the trial court determines that such inconsistencies exist.²⁰⁷ This rule removes from the jury a determination on the credibility of a witness whenever the trial court determines that no "real" inconsistency exists.

Similarly, although a defendant is permitted to cross-examine a witness about plea agreements that have been reached between that witness and the State, the defendant is not permitted to introduce extrinsic evidence of such an agreement when the "deal" is only "speculative."²⁰⁸ This limitation requirement may (1) deprive the defendant of the opportunity to prove that a state witness has perjured himself if the witness has been offered or has agreed to a deal in exchange for his/her testimony; and (2) may lead to a scenario in which a prosecution office intentionally enters into "speculative" deal with a state witness in order to prevent the defendant from effectively impeaching the witness.

Notably, at least one person in Ohio was convicted and sentenced to death due, in large part, to the perjured testimony of a jailhouse informant. In 1976, Gary Beeman was convicted of aggravated murder and sentenced to death after a prosecution witness testified that he saw Beeman with the victim prior to the offense and later with blood on his clothes and with several of the victim's belongings.²⁰⁹ An Ohio Appeals Court reversed the conviction because the trial court had prohibited the defense from cross-examining the witness about the fact that the witness was a prison escapee who other prisoners had overheard brag about committing the murder himself and that the witness put the blame on the defendant because the defendant had "snitched" on him.²¹⁰ Upon

²⁰⁶ OHIO R. CRIM. P. 16(B)(1)(g). A request for an *in camera* inspection may also be made by the prosecution after direct examination of a defense witness. OHIO R. CRIM. P. 16(C)(1)(d).

²⁰⁷ OHIO R. CRIM. P. 16(B)(1)(g); *see also* OHIO R. CRIM. P. 16(C)(1)(d).

²⁰⁸ *State v. Rodriguez*, 509 N.E.2d 952, 955 (Ohio Ct. App. 9th Dist. 1986) (holding that "while . . . it may have been proper for the court to permit evidence of a speculative 'deal' [with the witness/co-defendant], we cannot find prejudicial error in its exclusion," although co-defendant's counsel acknowledged that charges against the co-defendant would be dismissed after his testimony). This rule is in accordance with the Ohio Rules of Evidence which permit cross-examination of a witness on specific instances of conduct if probative of the truthfulness or untruthfulness of a witness; however, other than conviction of crime, the character of a witness may not be proved by extrinsic evidence. OHIO R. EVID. 608(B).

²⁰⁹ *State v. Beeman*, 1978 WL 215910, *1 (Ohio Ct. App. 11th Dist. Apr. 10, 1978) (unreported). Although Beeman was convicted under an Ohio death penalty sentencing scheme later found unconstitutional by the United States Supreme Court, this sentencing scheme does not bear on the fact that the prosecution permitted a prison escapee to testify against the defendant or prejudicial error committed against the defense when the trial court prohibited the defense from cross-examining the State's witness on his prior statements while in prison that he had actually committed the murder. *Id.*

²¹⁰ *Id.*

re-trial, five witnesses testified that they had heard the chief prosecution witness admit to the killing and that the witness wanted to put the blame on the defendant, which led to Beeman's acquittal.²¹¹

Although Beeman was able to produce witnesses who testified that they had heard the prosecution witness confess to the murder, a similarly situated defendant may not be able to produce the kind of evidence available to Beeman at his second trial. The case of Gary Beeman underscores the grave need for Ohio prosecutors to establish procedures for evaluating cases that rely upon the testimony of informants and witnesses who receive a benefit from the State.

While the *Ohio Jury Instructions* allow the jury to evaluate the credibility of witness testimony, no local or statewide policies for evaluating cases which rely upon eyewitness identifications, informants, snitches, or other witnesses receiving a benefit from the State were found. Moreover, Ohio court rules and case law may limit the ability of a defendant to inquire into the credibility of a particular witness. Therefore, it is unclear whether the State of Ohio is in compliance with Recommendation #2.

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.

State and federal law requires the state to disclose evidence favorable to the defendant when such evidence is material either to the defendant's guilt or punishment (*Brady* material).²¹² This includes exculpatory, mitigating, and impeachment evidence.²¹³ The prosecution is also under a duty to reveal any deal or agreement where leniency has been promised to a state witness in exchange for that witness's testimony.²¹⁴

In addition to requiring disclosure of evidence favorable to the defendant,²¹⁵ Rule 16 of the Ohio Rules of Criminal Procedure requires the prosecutor to disclose, upon motion of the defendant, discoverable evidence which is "within the possession, custody, or control

²¹¹ See Death Penalty Information Center, Innocence Cases: 1973-1983, #14: Gary Beeman, available at <http://www.deathpenaltyinfo.org/article.php?did=2338> (last visited Sept. 13, 2007).

²¹² See *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Spirko v. Mitchell*, 368 F.3d 603, 609 (6th Cir. 2004); OHIO R. CRIM. P. 16(B)(1)(f) ("Upon motion of the defendant before trial the court shall order the prosecuting attorney to disclose to counsel for the defendant all evidence, known or which may be known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment.").

²¹³ *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *United States v. Bagley*, 473 U.S. 667 (1985). *Kyles v. Whitley*, 514 U.S. 419 (1995), *Banks v. Dretke*, 540 U.S. 668, 675-76 (1999); *State v. Keene*, 693 N.E.2d 246, 253 (Ohio 1998).

²¹⁴ *Giglio v. United States*, 405 U.S. 150 (1972); *State v. Gavin*, 365 N.E.2d 1263, 1267 (Ohio 1977) ("The jury was entitled to know whether [the witness] had or hoped for a promise of leniency in his own case for the tailoring of his testimony to suit the State's proof in the case on trial."); see also *State v. Reynolds*, 2002 WL 46988, *12-13 (Ohio Ct. App. 7th Dist. Jan. 8, 2002) (unreported opinion).

²¹⁵ See OHIO R. CRIM. P. 16(B)(1)(f).

of the State, or the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney.”²¹⁶ Such evidence that is subject to this requirement includes:²¹⁷

- (1) Any statement of the defendant or a co-defendant, including:
 - (a) Relevant written or recorded statements made by the defendant or co-defendant, or copies thereof;
 - (b) Written summaries of any oral statement, or copies thereof, made by the defendant or co-defendant to a prosecuting attorney or any law enforcement officer; and/or
 - (c) Recorded testimony of the defendant or co-defendant before a grand jury;²¹⁸
- (2) The defendant's prior record;²¹⁹
- (3) Any documents and tangible objects which (1) are material to the preparation of the defendant's defense; (2) are intended for use by the prosecuting attorney as evidence at the trial; or (3) were obtained from or belong to the defendant;²²⁰
- (4) Any reports of examination and tests, including any results or reports of physical or mental examinations and/or scientific tests or experiments, made in connection with the particular case, or copies thereof;²²¹ and
- (5) All witness names and addresses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness(es).²²²

Additionally, the defense may receive a copy a state witness's direct testimony for cross-examination if the trial court determines that inconsistencies exist between the witness's statement on direct examination and a prior statement.²²³

The Ohio Rules of Professional Conduct also require that a prosecutor 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 all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by an order of the

²¹⁶ OHIO R. CRIM. P. 16(B)(1)(a).

²¹⁷ The State has a reciprocal right to move for discovery of documents and tangible objects, reports of examinations and tests, and witness names and addresses, whenever the defense moves for discovery of such items within the possession of the prosecution. *See* OHIO R. CRIM. P. 16(C)(1)(a)-(c).

²¹⁸ OHIO R. CRIM. P. 16(B)(1)(a).

²¹⁹ OHIO R. CRIM. P. 16(B)(1)(b).

²²⁰ OHIO R. CRIM. P. 16(B)(1)(c).

²²¹ OHIO R. CRIM. P. 16(B)(1)(d).

²²² OHIO R. CRIM. P. 16(B)(1)(e). Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. *Id.*

²²³ OHIO R. CRIM. P. 16(B)(1)(g); *see also supra* note 206 and accompanying text.

tribunal.”²²⁴ The Ohio Supreme Court has disciplined at least one prosecutor for failing to disclose discoverable materials.²²⁵

Based upon this information, it appears that the State of Ohio has erected no bars to full and timely disclosure to the defense of all discoverable information, documents, and tangible objects. Ohio law also permits reasonable inspection, copying, testing, and photographing of the disclosed documents and tangible objects. However, some prosecutors still fail to comply with discovery requirements under this framework.

In 1988, the Ohio Supreme Court granted Dale Johnston a new trial after it was discovered that the prosecution had withheld evidence that another person may have been responsible for the deaths of the victims and that the victims may have been at a different location at the time of their deaths than the prosecution alleged.²²⁶ Johnston was later acquitted upon re-trial.²²⁷ Similarly, in *Jamison v. Collins*, the United States Court of Appeals for the Sixth Circuit granted a writ of *habeas corpus* for a death-row inmate due to the suppression of various exculpatory evidence material to Jamison’s guilt and sentencing.²²⁸ The court found that the petitioner’s efforts to seek discovery of exculpatory material at trial were frustrated by the Cincinnati Police Department’s (C.P.D.) use of a “homicide book,” in which the C.P.D. disclosed evidence to the prosecution that inculpated the defendant and purposefully excluded any exculpatory information.²²⁹ Members of the C.P.D. also testified that “they received no training from the Hamilton County Prosecutor’s Office as to what constituted exculpatory evidence.”²³⁰

Although most prosecutors fully and timely comply with all legal, professional, and ethical obligations to disclose evidence, this is not always the case. Therefore, the State of Ohio is only in partial compliance with Recommendation #3.

Based on this information, the Ohio Death Penalty Assessment Team recommends that the courts in the State of Ohio should more vigorously enforce the rule requiring prosecutors to disclose to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates punishment.

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

²²⁴ OHIO RULES OF PROF’L CONDUCT R. 3.8(d).

²²⁵ *Disciplinary Counsel v. Wrenn*, 790 N.E.2d 1195 (Ohio 2003)

²²⁶ *State v. Johnston*, 529 N.E.2d 898, 911-12 (Ohio 1988).

²²⁷ Richard Dieter, *Innocence and the Death Penalty: The Increasing Risk of Executing the Innocent*, available at <http://www.deathpenaltyinfo.org/article.php?scid=45&did=292> (last available Sept. 13, 2007).

²²⁸ *Jamison v. Collins*, 291 F.3d 380 (6th Cir. 2002); see *infra* note 269 and accompanying text.

²²⁹ *Jamison*, 291 F.3d at 384.

²³⁰ *Jamison v. Collins*, 100 F. Supp. 2d 647, 673 (S.D. Ohio 2000).

occurred, and that the prejudicial impact of any such misconduct is remedied.

Attorney Discipline

The willful violation of the Ohio Rules of Professional Conduct by any attorney, including prosecutors, may result in public reprimand, suspension, probation, or disbarment from the practice of law.²³¹ Complaints about an attorney may be filed with the Office of Disciplinary Counsel or an approved local bar association.²³² Once a complaint is filed, an investigating committee or Disciplinary Counsel will gather evidence about the complaint and decide whether the attorney violated the Ohio Rules of Professional Conduct.²³³

If the committee or Disciplinary Counsel finds enough evidence of wrongdoing, it will file a formal complaint charging misconduct against the attorney with the Board of Commissioners on Grievances and Discipline (the Board), which is an independent board appointed by the Supreme Court of Ohio.²³⁴ All complaints are kept confidential until there is sufficient evidence of wrongdoing to file a formal complaint of misconduct with the Board.²³⁵ The Board will hold a public hearing on the complaint and based on the results of this hearing, the Supreme Court of Ohio may discipline the attorney.²³⁶

According to the American Bar Association's Center for Professional Responsibility, the Ohio Office of Disciplinary Counsel and the Board of Commissions on Grievances and Discipline received 6,676 complaints about alleged attorney misconduct in 2004 and had another 506 complaints pending from previous years.²³⁷ Of these cases, 4,430 were summarily dismissed for lack of jurisdiction, 2,752 were investigated, 1,058 were dismissed after investigation, and thirty-nine were found to warrant the filing of formal charges.²³⁸ Furthermore, twenty-eight lawyers were disbarred, fifty-six were suspended, eighteen were suspended on an interim basis, and eleven were publicly reprimanded and/or censured.²³⁹ The Ohio Supreme Court has disciplined at least one prosecutor for

²³¹ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(6)(B).

²³² See Supreme Court of Ohio, Board of Commissioners on Grievances & Discipline FAQ, available at <http://www.sconet.state.oh.us/BOC/faq/default.asp> (last visited Sept. 13, 2007).

²³³ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO 5(4)(C).

²³⁴ SUPREME COURT RULES FOR THE GOV'T OF THE BAR 5(6)(K).

²³⁵ Telephone Interview by Halli Brownfield with Telephone Representative of the Office of Disciplinary Counsel (May 23, 2005) (on file with author).

²³⁶ SUPREME COURT RULES FOR THE GOV'T OF THE BAR 5(8)(A).

²³⁷ ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS 2004, CHART 1, available at <http://www.abanet.org/cpr/discipline/sold/04-ch1.pdf> (last visited Sept. 13, 2007).

²³⁸ *Id.*

²³⁹ ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, SURVEY ON LAWYER DISCIPLINE SYSTEMS, 2004, CHART II: SANCTIONS IMPOSED, at <http://www.abanet.org/cpr/discipline/sold/04-ch2.xls> (last visited Sept. 13, 2006).

failing to disclose discoverable materials.²⁴⁰ Until recently, the Ohio appellate courts did not mention by name the prosecutors who engaged in misconduct.²⁴¹

Additionally, the organization HALT, which evaluates lawyer discipline systems across the country, recently assigned a grade of “D+” to Ohio’s system, based on an assessment of the adequacy of discipline imposed, its publicity and responsiveness efforts, the openness of the process, the fairness of the disciplinary procedures, the amount of public participation, and promptness of follow-up on complaints.²⁴² HALT specifically found that fewer than 20 percent of grievances filed against Ohio attorneys for misconduct are investigated, and fewer than five percent of those investigations result in public or private sanctions.²⁴³

Allegations of Prosecutorial Misconduct

According to the Center for Public Integrity, a study of criminal appeals between 1970 and 2003 found that there were 441 cases in which a defendant alleged prosecutorial error or misconduct in the State of Ohio.²⁴⁴ In seventy-one of these cases, an appeals court ruled that the conduct rose to a level that prejudiced the defendant and reversed or remanded the conviction, sentence, or indictment.²⁴⁵

Between 1984 and 2004, there were 150 capital cases in which a defendant alleged prosecutorial misconduct in the State of Ohio.²⁴⁶ The Ohio Supreme Court found prosecutorial misconduct in 116 of these cases.²⁴⁷ Despite this number, however, the Ohio Supreme Court has reversed a conviction or sentence as a result of such misconduct in only four cases.²⁴⁸ In addition, there are two additional cases in which the federal courts reversed a conviction or death sentence due to prosecutorial misconduct after the Ohio courts had denied relief on that basis.²⁴⁹

²⁴⁰ *Disciplinary Counsel v. Wrenn*, 790 N.E.2d 1195 (Ohio 2003)

²⁴¹ Edward C. Brewer, *Let’s Play Jeopardy: Where the Question Comes After the Answer for Stopping Prosecutorial Misconduct in Death-Penalty Cases*, 28 N. KY. L. REV. 34, 35 (2001).

²⁴² See HALT, OHIO, LAWYER DISCIPLINE 2006 REPORT CARD, available at http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006/pdf/OH_LDRC_06.pdf (last visited Sept. 13, 2007).

²⁴³ See *id.*

²⁴⁴ Center of Public Integrity, Harmful Error – Ohio, available at <http://www.publicintegrity.org/pm/states.aspx?st=OH> (last visited on June 14, 2007).

²⁴⁵ *Id.*

²⁴⁶ Information on file with author.

²⁴⁷ Information on file with author.

²⁴⁸ *State v. Thompson*, 514 N.E.2d 407, 421 (Ohio 1987) (vacating defendant’s death sentence due to prosecutor’s inflammatory, prejudicial arguments and reference to pictures to appeal to juror’s emotions during the penalty phase of trial); *State v. Johnston*, 529 N.E.2d 898, 913 (Ohio 1988) (reversing conviction due to prosecutor’s failure to disclose exculpatory evidence); *State v. Keenan*, 613 N.E.2d 203, 211 (Ohio 1993) (reversing conviction due to prosecutor’s “pattern of misconduct”); *State v. Williams*, 794 N.E.2d 27, 52-54 (Ohio 2003) (vacating defendant’s death sentence due to prosecutorial errors that had the tendency to “urge the jury to consider the most emotional aspects of the crime as if those aspects were legitimate aggravating circumstances”).

²⁴⁹ See *DePew v. Anderson*, 104 F. Supp. 2d 879, 891 (S.D. Ohio 2000) (granting writ of habeas corpus and vacating death sentence due to prosecution’s numerous and intentional improper statements); *Jamison*

This data is especially troubling, given that the Ohio Supreme Court has for some time expressed its concern over the prevalence of prosecutorial misconduct in capital cases. For example, in *State v. DePew*, the Ohio Supreme Court acknowledged “mounting alarm over the increasing incidence of misconduct by prosecutors and defense counsel in capital cases,” and stated that “time and again, we see misconduct which in many cases would appear to be grounds for reversal and the vacating of convictions and/or sentences.”²⁵⁰ The *DePew* Court further proclaimed “that it is henceforth the intention of this court to refer matters of misconduct to the Disciplinary Counsel in those cases where we find it necessary and proper to do so.”²⁵¹ In 1993, the Ohio Supreme Court reiterated its alarm over the increasing incidence of prosecutorial misconduct when it overturned a defendant’s conviction and sentence due to the “aggravated example of such misconduct.”²⁵²

In 2000, the United States District Court for the Southern District of Ohio vacated DePew’s death sentence, admonishing that

Not only did the prosecutor’s misconduct tend to mislead the jury and to prejudice the Petitioner, it was intended to accomplish that end. Moreover, rather than the prosecutorial misconduct being an isolated incident, the prosecution engaged in a series of improper statements. In addition, the prosecution deliberately put the objectionable matters before the jury during the penalty phase of DePew’s trial. That misconduct did not occur by accident.²⁵³

Furthermore, the Ohio Supreme Court has, on at least fifteen occasions between 1981 and 2004, rebuked Hamilton County prosecuting attorneys for misconduct during the guilt and sentencing phase of capital trials.²⁵⁴ The Chief Justice of the Ohio Supreme Court

v. Collins, 291 F.3d 380, 392 (6th Cir. 2002) (affirming federal district court’s judgment and order of re-trial of petitioner in light of prosecution’s suppression of *Brady* material). The United States Supreme Court also vacated and remanded a third case in which the Ohio Supreme Court had upheld a death sentence, in light of *Caldwell v. Mississippi*, due to a statement by the prosecution to the jury that its role was to *recommend* a sentence for the defendant. *Rogers v. Ohio*, 474 U.S. 1002 (1985) (citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). However, upon remand, the Ohio Supreme Court distinguished *Caldwell* and reaffirmed the conviction and death sentence because the prosecutor’s remark was a brief statement of Ohio law, which provides that when the jury recommends a death sentence, the trial court ultimately decides whether to impose the death penalty, and the remark therefore would not distort the jury’s deliberations. *State v. Rogers*, 504 N.E. 2d 52, 59 (Ohio 1986).

²⁵⁰ *State v. DePew*, 528 N.E.2d 542, 556 (Ohio 1988), *aff’d in relevant part and rev’d in part*, 311 F.3d 742 (6th Cir. 2002).

²⁵¹ *Id.* at 557.

²⁵² *See Keenan*, 613 N.E.2d at 207.

²⁵³ *DePew v. Anderson*, 104 F. Supp. 2d 879, 883 (S.D. Ohio 2000).

²⁵⁴ *See State v. Bedford* 529 N.E.2d 913 (Ohio 1988); *State v. Hicks*, 538 N.E.2d 1030 (Ohio 1989); *State v. Combs*, 581 N.E.2d 1071 (Ohio 1991); *State v. Hawkins*, 612 N.E.2d 1227 (Ohio 1993); *State v. Carter*, 651 N.E.2d 965 (Ohio 1995); *State v. Gumm*, 653 N.E.2d 253 (Ohio 1995); *State v. Hill*, 661 N.E.2d 1068 (Ohio 1996); *State v. Wogenstahl*, 662 N.E.2d 311 (Ohio 1996); *State v. Moore*, 689 N.E. 2d 1 (Ohio 1998); *State v. Clemons*, 696 N.E.2d 1009 (Ohio 1998); *State v. Sheppard*, 703 N.E. 2d 286 (Ohio 1998); *State v. Fears*, 715 N.E.2d 136 (Ohio 1999); *State v. Jones*, 739 N.E. 2d 300 (Ohio 2000); *State v. Nields*,

has stated that “Hamilton County has a greater number of [] cases” in which prosecutorial misconduct has been found, and added that “the record speaks for itself.”²⁵⁵

Ohio’s discipline system for attorneys also appears to be ineffective in disciplining prosecutors whose misconduct in capital cases has time and time again been criticized by the Ohio Supreme Court. The Ohio Supreme Court has identified three prosecutors by name who it found to have engaged in misconduct in capital cases;²⁵⁶ however, none of these prosecutors have been subject to discipline and one was later promoted and appointed to a Municipal Judgeship in Summit County, Ohio.²⁵⁷ Similarly, Joseph T. Deters, Prosecuting Attorney for Hamilton County, has overseen an office which has been repeatedly rebuked by the Ohio Supreme Court for misconduct in over fifteen capital cases.²⁵⁸ Nonetheless, since he began work at the Hamilton County Prosecuting Attorney’s Office, Deters was elected to the offices of Hamilton County Clerk of Courts in 1988, Hamilton County Prosecuting Attorney in 1992, Ohio Treasurer of State in 1998, and re-elected as Treasurer of State in 2002.²⁵⁹ Deters was re-elected as Hamilton Prosecuting Attorney as a write-in candidate in 2004, gaining 57 percent of the vote.²⁶⁰ As of 2005, no attorney in the Hamilton County Prosecuting Attorney’s Office has been terminated for misconduct.²⁶¹

Likewise, the conduct of Carmen Marino, who was an assistant prosecutor in Cuyahoga County for thirty years and was head of the major trials division in the Cuyahoga County Prosecuting Attorney’s Office, has been addressed at least fifteen times by courts of appeal in Ohio.²⁶² Marino’s conduct in *State v. Keenan* was cause for the Ohio Supreme Court to reverse a capital defendant’s conviction.²⁶³ To date, Marino has not been subject to discipline.²⁶⁴ Finally, at least one Ohio prosecuting attorney, whose

752 N.E.2d 859 (Ohio 2001); *State v. Lynch*, 787 N.E.2d 1185 (Ohio 2003); *see also* Spencer Hunt, *Criticized Cases*, CINCINNATI ENQUIRER, available at http://www.enquirer.com/editions/2000/09/10/loc_criticized_cases.html (last visited Sept. 13, 2007).

²⁵⁵ Spencer Hunt, *Clouded Cases*, CINCINNATI ENQUIRER, available at http://www.enquirer.com/editions/2000/09/10/loc_clouded_cases.html (last visited Sept. 13, 2007).

²⁵⁶ *See State v. White*, 709 N.E.2d 140, 150 (Ohio 1999) (noting that assistant prosecutor Alison E. McCarty cried during co-counsel’s direct examination); *Fears*, 715 N.E.2d at 146 (expressing “deep concern” about the remarks and misstatements of prosecutors Prem and Russell).

²⁵⁷ *See* Ohio Supreme Court, Attorney Information Search, available at http://www.sconet.state.oh.us/atty_reg/Public_AttorneyInformation.asp (last visited Sept. 13, 2007); *see also* Akron Municipal Court, Judge Allison McCarty, available at http://courts.ci.akron.oh.us/judges/judge_mccarty_a.htm (last visited Sept. 13, 2007).

²⁵⁸ *See supra* note 254 and accompanying text; *see also* Hunt, *supra* note 254.

²⁵⁹ Hamilton County Prosecuting Attorney’s Office, Biography of Joseph T. Deters, available at <http://www.hcpros.org/bio.html> (last visited Sept. 13, 2007).

²⁶⁰ *Id.* It has also been observed that “in nearly one of three cases in which the death penalty was successfully sought in the last decade, the Ohio Supreme Court has had to address questions of misconduct by prosecutors in Hamilton County.” Brewer, *supra* note 241, at 39.

²⁶¹ Telephone Interview by Halli Brownfield with Bill Breyer, Chief Assistant, Hamilton County Prosecuting Attorney’s Office (June 15, 2005).

²⁶² Center for Public Integrity, Harmful Error – Ohio, available at <http://www.publicintegrity.org/pm/states.aspx?st=OH> (last visited Sept. 13, 2007).

²⁶³ *Id.*; *see also Keenan v. State*, 613 N.E.2d 203, 207 (Ohio 1993).

²⁶⁴ *See* Ohio Supreme Court, Attorney Information Search, available at http://www.sconet.state.oh.us/atty_reg/Public_AttorneyInformation.asp (last visited Sept. 13, 2007)

misconduct was rebuked in a capital case, left the practice of law after he was charged with public corruption. The conduct of the Mahoning County prosecuting attorney – James Philomena – was addressed in *State v. Spivey*, in which an Ohio appellate court found that Philomena’s comments in a capital trial “were both racist and offensive,” although the defendant failed to establish that “he was prosecuted due to his race, or in the alternative, that others similarly situated were not prosecuted.”²⁶⁵ In 2000, Philomena pleaded guilty for accepting bribes to fix a drug case and was sentenced to four years in prison.²⁶⁶

Although the State of Ohio has established a procedure by which grievances are investigated and members of the Ohio Bar are disciplined, numerous instances of misconduct call into question the procedure’s effectiveness. Based on this information, the State of Ohio is only in partial compliance with Recommendation #4.

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 State must disclose “[e]vidence known to the police and not the prosecutor” as part of the *Brady* duty to disclose.”²⁶⁷ Rule 16 of the Ohio Rules of Criminal Procedure also requires the prosecution to disclose, upon motion of the defendant, certain evidence that is:

available to, or within the possession, custody, or control of the state, the existence of which is known by or by the reasonable exercise of due diligence may become known to the prosecuting attorney.²⁶⁸

While most police agencies throughout the State of Ohio make diligent efforts to comply with *Brady* and its progeny, as well as Rule 16, at least one serious instance of police misconduct casts doubt on the ability of prosecutors to ensure that law enforcement agencies are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.

In *Jamison v. Collins*, the United States Court of Appeals for the Sixth Circuit granted a writ of *habeas corpus* to a death-row inmate, Derrick Jamison, as a result of the State’s suppression of various pieces of exculpatory evidence.²⁶⁹ The court found that the

²⁶⁵ *State v. Spivey*, 2002 WL 418373, *11 (Ohio Ct. App. 7th Dist. Mar. 15, 2002).

²⁶⁶ John Caniglia, *Former Judge Ordered to Prison for Taking Bribes*, PLAIN DEALER (Cleveland, Ohio), June 28, 2000, at 2B (on file with author). John Caniglia, *Youngstown Businessman Indicted in Bribe Case*, PLAIN DEALER (Cleveland, Ohio), Dec. 28, 2000, at 4B (on file with author).

²⁶⁷ *State v. Connor*, 2000 WL 263397, *3 (Ohio Ct. App. 8th Dist. Mar. 9, 2000) (citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995)).

²⁶⁸ *See, e.g.*, OHIO R. CRIM. P. 16(B)(1)(a).

²⁶⁹ *Jamison v. Collins*, 291 F.3d 380 (6th Cir. 2002).

petitioner's efforts to seek discovery of exculpatory material at trial were complicated because the Cincinnati Police Department (C.P.D.):

routinely selected certain information and evidence from its files that it judged to be relevant to a homicide case and assembled these documents into what was referred to as a "homicide book." Rather than turn over the entire case file to the Hamilton County Prosecutor's Office, the C.P.D. would only provide this "homicide book." According to petitioner, this "homicide book" did not contain all of the evidence gathered by the police. This fact is undisputed by the [State].²⁷⁰

The United States Court of Appeals for the Sixth Circuit found that no exculpatory material was included in the "homicide book,"²⁷¹ and members of the C.P.D. also testified that "they received no training from the Hamilton County Prosecuting Attorney's Office as to what constituted exculpatory evidence."²⁷² Jamison was permitted discovery prior to the federal *habeas corpus* proceeding, in which several pieces of previously undisclosed exculpatory evidence came to light.²⁷³ The Sixth Circuit found that the prosecution was not able to evaluate whether evidence within its possession constituted *Brady* material since "it was intentionally kept in the dark regarding the exculpatory evidence."²⁷⁴ After the Sixth Circuit granted the petitioner's writ of *habeas corpus*,²⁷⁵ the State of Ohio elected not to re-try Jamison.²⁷⁶

²⁷⁰ Jamison v. Collins, 100 F. Supp. 2d 647, 673 (S.D. Ohio 2000).

²⁷¹ Jamison, 291 F.3d at 384.

²⁷² Jamison, 100 F. Supp. 2d at 673.

²⁷³ Id. at 674; see also Death Penalty Information Center, Ohio Inmate Becomes 119th Innocent Person Freed from Death Row, available at <http://www.truthinjustice.org/jamison.htm> (last visited Sept. 13, 2007). This included:

- (1) Evidence relating to petitioner's co-defendant who pleaded guilty to aggravated robbery in connection with the murder and who testified against the petitioner; in fact, the suppressed statements would have contradicted the co-defendant's testimony, undermined the prosecution's theory as to the victim's cause of death; and would have pointed to other possible suspects for the murder;
- (2) Evidence relating to an eyewitness who testified at trial that he had been unable to make an identification when police showed him a photo array following the offense; however, police records indicated that the eyewitness had identified two suspects – neither of which was the petitioner; and
- (3) Discrepancies between the petitioner's physical characteristics and the description of the perpetrators given to police investigators by eyewitnesses.

Id.

²⁷⁴ Jamison, 291 F.3d at 387-88. Notably, the petitioner had been denied relief following his direct appeal and post-conviction appeals in Ohio state courts. See *State v. Jamison*, 552 N.E.2d 180, 193 (Ohio 1990) (affirming defendant's convictions and death sentence on direct appeal); *State v. Jamison*, 1992 WL 333011, *7 (Ohio Ct. App. 1st Dist. Nov. 10, 1992) (unreported opinion) (affirming denial of post-conviction relief). Because the State of Ohio does not generally permit discovery during state post-conviction proceedings and because the petitioner had no way of knowing that the later-disclosed exculpatory evidence existed, the petitioner was not able to put forth a justiciable claim concerning a *Brady* violation during the state post-conviction proceedings. See *State v. Smith*, 2005 WL 1225931, *4 (Ohio Ct. App. 9th Dist. May 25, 2005) (holding that the trial court properly dismissed petitioner's motion for

While most prosecutors take their obligations to disclose exculpatory evidence to the defense seriously and undertake due diligence to ensure that law enforcement agencies comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence, in at least one instance a law enforcement agency purposefully withheld exculpatory evidence from the prosecution. Therefore, the State of Ohio is only in partial compliance with Recommendation #5.

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.

The Ohio Prosecuting Attorneys Association (OPAA) is a private non-profit membership organization, established to “increase the efficiency of its members in the pursuit of their profession; to broaden their interest in the government; to provide cooperation and concerted action on policies which affect the office of Prosecuting Attorney, and to aid in the furtherance of justice.”²⁷⁷ OPAA “promotes the study of law, the diffusion of knowledge, and the continuing education of its members.”²⁷⁸ To that end, the organization has sponsored training programs for its members on capital prosecutions in previous years, including a review of case law on death penalty issues, suggested responses for pre-trial motions and discovery requests, a review of the law and practical considerations in jury selection and at sentencing, and dealing with motions for new trial, appeal, post-conviction and habeas corpus.²⁷⁹ Additionally, OPAA sponsors four training programs for prosecutors each year,²⁸⁰ as well as programs for support staff in

discovery in capital post-conviction proceeding); *State v. Chinn*, 2000 WL 1458784, *7 (Ohio Ct. App. 2d Dist. Aug. 21, 1998) (holding that the civil discovery rules do not apply to post-conviction proceedings because section 2953.21 of the Ohio Revised Code does not explicitly provide for the application of the Ohio Rules of Civil Procedure to post-conviction proceedings); *see also State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 96 (Ohio 1994) (“[W]e hold that a defendant in a criminal case who has exhausted the direct appeals of her or his conviction may not avail herself or himself of [section 149.43 relating to disclosure of public records] to support a petition for post-conviction relief.”) (later codified at OHIO REV. CODE. § 149.43(B)(4) (West 2005)).

²⁷⁵ *Jamison*, 291 F.3d at 392.

²⁷⁶ Death Penalty Information Center, Ohio Inmate Becomes 119th Innocent Person Freed from Death Row, *available at* <http://www.truthinjustice.org/jamison.htm> (last visited Sept. 13, 2007).

²⁷⁷ Ohio Prosecuting Attorneys Association, OPAA Online Mission Statement, *available at* <http://www.ohiopa.org/index.html> (last visited Sept. 13, 2007).

²⁷⁸ *Id.*

²⁷⁹ *See also* Email Correspondence by Sarah Turberville with John Murphy, Executive Director, Ohio Prosecuting Attorneys Association (June 20, 2007).

²⁸⁰ Ohio Prosecuting Attorneys Association, Training, *available at* <http://www.ohiopa.org/spr07.htm> (last visited Sept. 13, 2007). The Spring 2007 training program included training sessions on “Evaluating Witness Demeanor;” “The Reid Nine Steps of Interrogation;” and “False Confession Issues;” including information on the frequency of false confessions, the experts who testify in false confession cases and their positions, the elements which contribute to false confessions, and the role of electronic recording to protect against false confessions. *Id.*; *see also* Telephone Interview by Sarah Turberville with John Murphy, Executive Director, Ohio Prosecuting Attorneys Association (June 19, 2007).

prosecution offices²⁸¹ and a membership organization for investigators within prosecuting attorney offices.²⁸² The Ohio Attorney General also maintains a “team of career prosecutors” who “assist[] county prosecutors with every phase of death penalty prosecutions – from the indictment and trial through every stage of appeal.”²⁸³

Based on this information, the State of Ohio is in compliance with Recommendation #6.

²⁸¹ Ohio Prosecuting Attorneys Association, OPAA Support Staff Training, *available at* <http://www.ohiopa.org/support06.htm> (last visited Sept. 13, 2007).

²⁸² Ohio Prosecuting Attorneys Association, Ohio Prosecuting Attorneys Investigators Association, *available at* <http://www.ohiopa.org/opaia.htm> (last visited Sept. 13, 2007).

²⁸³ Office of the Ohio Attorney General, Prosecuting Crime, *available at* <http://www.ag.state.oh.us/le/prosecuting/index.asp> (last visited Sept. 13, 2007).

CHAPTER SIX

DEFENSE SERVICES

INTRODUCTION TO THE ISSUE

Defense counsel competency is perhaps the most critical factor determining whether a capital offender/defendant will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study 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.¹ 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.² In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that led ultimately 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 Strickland v. Washington, 466 U.S. 668 (1984).

² JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), available at <http://www.thejusticeproject.org/press/reports/broken-system-studies.html> (last visited Sept. 13, 2007).

I. FACTUAL DISCUSSION

A. *Ohio's Indigent Legal Representation System*

Ohio's indigent legal representation system for indigent capital defendants and death-row inmates consists of the Office of the Ohio Public Defender,³ single county public defender offices,⁴ joint county public defender offices⁵, non-profit corporations,⁶ and court-appointed counsel.⁷ The work of these offices and attorneys is supported and/or overseen by the Ohio Public Defender Commission,⁸ county public defender commissions,⁹ and joint county public defender commissions.¹⁰ The indigent defense system used in each county is determined by the local Board of County Commissioners.¹¹

1. The Ohio Public Defender Commission and the Office of the Ohio Public Defender

a. The Ohio Public Defender Commission

The Ohio Public Defender Commission (Commission) was created in 1976 by section 120.01 of the Ohio Rev. Code "to provide, supervise, and coordinate legal representation at state expense for indigent and other persons."¹² The Commission has nine members, four of whom are appointed by the governor and four of whom are appointed by the Supreme Court.¹³ Two of the governor's and two of the Supreme Court's appointees must be from each of the two major political parties.¹⁴ The chair of the Commission is appointed by the governor, with the advice and consent of the Senate.¹⁵ The chair, and at least two of the members appointed by the Supreme Court and at least two members appointed by the governor, must be attorneys licensed to practice law in the State of Ohio.¹⁶

³ OHIO REV. CODE § 120.04 (West 2007).

⁴ OHIO REV. CODE § 120.15 (West 2007).

⁵ OHIO REV. CODE § 120.24 (West 2007).

⁶ OHIO REV. CODE § 120.03(B)(3) (West 2007).

⁷ OHIO REV. CODE § 120.33 (West 2007).

⁸ OHIO REV. CODE § 120.01 (West 2007).

⁹ OHIO REV. CODE § 120.13 (West 2007).

¹⁰ OHIO REV. CODE § 120.23 (West 2007).

¹¹ OHIO REV. CODE §§ 120.13, .23 (West 2007).

¹² OHIO REV. CODE § 120.01 (West 2007).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* Currently, all nine Commission members are attorneys and/or former justices of the Ohio Supreme Court. Office of the Ohio Public Defender, Ohio Public Defender Commission, *available at* http://opd.ohio.gov/comm/cm_commission.htm (last visited Sept. 13, 2007).

The Commission is responsible for appointing the state public defender¹⁷ and establishing rules for the conduct of county and joint county public defender offices and county-appointed counsel systems in the state, including:

- (1) Standards of indigency and minimum qualifications for legal representation by a public defender office or appointed counsel;¹⁸
- (2) Standards for the hiring of outside counsel;
- (3) Standards for contracts for providing counsel between a public defender and law schools, legal aid societies, and non-profit organizations;
- (4) Standards for the qualifications, training, and size of the legal and supporting staff for a public defender, facilities, and other requirements needed to maintain and operate an office of a public defender;
- (5) Minimum caseload standards;
- (6) Procedures for the assessment and collection of the costs of legal representation that is provided by public defenders or appointed counsel;
- (7) Standards and guidelines for determining whether a client is able to make an up-front contribution toward the cost of his/her legal representation;
- (8) Procedures for the collection of up-front contributions from clients who are able to contribute toward the cost of their legal representation; and
- (9) Standards for contracts between a board of county commissioners, a county public defender commission, or a joint county public defender commission and a municipal corporation for the legal representation of indigent persons charged with violations of the ordinances of the municipal corporation.¹⁹

In addition, the Commission must adopt rules prescribing minimum qualifications of counsel appointed under section 120.03 of the Ohio Rev. Code or appointed by the courts and special qualification standards for counsel and co-counsel in capital cases.²⁰

In administering the office, the Commission must approve an annual operating budget and make an annual report to the governor, the general assembly, and the Ohio Supreme Court on the operation of the state public defender's office, county appointed counsel systems, and county and joint county public defenders' offices.²¹ In addition, the Commission may:

- (1) Accept the services of volunteer workers and consultants at no compensation other than reimbursement of actual and necessary expenses;
- (2) Prepare and publish statistical and case studies and other data pertinent to the legal representation of indigent people; and

¹⁷ OHIO REV. CODE § 120.03(A) (West 2007).

¹⁸ In establishing standards of indigency and determining who is eligible for legal representation by a public defender or appointed counsel, the Commission must consider an indigent person to be an individual who at the time his/her need is determined is unable to provide for the payment of an attorney and all other necessary expenses of representation. OHIO REV. CODE § 120.03(B) (West 2007).

¹⁹ *Id.*

²⁰ OHIO REV. CODE § 120.03(C) (West 2007).

²¹ OHIO REV. CODE § 120.03(D)(1) (West 2007).

- (3) Conduct programs having a general objective of training and educating attorneys and others in the legal representation of indigent people.²²

b. The Office of the Ohio Public Defender

The Office of the Ohio Public Defender mainly represents those convicted of criminal offenses on appeal and in state post-conviction proceedings.²³ Approximately one half of the office's staff and resources are devoted to capital cases.²⁴ The Office of the Ohio Public Defender also offers representation at trial when requested by the courts, as well as at parole and probation revocation hearings.²⁵ Other services include technical services, educational programs, and assistance to court-appointed attorneys throughout the state.²⁶

The Office of the Ohio Public Defender is not required to prosecute any appeal, post-conviction remedy, or other proceeding, unless the state public defender is satisfied that there is "arguable merit to the proceedings."²⁷ A court may appoint counsel or allow an indigent person to select counsel to assist the state public defender as co-counsel when "the interests of justice require."²⁸

The Office of the Ohio Public Defender may provide legal representation:

- (1) When designated by the court or requested by a county or joint county public defender, in all courts throughout the State of Ohio, to indigent adults and juveniles who are charged with the commission of an offense or act for which the penalty or any possible adjudication includes the potential loss of liberty;
- (2) To any indigent person who, while incarcerated in any state correctional institution, is charged with a felony offense, for which the penalty or any possible adjudication that may be imposed by a court upon conviction includes the potential loss of liberty;
- (3) To any person incarcerated in any correctional institution of the state, in any matter in which the person asserts that he/she is unlawfully imprisoned or detained;
- (4) On appeal, in any case in which the state public defender has provided legal representation or is requested to do so by a court or joint county public defender;
- (5) When designated by the court or requested by a county or joint county public defender or the director of rehabilitation and correction, in parole and probation revocation matters or matters relating to the revocation of

²² OHIO REV. CODE § 120.03(D)(2)(a)-(c) (West 2007).

²³ Office of the Ohio Public Defender, About the Office of the Ohio Public Defender, *available at* http://opd.ohio.gov/us/US_AboutUs.htm (last visited Sept. 13, 2007).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ OHIO REV. CODE § 120.06(B) (West 2007).

²⁸ OHIO REV. CODE § 120.06(C) (West 2007).

community control or post-release control under a community control sanction or post-release control sanction, unless the state public defender finds that the alleged parole or probation violator or alleged violator of a community control sanction or post-release control sanction has the financial capacity to retain the alleged violator's own counsel; and

- (6) If the state public defender contracts with a county public defender commission, a joint county public defender commission, or a board of county commissioners for the provision of services.²⁹

The state public defender is appointed by the Ohio Public Defender Commission and must be an attorney with at least four years of experience in the practice of law and have been admitted to practice law in the State of Ohio for at least one year prior to his/her appointment.³⁰ The state public defender also must, among other things:

- (1) Maintain a central office in Columbus;
- (2) Appoint assistant state public defenders, all of whom must be attorneys admitted to the practice of law in the State of Ohio, and other personnel necessary for the operation of the state public defender office;
- (3) Supervise the compliance of county public defender offices, joint county public defender offices, and county appointed counsel systems;
- (4) Keep and maintain financial records of all cases handled and develop records for use in the calculation of direct and indirect costs, in the operation of the office, and report periodically, but not less than annually, to the Commission on all relevant data on the operations of the office, costs, projected needs, and recommendations for legislation or amendments to court rules, to improve the criminal justice system;
- (5) Collect all moneys due the State for reimbursement for legal services and institute any actions in court on behalf of the State for the collection of such sums that the state public defender considers advisable;
- (6) Establish standards and guidelines for the reimbursement of counties for the operation of county public defender offices, joint county public defender offices, and county appointed counsel systems and for other costs related to felony prosecutions;
- (7) Establish maximum amounts that the State will reimburse the counties;
- (8) Establish maximum amounts that the State will reimburse the counties for each specific type of legal service performed by a county appointed counsel system;
- (9) Establish an office for the handling of appeal and post-conviction matters; and
- (10) Provide technical aid and assistance to county public defender offices, joint county public defender offices, and other local counsel providing legal representation to indigent persons, including representation and assistance on appeals.³¹

²⁹ OHIO REV. CODE § 120.06(A) (West 2007).

³⁰ OHIO REV. CODE § 120.04(A) (West 2007).

³¹ OHIO REV. CODE § 120.04(B) (West 2007).

In addition, the state public defender may:

- (1) In providing legal representation, conduct investigations, obtain expert testimony, take depositions, use other discovery methods, order transcripts, and make all other preparations which are appropriate and necessary to an adequate defense or the prosecution of appeals and other legal proceedings;
- (2) Seek, solicit, and apply for grants for the operation of programs for the defense of indigent persons from any public or private source, and receive donations, grants, awards, and similar funds from any lawful source;
- (3) Make all the necessary arrangements to coordinate the services of the office with any federal, county, or private programs established to provide legal representation to indigent persons and others, and to obtain and provide all funds allowable under any such programs;
- (4) Consult and cooperate with professional groups concerned with the causes of criminal conduct, the reduction of crime, the rehabilitation and correction of persons convicted of crime, the administration of criminal justice, and the administration and operation of the state public defender's office;
- (5) Accept the services of volunteer workers and consultants at no compensation other than reimbursement for actual and necessary expenses;
- (6) Contract with a county public defender commission or a joint county public defender commission to provide all or any part of the services that a county or joint county public defender is required or permitted to provide, or contract with a board of county commissioners of a county that is not served by a county or joint county public defender commission for the provision of services;³² and
- (7) Authorize persons employed as criminal investigators to attend the Ohio peace officer training academy or any other peace officer training school for training.³³

c. Funding for the Ohio Public Defender Commission and the Office of the Ohio Public Defender

The State of Ohio provides funding for the Ohio Public Defender Commission and the Office of the Ohio Public Defender.³⁴

³² The Office of the Ohio Public Defender has contracted with the following counties to represent its capital defendants at trial: Adams, Athens, Brown, Fayette, Jackson, Meigs, Pickaway, Pike, Ross, Trumbull, and Washington. See Office of the Ohio Public Defender, County Public Defenders, County Indigent Defense Systems, *available at* http://www.opd.ohio.gov/pub/pub_cty.htm (last visited Sept. 13, 2007).

³³ OHIO REV. CODE § 120.04(C) (West 2007).

³⁴ See OHIO LEGISLATIVE SERVICE COMMISSION, FY 2006 – FY 2007 LSC FINAL FISCAL ANALYSIS [hereinafter 2006-2007 FINAL FISCAL ANALYSIS], *available at* <http://www.lbo.state.oh.us/fiscal/budget/FiscalAnalysis/126GA/PUB.pdf> (last visited Sept. 13, 2007).

The State of Ohio disbursed the following amounts to the Ohio Public Defender Commission between 1997 and 2007:

2007	\$64,020,000
2006	\$59,060,000
2005	\$57,863,430
2004	\$53,922,891
2003	\$54,535,402
2002	\$59,846,680
2001	\$61,758,328
2000	\$60,063,023
1999	\$51,772,432
1998	\$50,677,230
1997	\$47,064,320 ³⁵

The Office of the Ohio Public Defender's State Legal Defense Services program, which includes its death penalty representation program, its appeals and post-conviction representation program, its intake and prison legal services program, its juvenile legal services program, and its legal resource center, received \$6,928,156 in fiscal year 2007 and \$6,698,870 in fiscal year 2006.³⁶

Because the Office of the Ohio Public Defender is responsible for reimbursing counties for the partial cost of indigent defense, much of its money ultimately ends up with the counties.³⁷ The Office of the Ohio Public Defender reimbursed counties a total of \$13,532,686 in 2004 and \$13,874,279 in 2005 for the cost of operating county and joint county public defender offices³⁸ and an additional \$785,624 for appointed counsel in capital cases in 2004 and \$725,999 in 2005.³⁹

2. County Public Defender Commissions, Joint County Public Defender Commissions, County Public Defender Offices, and Joint County Public Defender Offices

³⁵ See OHIO PUBLIC DEFENDER COMMISSION, 1999 ANNUAL REPORT 3, available at http://opd.ohio.gov/us/us_1999.pdf (last visited Sept. 13, 2007); OHIO PUBLIC DEFENDER COMMISSION, 2002 ANNUAL REPORT 3, available at http://opd.ohio.gov/us/us_2002.pdf (last visited Sept. 13, 2007); OHIO PUBLIC DEFENDER COMMISSION, 2004 ANNUAL REPORT 3, available at http://opd.ohio.gov/us/us_2004.pdf (last visited Sept. 13, 2007); OHIO PUBLIC DEFENDER COMMISSION, 2005 ANNUAL REPORT 3 [hereinafter 2005 ANNUAL REPORT], available at http://opd.ohio.gov/us/us_2005.pdf (last visited Sept. 13, 2007); OHIO PUBLIC DEFENDER COMMISSION, 2006 ANNUAL REPORT 4 [hereinafter 2006 ANNUAL REPORT], available at http://opd.ohio.gov/us/us_2006.pdf (last visited Sept. 13, 2007); 2006-2007 FINAL FISCAL ANALYSIS, *supra* note 34, at 658.

³⁶ See 2006-2007 FINAL FISCAL ANALYSIS, *supra* note 34, at 660.

³⁷ See 2005 ANNUAL REPORT, *supra* note 35, at 3.

³⁸ See *id.* at 22.

³⁹ See *id.* at 23.

a. County Public Defender Commissions and Joint County Public Defender Commissions

Pursuant to section 120.13 of the Ohio Rev. Code, “[t]he county commissioners in any county may establish a county public defender commission.”⁴⁰ Each county public defender commission has five members, three of whom are appointed by the board of county commissioners and two by the presiding judge of the county court of common pleas.⁴¹ At least two members of each county commission must be attorneys who are admitted to practice law in the State of Ohio.⁴²

Alternatively, the boards of county commissioners in two or more adjoining or neighboring counties may form into a joint board and organize a district for the establishment of a joint county public defender commission.⁴³ Each joint public defender commission must have three members from each participating county, all of whom are appointed by the board of county commissioners of that county.⁴⁴

Each county or joint county public defender commission is responsible for appointing the county or joint county public defender.⁴⁵ Once appointed, the county or joint county public defender may be removed from office only for good cause.⁴⁶ Alternatively, a county or joint county public defender commission may contract with the state public defender or with one or more non-profit organizations to provide the services that a county or joint county public defender would provide.⁴⁷

⁴⁰ OHIO REV. CODE § 120.13(A) (West 2007).

⁴¹ *Id.* If there is only one judge in the court of common pleas of the county, that judge is responsible for the appointment to the county public defender commission. *Id.*

⁴² *Id.*

⁴³ OHIO REV. CODE § 120.23(A) (West 2007). The board of county commissioners of any county within a joint county public defender commission district may withdraw from the district. OHIO REV. CODE § 120.23(H) (West 2007). Upon the withdrawal, all joint county public defender matters relating to the withdrawing county will be transferred to the state public defender, a county public defender, or appointed counsel. *Id.* The agreement to form a joint county public defender commission must provide for the allocation of the proportion of expenses to be paid by each county. OHIO REV. CODE § 120.23(E) (West 2007). This may be based on population, number of cases, or any other factor the commissioners determine to be appropriate. *Id.* The agreement may be amended to provide for a different allocation of the proportion of expenses to be paid by each county. *Id.* The county auditor of the county with the greatest population is designated as the fiscal officer of the joint county public defender district. OHIO REV. CODE § 120.23(F) (West 2007).

⁴⁴ OHIO REV. CODE § 120.23(A) (West 2007).

⁴⁵ OHIO REV. CODE §§ 120.14(A)(1), .24(A)(1) (West 2007).

⁴⁶ *Id.*

⁴⁷ OHIO REV. CODE §§ 120.14(A)(2), .24(A)(2) (West 2007). To do this, the county public defender commission must obtain the approval of the board of county commissioners regarding all provisions that pertain to the financing of defense counsel for indigent people. A contract entered into for this purpose may provide for the payment for the services provided on a per case, hourly, or fixed contract basis. The state public defender and any non-profit organization that contracts with a county public defender commission must comply with all standards established by the rules of the Ohio public defender commission, comply with all standards established by the state public defender, and comply with all statutory duties and other laws applicable to county public defenders. OHIO REV. CODE §§ 120.14(F), .24(F) (West 2007).

If the county or joint county public defender commission hires a county or joint county public defender, he/she is responsible for determining the qualifications and size of the supporting staff and facilities and other requirements needed to maintain and operate the office.⁴⁸ In addition, each county or joint county commission must:

- (1) Recommend an annual operating budget to the county commissioners;
- (2) Make an annual report on the operation of the county or joint county public defender's office to the county commissioners and the Ohio Public Defender Commission;
- (3) Make monthly reports relating to reimbursement and associated case data pursuant to the rules of the Ohio Public Defender Commission to the board of county commissioners and the Ohio Public Defender Commission on the total costs of the public defender's office; and
- (4) Cooperate with the Ohio Public Defender Commission in maintaining the standards established by the rules of the Ohio Public Defender Commission and cooperate with the state public defender in his/her programs providing technical aid and assistance to county systems.⁴⁹

Lastly, the commission may contract with any municipal corporation within the county or counties served by the county or joint county public defender for the county or joint county public defender to provide legal representation for indigent people who are charged with a violation of the ordinances of the municipal corporation.⁵⁰

b. County Public Defenders and Joint County Public Defenders

A county or joint county public defender is appointed by the county or joint county public defender commission for a term of up to four years.⁵¹ The county or joint county public defender must be an attorney with at least two years of experience in the practice of law and have been admitted to the practice of law in the State of Ohio for at least one year prior to his/her appointment.⁵²

⁴⁸ OHIO REV. CODE §§ 120.14(B), .24(B) (West 2007).

⁴⁹ OHIO REV. CODE §§ 120.14(C), .24(C) (West 2007).

⁵⁰ OHIO REV. CODE §§ 120.14(E), .24(E) (West 2007). The following counties have contracted with a private firm or municipal corporation to provide legal representation to indigent people: Ashtabula, Columbiana, Drake, Lucas, Summit, Union, and Van Wert. Office of the Ohio Public Defender, County Public Defenders, County Indigent Defense Systems, *available* at http://www.opd.ohio.gov/pub/pub_cty.htm (last visited Sept. 13, 2007).

⁵¹ OHIO REV. CODE §§ 120.15(A), .25(A) (West 2007). The following counties have county or joint county public defender offices: Ashtabula, Auglaize, Belmont, Carroll, Clark, Clermont, Clinton, Columbiana, Coshocton, Cuyahoga, Erie, Franklin, Geauga, Greene, Hamilton, Hancock, Harrison, Huron, Knox, Lake, Lucas, Medina, Miami, Monroe, Montgomery, Portage, Shelby, Stark, Summit, Tuscarawas, Union, Van Wert, Wayne, and Wood. Office of the Ohio Public Defender, County Public Defenders, County Indigent Defense Systems, *available* at http://www.opd.ohio.gov/pub/pub_cty.htm (last visited Sept. 13, 2007). Some of these counties contract with a private firm or corporation to handle some or all of their public defender services. These counties include Ashtabula, Lucas, Summit, Union, and Van Wert. *Id.*

⁵² OHIO REV. CODE § 120.15(A), .25(A) (West 2007).

The county or joint county public defender is responsible for providing “legal representation to indigent adults and juveniles who are charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty and in post-conviction proceedings” under certain circumstances,⁵³ at every stage of the proceedings following arrest, detention, service of summons, or indictment.⁵⁴ In addition, if the county or joint county public defender commission contracted with the municipal corporation to provide legal representation for indigent persons charged with a violation of an ordinance of the municipal corporation, the county or joint county public defender may provide legal representation.⁵⁵

The county or joint county public defender may ask the state public defender to prosecute any appeal or other remedy before or after conviction that the county or joint county public defender feels is “in the interest of justice,” and may provide legal representation in parole and probation revocation matters and matters relating to the revocation of community control or post-release control under a community control sanction or post-release control sanction.⁵⁶ In addition, the county or joint county public defender may not be required to prosecute any appeal, post-conviction remedy, or other proceeding unless he/she “is first satisfied there is arguable merit to the proceeding.”⁵⁷

Furthermore, the county or joint county public defender must:

- (1) Maintain an office;
- (2) Keep and maintain financial records of all cases handled and develop records for use in the calculation of direct and indirect costs in the operation of the office, and report monthly pursuant to the rules of the Ohio Public Defender Commission to the county or joint county public defender commission and to the Ohio Public Defender Commission on all relevant data on the operations of the office, costs, projected needs, and recommendations for legislation or amendments to court rules, as may be appropriate to improve the criminal justice system;
- (3) Collect all money due from contracts with municipal corporations or for reimbursement for legal services and institute such actions in court for the collection of such sums as he/she considers advisable; and

⁵³ OHIO REV. CODE §§ 120.16(A)(1), .26(A)(1) (West 2007).

⁵⁴ OHIO REV. CODE §§ 120.16(B), .26(B) (West 2007). A court may appoint counsel other than the county or joint county public defender, however, and may allow an indigent person to select the indigent person’s personal counsel to represent him/her. A court also may appoint counsel or allow an indigent person to select the indigent person’s own counsel to assist the county or joint county public defender as co-counsel when the interests of justice require it. OHIO REV. CODE §§ 120.16(E), .26(E) (West 2007).

⁵⁵ OHIO REV. CODE §§ 120.16(A)(2), .26(A)(2) (West 2007).

⁵⁶ OHIO REV. CODE §§ 120.16(C), .26(C) (West 2007).

⁵⁷ OHIO REV. CODE §§ 120.16(D), .26(D) (West 2007).

- (4) Appoint assistant county or joint county public defenders and all other personnel necessary to the functioning of the county public defender's office.⁵⁸

c. Funding for County and Joint County Public Defender Commissions and Offices

Counties provide initial funding for their county and joint county public defender offices, but are eligible for reimbursement by the state for up to 50 percent of all costs and expenses of providing indigent defense services in capital cases.⁵⁹ Reimbursement is administered by the Office of the Ohio Public Defender.⁶⁰ In 2005, counties were reimbursed in capital and non-capital cases at a rate of approximately 31 percent of their costs and expenses.⁶¹

The Ohio Public Defender establishes maximum hourly rates and fee caps that the state will reimburse for indigent defense.⁶² However, each county sets its own fee schedule for capital defense work,⁶³ up to 50 percent of which is reimbursable up to the maximums set by the Office of the Ohio Public Defender.⁶⁴ The maximum rate for capital trial work is \$95 an hour with a fee cap of \$75,000 per case.⁶⁵ The established maximum reimbursable hourly rate for capital appeals work is \$95 per hour with a fee cap of \$25,000 per case.⁶⁶ For capital state post-conviction and *habeas corpus* proceedings, the maximum reimbursable hourly rate is \$95 and the fee cap is \$25,000 per case for services provided in the trial court, the Court of Appeals, and the Ohio Supreme Court.⁶⁷ The Ohio Public Defender will reimburse "extraordinary fees" in cases involving "extraordinarily complex issues, multiple offenses, lengthy trials, or other reasons," although the judge hearing the case must approve of any extraordinary fees before reimbursement will be allowed.⁶⁸

Reimbursement to counties is based on whichever is lower of the state or county rates.⁶⁹

3. Court-appointed or Selected Counsel

⁵⁸ OHIO REV. CODE §§ 120.15(B), .25(B) (West 2007). All assistant county or joint county public defenders must be admitted to the practice of law in the State of Ohio and may be appointed on a full or part-time basis. OHIO REV. CODE §§ 120.15(B)(4), .25(B)(4) (West 2007).

⁵⁹ OHIO REV. CODE § 120.35 (West 2007).

⁶⁰ OHIO REV. CODE §§ 120.18, .28 (West 2007).

⁶¹ See 2005 ANNUAL REPORT, *supra* note 35, at 22 (a chart noting that counties were reimbursed \$13,874,279 of their total expenses of \$44,755,739).

⁶² OHIO REV. CODE § 120.04(B)(8)-(9) (West 2007).

⁶³ OHIO REV. CODE § 120.33(A)(3) (West 2007).

⁶⁴ OFFICE OF THE OHIO PUBLIC DEFENDER, STATE MAXIMUM FEE SCHEDULE FOR APPOINTED COUNSEL REIMBURSEMENT 13, available at http://opd.ohio.gov/reimb/rm_stdn.pdf (last visited Sept. 13, 2007).

⁶⁵ *Id.*

⁶⁶ *Id.* at 14-15.

⁶⁷ *Id.* at 15.

⁶⁸ *Id.* at 16.

⁶⁹ *Id.* at 13.

a. Appointment of Court-appointed or Selected Counsel

Instead of using a county or joint county public defender, a board of county commissioners may adopt a resolution to pay counsel who are selected by the indigent defendant or appointed by the court.⁷⁰ If a board of county commissioners passes such a resolution, the resolution must include those provisions which it considers necessary to provide effective representation of indigent people in any proceeding for which counsel is provided, including provisions for contracts with any municipal corporation under which the municipal corporation will reimburse the county for counsel appointed to represent indigent people charged with violations of the ordinances of the municipal corporation.⁷¹

In a county that adopts a resolution to pay counsel, an indigent person has the right to select his/her own counsel to represent him/her in any proceeding included within the provisions of the resolution or to request the court to appoint counsel to represent the person in such a proceeding.⁷²

b. Funding for Court-appointed or Selected Counsel

The board of county commissioners must establish a schedule of fees either per case or on an hourly basis to be paid to counsel for legal services.⁷³ Prior to setting a fee schedule, the board of county commissioners must ask the bar association or bar associations of the county to submit a proposed fee schedule.⁷⁴

B. Appointment, Qualifications, and Compensation of and Resources Available to Defense Counsel at Trial, on Appeal, and in Post-Conviction Proceedings

1. The Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases

The Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases (Committee) exists pursuant to Rule 20 of the Rules of Superintendence for the Courts of Ohio⁷⁵ and is responsible for:

⁷⁰ OHIO REV. CODE § 120.33(A) (West 2007). The following counties do not have a county or joint county public defender office and use only appointed counsel in capital cases: Allen, Ashland, Butler, Champaign, Crawford, Darke, Defiance, Delaware, Fairfield, Fulton, Gallia, Guernsey, Hardin, Henry, Highland, Hocking, Holmes, Jefferson, Lawrence, Licking, Logan, Lorain, Madison, Mahoning, Marion, Mercer, Morgan, Morrow, Muskingum, Noble, Ottawa, Paulding, Perry, Preble, Putnam, Richland, Sandusky, Scioto, Seneca, Vinton, Warren, Williams, and Wyandot. See Office of the Ohio Public Defender, County Public Defenders, County Indigent Defense Systems, *available* at http://www.opd.ohio.gov/pub/pub_cty.htm (last visited Sept. 13, 2007).

⁷¹ OHIO REV. CODE § 120.33(A) (West 2007).

⁷² OHIO REV. CODE § 120.33(A)(1) (West 2007).

⁷³ OHIO REV. CODE § 120.33(A)(3) (West 2007).

⁷⁴ *Id.*

⁷⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(A).

- (1) Preparing and notifying attorneys of procedures for applying for certification to be appointed counsel for indigent defendants in capital cases;
- (2) Periodically providing all common pleas and appellate court judges and the Ohio Public Defender with a list of all attorneys who are certified to be appointed counsel for indigent capital defendants;
- (3) Periodically reviewing the list of certified counsel, all court appointments give to attorneys in capital cases, and the result and status of those cases;
- (4) Developing criteria and procedures for retention of certification including, but not limited to, mandatory continuing legal education on the defense and appeal of capital cases;
- (5) Expanding, reducing, or otherwise modifying the list of certified attorneys as appropriate and necessary in accord with recertification requirements;
- (6) Reviewing and approving specialized training programs on subjects that will assist counsel in the defense and appeal of capital cases; and
- (7) Recommending to the Supreme Court of Ohio amendments to rules or statutes relative to the defense or appeal of capital cases.⁷⁶

The Committee is comprised of five attorneys,⁷⁷ each of whom must be admitted to the practice of law in Ohio, have represented criminal defendants for at least five years, demonstrate a knowledge of the law and practice of capital cases, and not serve currently as a prosecuting attorney, city director of law, village solicitor, or similar officer or their assistant or employee, or an employee of any court.⁷⁸ No more than two Committee members may reside in the same county and no more than one member may be a judge.⁷⁹ Three members are appointed by a majority vote of all members of the Supreme Court of Ohio, one member is appointed by the Ohio State Bar Association, and one member is appointed by the Ohio Public Defender Commission.⁸⁰ Each term of office is five years.⁸¹

⁷⁶ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(G). The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 that would make the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases also responsible for:

- (1) Certifying attorneys as qualified to be appointed to represent defendants in death penalty cases;
- (2) Monitoring the performance of attorneys providing representation in capital proceedings; and
- (3) Investigating and maintaining records concerning complaints about the performance of attorneys providing representation in death penalty cases and taking appropriate corrective action.

See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

⁷⁷ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(B).

⁷⁸ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(C).

⁷⁹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(D).

⁸⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(B).

⁸¹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(E).

2. Appointment of Counsel

The court is required to appoint counsel for an indigent individual accused or convicted of a capital offense for trial, during the direct appeal, and through state post-conviction proceedings.⁸² The determination of whether a defendant is able to obtain counsel must be made in a recorded proceeding in open court.⁸³

In all cases, the court must advise the defendant at the initial appearance of his/her right to counsel.⁸⁴ If the defendant is entitled to appointed counsel and has not privately retained an attorney, the court must appoint two attorneys who are certified to represent capital defendants under Rule 20 of the Rules of Superintendence for the Courts of Ohio.⁸⁵ If the capital defendant retains one private lawyer to represent him/her, the court will not appoint a second attorney.⁸⁶

Each court or division of a court has adopted a local rule governing trial-level appointments made by the court or division of a court which includes: (1) a procedure for selecting appointees from a list maintained by the court or division of people qualified to serve in the capacity designated by the court or division; (2) a procedure by which all appointments made by the court or division are reviewed periodically to ensure the equitable distribution of appointments among people on each list maintained by the court or division; and (3) the manner of compensation and rate at which people appointed will be compensated for services provided as a result of the appointment.⁸⁷

On appeal, only attorneys who have been certified as appellate counsel, pursuant to Rule 20 of the Rules of Superintendence for the Courts of Ohio, may be appointed.⁸⁸ Each appellate court may adopt local rules establishing additional qualifications for appointment.⁸⁹ Appointments of counsel in these cases are to be distributed “as widely as possible among the certified attorneys in the jurisdiction of the appointing court.”⁹⁰

⁸² OHIO R. CRIM. P. 44(A) (“Where a defendant charged with a serious offense is unable to obtain counsel, counsel shall be assigned to represent him at every stage of the proceedings from his initial appearance before a court through appeal as of right, unless the defendant, after being fully advised of his right to assigned counsel, knowingly, intelligently, and voluntarily waives his right to counsel.”); OHIO REV. CODE § 2953.21(I)(1) (West 2006) (“If a person sentenced to death intends to file a [post-conviction] petition under this section, the court shall appoint counsel to represent the person upon a finding that the person is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel. The court may decline to appoint counsel for the person only upon a finding, after a hearing if necessary, that the person rejects the appointment of counsel and understands the legal consequences of that decision or upon a finding that the person is not indigent.”).

⁸³ OHIO R. CRIM. P. 44(D).

⁸⁴ OHIO REV. CODE § 2937.02(B) (West 2007); OHIO R. CRIM. P. 5(A)(2).

⁸⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(I)(A)-(C).

⁸⁶ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(I)(C).

⁸⁷ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 8(B).

⁸⁸ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 21(B)(1).

⁸⁹ *Id.*

⁹⁰ *Id.*

Indigent death-row inmates who intend to file a state post-conviction petition also are entitled to appointed counsel.⁹¹ The court should appoint counsel after finding that the inmate “is indigent and that the person either accepts the appointment of counsel or is unable to make a competent decision whether to accept or reject the appointment of counsel.”⁹² The court may decline to appoint counsel to an indigent death-row inmate only if it finds, after a hearing on the matter, that the inmate rejects the appointment of counsel and understands the legal consequences of that decision.⁹³ All attorneys appointed to represent death-row inmates in state post-conviction proceedings must be certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent capital defendants or death-row inmates on appeal.⁹⁴ The court may not appoint the same attorney who represented the inmate at trial, unless the inmate and attorney “expressly request the appointment.”⁹⁵

3. Qualifications and Workload Limitations of Appointed Counsel

Rule 20 of the Rules of Superintendence for the Courts of Ohio contains specific qualification requirements for trial counsel (both lead and co-counsel) and appellate counsel.⁹⁶

a. Trial Counsel

⁹¹ OHIO REV. CODE § 2953.21(I)(1) (West 2006).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ OHIO REV. CODE § 2953.21(I)(2) (West 2006).

⁹⁵ *Id.*

⁹⁶ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20. The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 that would significantly strengthen Ohio’s qualification requirements. *See* Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author). In addition to the qualification requirements discussed in this chapter, the proposed rule would require that every attorney representing a capital defendant also should have:

- (1) Demonstrated a commitment to providing high quality legal representation in the defense of capital cases;
- (2) Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
- (3) Skill in the management and conduct of complex negotiations and litigation;
- (4) Skill in legal research, analysis, and the drafting of litigation documents;
- (5) Skill in oral advocacy;
- (6) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- (7) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- (8) Skill in the investigation, preparation, and presentation of mitigating evidence; and
- (9) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

Id.

At least two attorneys must be appointed to represent an indigent defendant charged with a capital crime.⁹⁷ At least one of them must maintain a law office in the State of Ohio and have experience in Ohio criminal trial practice.⁹⁸

In addition, lead counsel must:

- (1) Be admitted to the practice of law in the State of Ohio or admitted to practice *pro hac vice*;
- (2) Have at least five years of civil or criminal litigation or appellate experience;
- (3) Have specialized training, as approved by the Committee, on subjects that will assist him/her in the defense of people accused of capital crimes in the two-year period prior to submitting his/her application for certification;
- (4) Have been lead counsel in the jury trial of at least one capital case or been co-counsel in the trial of at least two capital cases;⁹⁹
- (5) Have completed at least one of the following:
 - (a) Been lead counsel in the jury trial of at least one capital case; or
 - (b) Been co-counsel in the trial of at least two capital cases; and
- (6) Have completed at least one of the following:
 - (a) Been lead counsel in the jury trial of at least one murder or aggravated murder case,
 - (b) Been lead counsel in ten or more criminal or civil jury trials, at least three of which were felony jury trials, or
 - (c) Been lead counsel in either three murder or aggravated murder jury trials, one murder or aggravated murder jury trial and three felony jury trials, or three aggravated or first- or second-degree felony jury trials in a court of common pleas in the three years prior to making the application for certification.¹⁰⁰

Co-counsel must:

- (1) Be admitted to the practice of law in the State of Ohio or admitted to practice *pro hac vice*;
- (2) Have at least three years of civil or criminal litigation or appellate experience;
- (3) Have specialized training, as approved by the Committee, on subjects that will assist counsel in the defense of persons accused of capital crimes in the two years prior to making application for certification;
- (4) Have experience as co-counsel in one murder or aggravated murder trial, experience as lead counsel in one first-degree felony jury trial, or

⁹⁷ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(A)(1).

⁹⁸ *Id.*

⁹⁹ The proposed changes to Rule 20 also would require that this experience have been in jury trials on the side of the defense. See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

¹⁰⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(I)(A)(2).

experience as lead or co-counsel in at least two felony jury or civil jury trials in a court of common pleas in the three years prior to making application for certification.¹⁰¹

An attorney may be certified as lead or co-counsel at trial although he/she does not satisfy the qualification requirements if it can be demonstrated to the Committee that “competent representation will be provided to the defendant.”¹⁰² In making this determination, the Committee may consider whether the attorney has received specialized training, has experience in the trial or appeal of criminal or civil cases, has experience in the investigation, preparation, and litigation of capital cases that were resolved prior to trial, and any other relevant considerations.¹⁰³

In appointing lead and co-counsel, beyond requiring that the attorneys be Rule 20 certified, the court is required to consider the “nature and volume of the workload of the prospective counsel to ensure that counsel, if appointed, could direct sufficient attention to the defense of the case and provide competent representation to the defendant.”¹⁰⁴ Attorneys who accept appointments are instructed to “provide each client with competent representation in accordance with constitutional and professional standards” and may not “accept workloads that, by reason of their excessive size, interfere with the rendering of competent representation or lead to the breach of professional obligations.”¹⁰⁵

To retain certification as lead or co-counsel at trial, a previously certified attorney must complete at least twelve hours of Committee-approved specialized training every two years.¹⁰⁶ At least six of the twelve hours must be devoted to instruction in the trial of capital cases.¹⁰⁷

b. Appellate Counsel

At least two attorneys must be appointed by the court to represent a death-row inmate during the direct appeal process.¹⁰⁸ At least one of them must maintain a law office in the State of Ohio.¹⁰⁹ In addition, to qualify as appellate counsel, both attorneys must:

- (1) Be admitted to the practice of law in the State of Ohio or admitted to practice *pro hac vice*;

¹⁰¹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(I)(A)(3).

¹⁰² RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(C).

¹⁰³ *Id.* The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 that would delete the above-listed considerations for exceptional appointments and instead require that the factors listed in footnotes 96 and 99 be met. *See* Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

¹⁰⁴ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(B)(1).

¹⁰⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(B)(2).

¹⁰⁶ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VII)(A)(1).

¹⁰⁷ *Id.*

¹⁰⁸ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(B)(1).

¹⁰⁹ *Id.*

- (2) Have at least three years of civil or criminal litigation or appellate experience;
- (3) Have specialized training, as approved by the Committee, on subjects that will assist in the defense of people accused of capital crimes in the two years prior to applying for certification;
- (4) Have specialized training, as approved by the Committee, on subjects that will assist counsel in the appeal of cases in which the death penalty was imposed in the two years prior to applying for certification; and
- (5) Have experience as counsel in the appeal of at least three felony convictions in the three years prior to applying for certification.¹¹⁰

An attorney may be certified as appellate counsel even if he/she does not satisfy the qualification requirements if it can be demonstrated to the Committee that “competent representation will be provided to the defendant.”¹¹¹ In making this determination, the Committee may consider whether the attorney has received specialized training, has experience in the trial or appeal of criminal or civil cases, has experience in the investigation, preparation, and litigation of capital cases that were resolved prior to trial, and any other relevant considerations.¹¹²

In appointing appellate counsel, the court is required to consider the “nature and volume of the workload of the prospective counsel to ensure that counsel, if appointed, could direct sufficient attention to the appeal of the case and provide competent representation to the defendant.”¹¹³ Attorneys who accept appointments are instructed to “provide each client with competent representation in accordance with constitutional and professional standards” and may not “accept workloads that, by reason of their excessive size, interfere with the rendering of competent representation or lead to the breach of professional obligations.”¹¹⁴

To retain certification as appellate counsel, a previously certified attorney must complete at least twelve hours of Committee-approved specialized training every two years.¹¹⁵ At least six of the twelve hours must be devoted to instruction in the appeal of capital cases.¹¹⁶

c. Post-Conviction Counsel

¹¹⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(B)(2). There is no differentiation between the qualifications required of lead and co-counsel at the appellate level. *See id.*

¹¹¹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(C). The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 that would delete the above-listed considerations for exceptional appointments and instead require that the factors listed in footnotes 96 and 99 be met. *See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).*

¹¹² *Id.*

¹¹³ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 21(B)(2).

¹¹⁴ *Id.*

¹¹⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VII)(A)(1).

¹¹⁶ *Id.*

Section 2953.21(I)(2) of the Ohio Rev. Code requires that all attorneys appointed to represent death-row inmates in state post-conviction proceedings must be certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent capital defendants or death-row inmates on direct appeal.¹¹⁷ The court may not appoint the same attorney who represented the inmate at trial, unless the inmate and attorney “expressly request the appointment.”¹¹⁸

4. Training Requirements for Appointed Counsel and Training Sponsors

a. Training Requirements

The Ohio Supreme Court requires all attorneys to participate in a minimum of 24 hours of approved continuing legal education (CLE) every two years.¹¹⁹ Two and one half of the 24 hours must be related to professional conduct and include thirty minutes of instruction on substance abuse, sixty minutes of instruction related to the Code of Professional Responsibility, and sixty minutes related to professionalism.¹²⁰

In addition to the general CLE requirements for all attorneys, those trial, appellate, and post-conviction counsel litigating death penalty cases who are certified under Rule 20 to take such appointments are required to attend, within the last two years, continuing legal education programming involving twelve hours of specialized training, at least six hours of which must be dedicated to instruction in the trial of capital cases for trial counsel (both lead and co-counsel) and in the appeal of capital cases for appellate counsel.¹²¹ There are no special training requirements for capital post-conviction counsel and they are required only to receive the training mandated for trial or direct appeal lawyers.

b. Specialized Training Program Requirements

The Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases (Committee) is responsible for reviewing and approving specialized training programs on subjects that will assist attorneys in the defense and appeal of capital cases.¹²² To be approved by the Committee, a death penalty trial seminar must include instruction on the investigation, preparation, and presentation of a death penalty trial,¹²³ including specialized training in the following areas: an overview of current developments in death penalty litigation; death penalty voir dire; trial phase presentation; use of experts in the trial and penalty phase; investigation, preparation, and presentation of mitigation;

¹¹⁷ OHIO REV. CODE § 2953.21(I)(2) (West 2006).

¹¹⁸ *Id.*

¹¹⁹ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR R. 10(3)(A)(1).

¹²⁰ *Id.*

¹²¹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VII)(A)(1). The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 that would reduce the number of specialized training hours for certified appellate counsel to six. *See* Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

¹²² RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(G)(6).

¹²³ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(A)(1).

preservation of the record; counsel's relationship with the accused and the accused's family; and death penalty appellate and post-conviction litigation in state and federal courts.¹²⁴

A death penalty appeals seminar must include instruction on the appeal of a case in which the death penalty has been imposed,¹²⁵ including specialized training in the following areas: an overview of current developments in death penalty law; completion, correction, and supplementation of the record on appeal; reviewing the record for unique death penalty issues; motion practice for death penalty appeals; preservation and presentation of constitutional issues; preparing and presenting oral argument; unique aspects of death penalty practice in the courts of appeals, the Supreme Court of Ohio, and the United States Supreme Court; the relationship of counsel with the appellant and the appellant's family during the course of the appeals; and procedure and practice in collateral litigation, extraordinary remedies, state post-conviction litigation, and federal habeas corpus litigation.¹²⁶

5. Compensation Available to Defense Counsel in Capital Cases

a. Salaries of Public Defenders

The salaries paid to public defenders should be "equivalent to salaries paid to similar positions within the justice system."¹²⁷ The pay ranges set by each board of county commissioners for the county or joint county public defender and his/her staff may not

¹²⁴ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(A)(2). The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 that would eliminate the above-listed areas of training and instead require training in the following areas:

- (1) Relevant state, federal, and international law;
- (2) Pleading and motion practice;
- (3) Pretrial investigation, preparation, and theory development regarding trial and sentencing;
- (4) Jury Selection;
- (5) Trial Preparation and presentation, including the use of experts;
- (6) Ethical considerations particular to capital defense representation;
- (7) Preservation of the record and of issues for post-conviction review;
- (8) Counsel's relationship with the client and his/her family;
- (9) Post-conviction litigation in state and federal courts;
- (10) The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
- (11) The unique issues relating to the defense of those charged with committing capital offenses when under the age of 18;
- (12) Death penalty appellate and post-conviction litigation in state and federal courts.

See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

¹²⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(B)(1).

¹²⁶ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(B)(2).

¹²⁷ OHIO ADMIN. CODE § 120-1-15(B) (2007).

exceed the pay ranges set for comparable positions in the Office of the Ohio Public Defender.¹²⁸

b. Compensation of Appointed Private Defense Counsel

All private court-appointed attorneys are paid at an hourly rate set by the board of county commissioners in the county in which they are appointed.¹²⁹ Various counties set differing rates of compensation. For example, Cuyahoga County pays an hourly rate of \$45 an hour in death penalty cases, with a cap of \$25,000 for two attorneys handling a capital trial and \$12,500 for one attorney.¹³⁰ Attorneys may be paid up to \$5,000 for handling a capital appeal, up to \$170 for handling state post-conviction proceedings, and up to \$200 for handling *habeas corpus* or clemency proceedings.¹³¹ Extraordinary fees are allowed if approved by the judge.¹³²

Franklin County pays an hourly rate of \$50 an hour for out-of-court time and \$60 for in-court time for appointed trial attorneys, with a cap of \$25,000 for one capital defense attorney and \$50,000 for two.¹³³ The maximum fee is \$500 in state post-conviction proceedings and \$300 in *habeas corpus* and clemency proceedings.¹³⁴ Extraordinary fees are allowed “in complex cases with the consent of the Assigned Judge.”¹³⁵

In Allen County, the hourly rate in capital cases for out-of-court time is \$40 per hour and for in-court time \$50 an hour, up to a maximum of \$20,000 for two trial attorneys and \$10,000 for one attorney.¹³⁶ The hourly rate for capital appeals is \$40 per hour for out-of-court time and \$50 an hour for in-court time, up to a maximum of \$7,500.¹³⁷ The hourly rate for state post-conviction and *habeas corpus* counsel is \$45 an hour for in- and out-of-court time, up to a cap of \$10,000 in capital cases.¹³⁸ Extraordinary fees are allowed if approved by the judge, up to 50% of the fee caps otherwise prescribed.¹³⁹

c. Resources Available to Appointed Lawyers

An appointing court should provide an appointed lawyer, “as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator, mitigation specialists, mental health professional, and other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings including, but not limited

¹²⁸ OHIO REV. CODE § 120.40 (West 2007).

¹²⁹ OHIO REV. CODE § 120.33(A)(3) (West 2007).

¹³⁰ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(B).

¹³¹ *Id.*

¹³² *Id.*

¹³³ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.15.

¹³⁴ *Id.*

¹³⁵ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.16-.17.

¹³⁶ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(1).

¹³⁷ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(3).

¹³⁸ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(4).

¹³⁹ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(7).

to, determinations relevant to competency to stand trial, a not guilty by reason of insanity plea, cross-examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for and presentation of mitigating evidence in the sentencing phase of the trial.”¹⁴⁰ The Office of the Ohio Public Defender has five criminal investigators and four mitigation specialists on staff.¹⁴¹ Each Board of County Commissioners has the authority to place caps on the amount of money that the court may provide for expenses, including experts.¹⁴²

Various counties have differing rules regarding the resources that are available to appointed counsel in capital cases. For example, Cuyahoga County will reimburse

¹⁴⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(D). In addition, the Ohio Revised Code states that “[i]f the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant’s counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120 of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant’s counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made as provided in this section.” OHIO REV. CODE § 2929.024 (West 2007).

The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 that would greatly increase these requirements and would require that “lead counsel should assemble a defense team” “[a]s soon as possible after designation” by consulting with co-counsel and “[s]electing and making any appropriate contractual agreements with non-attorney team members in such a way that the team” includes:

- (1) At least on mitigation specialist and one fact investigator;
- (2) At least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and
- (3) Any other members needed to provide high quality legal representation.

See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author). In addition, counsel should:

- (1) Demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for review;
- (2) 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;
- (3) Have the right to have such services provided by persons independent of the government; and
- (4) 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.

Id.

¹⁴¹ Office of the Ohio Public Defender, About the Death Penalty Division, *available at* http://opd.ohio.gov/dp/dp_DeathPenalty.htm (last visited Sept. 13, 2007).

¹⁴² OHIO REV. CODE § 2941.51(A) (West 2007).

appointed counsel for select expenses,¹⁴³ but sets significant limitations, including that investigators may not be hired in capital cases without the court's permission and limits payment to \$25 per hour, up to \$500, except in extraordinary cases when the fee is capped at \$1,000.¹⁴⁴ In addition, the court "shall not consider approval of or payment for and shall not approve or pay any amount for any expert or specialist relating to psychological, mitigation or similar services" unless the attorney files an application providing the name of the individual sought to be provided for research, investigation, testimony, and/or consultation, the hourly rate to be charged and the estimated number of hours, any additional expenses anticipated in connection with these services, and the total projected expense anticipated for each individual.¹⁴⁵

In Franklin County, "services reasonably necessary for the proper representation of an indigent defendant" are reimbursable in capital cases."¹⁴⁶ These expenses include costs for investigators, interpreters, experts, photocopies, psychological evaluations, polygraphs, transcripts, and other expenses "reasonably related and necessary to the defense of an indigent defendant."¹⁴⁷ These expenses do not include travel time, mileage and parking, office overhead, daily copies of transcripts, or depositions.¹⁴⁸ The assigned judge must approve expenses above \$100 and the assigned judge and the administrative judge must approve expenses in excess of \$2,500.¹⁴⁹

In Allen County, allowable expenses include expert witness fees, polygraph examination costs, and investigation costs, but without prior approval of the court, exclude parking and meal expenses, long distance telephone calls, and copying and postage.¹⁵⁰ Regardless of what expenses are approved, the maximum amount of reimbursement for expenses, without prior approval of the court, is capped at \$2,000.¹⁵¹

The Office of the Ohio Public Defender will "reimburse up to 50 percent of certain expenses reasonably related and necessary to the defense of an indigent client. These expenses include travel, transcripts, expert services, and certain other miscellaneous expenses," including polygraph examinations, phone calls, and photocopies.¹⁵²

B. Appointment, Qualifications, Training and Resources Available to Attorneys Handling Capital Federal Habeas Corpus Petitions

¹⁴³ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(B).

¹⁴⁴ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(E).

¹⁴⁵ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(G).

¹⁴⁶ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13(b).

¹⁴⁷ *Id.*

¹⁴⁸ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13(a).

¹⁴⁹ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13.

¹⁵⁰ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(2).

¹⁵¹ *Id.*

¹⁵² OFFICE OF THE OHIO PUBLIC DEFENDER, STANDARDS AND GUIDELINES FOR APPOINTED COUNSEL REIMBURSEMENT 7 [hereinafter STANDARDS AND GUIDELINES], available at http://opd.ohio.gov/reimb/rm_stdnd.pdf (last visited Sept. 13, 2007).

Pursuant to section 3599 of Title 18 of the United States Code, a death-sentenced inmate petitioning for federal *habeas corpus* in one of Ohio’s two federal judicial districts—the Northern or Southern—is entitled to appointed counsel and other resources if he/she “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.”¹⁵³ In Ohio, attorneys from the Office of the Ohio Public Defender often are appointed to handle these cases.¹⁵⁴

According to section 3599 of Title 18 of the United States Code, inmates entitled to an appointed attorney must be appointed “one or more” qualified attorneys prior to the filing of a formal, legally sufficient federal *habeas* petition.¹⁵⁵ To be qualified for appointment, at least one attorney must have been admitted to practice in the United States Court of Appeals for the Sixth Circuit for at least five years, and have had at least three years of experience in handling felony appeals in the Sixth Circuit.¹⁵⁶ For “good cause,” the court may appoint another attorney “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.”¹⁵⁷ Attorneys appointed pursuant to section 3599 are entitled to compensation at a rate of not more than \$125 per hour for both in-court and out-of-court work.¹⁵⁸

In addition to counsel, the court also may authorize the attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.¹⁵⁹ The fees and expenses paid for these services may not exceed \$7,500 in any case, unless the court authorizes payment in excess of this limit.¹⁶⁰

C. Appointment and Qualifications of Attorneys Representing Death-Sentenced Clemency Petitioners

The State of Ohio does not require that the court appoint counsel to death-row inmates petitioning for clemency. Despite this, federal law provides that a death row inmate has the right to petition the federal court to have counsel represent him/her in state clemency proceedings.¹⁶¹

¹⁵³ 18 U.S.C. § 3599(a)(2) (2006).

¹⁵⁴ See Office of the Ohio Public Defender, Death Penalty Division, *available at* http://www.opd.ohio.gov/dp/dp_DeathPenalty.htm (last visited Sept. 13, 2007) (“Death Penalty Division attorneys focus on three areas of appeal: Direct Appeal, Post-Conviction, and Federal Habeas Corpus.”).

¹⁵⁵ 18 U.S.C. § 3599(a)(2) (2006); *see also* *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

¹⁵⁶ 18 U.S.C. § 3599(c) (2007).

¹⁵⁷ 18 U.S.C. § 3599(d) (2007).

¹⁵⁸ 18 U.S.C. § 3599(g)(1) (2007).

¹⁵⁹ 18 U.S.C. § 3599(f) (2007).

¹⁶⁰ 18 U.S.C. § 3599(g)(2) (2007).

¹⁶¹ 18 U.S.C. § 3599(e) (2007).

Attorneys who are appointed by the federal court to represent death-row inmates in clemency proceedings are not subject to additional qualification standards nor are they required to participate in any specialized training.

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. 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):

Ohio law specifically provides counsel to indigent defendants at trial, on direct appeal, and through state post-conviction.¹⁶²

Counsel must be appointed prior to trial,¹⁶³ and there is a requirement that counsel be appointed in post-conviction proceedings prior to the death-row inmate filing a post-conviction petition.¹⁶⁴ Under federal law, however, if new counsel is appointed for habeas corpus proceedings, he/she must be appointed prior to the filing of a formal, legally sufficient habeas petition.¹⁶⁵ Ohio has a special proceeding¹⁶⁶ for addressing appellate ineffective assistance of counsel claims. There is no provision requiring appointment of counsel for initiating these proceedings although counsel will be appointed if the court accepts jurisdiction of the matter.¹⁶⁷ Appellate counsel must be appointed for appeals of right only and thus there is no requirement that counsel be provided for presenting a memorandum in support of jurisdiction to the Ohio Supreme Court after direct appeal to the district court of appeals in post-conviction proceedings or for presenting a petition for writ of certiorari to the United States Supreme Court in any case.¹⁶⁸

The adequacy of compensation provided to defense counsel in capital cases will be discussed in Recommendation #4.

¹⁶² See *supra* note 82 and accompanying text.

¹⁶³ OHIO R. CRIM. P 44(A).

¹⁶⁴ OHIO REV. CODE § 2953.21(I)(1) (West 2006); Telephone Interview by Deborah Fleischaker with Joe Wilhelm, Chief Counsel, Death Penalty Division, Office of the Ohio Public Defender (Apr. 2, 2007).

¹⁶⁵ See *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

¹⁶⁶ OHIO SUP. CT. RULES OF PRACTICE R. XI(6); OHIO R. APP. P. 26 (governing cases before 1995). This procedure was first explained in *State v. Mumahan*, 584 N.E.2d 1204 (Ohio 1992).

¹⁶⁷ OHIO SUP. CT. RULES OF PRACTICE R. XI(6)(F)(1); OHIO R. APP. P. 26(B)(6)(a) (governing cases before 1995).

¹⁶⁸ The majority opinion in *Ross v. Moffit*, 417 U.S. 600, 618 (1974), observed that “[t]he right to seek certiorari in [the U.S. Supreme Court] is not granted by any State, and exists by virtue of federal statute with or without the consent of the State whose judgment is sought to be reviewed.” 417 U.S. at 617.

- a. **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 guarantee the appointment of two attorneys at trial and during the direct appeal, but only one attorney during state post-conviction and federal habeas corpus proceedings. In addition, state and federal law provide for defense access to an investigator and mitigation specialist at every stage of the legal proceedings. The qualification requirements for attorneys appointed in all legal proceedings will be discussed below in Recommendation #2.

Appointment of Counsel

In all capital cases in Ohio, the court must appoint at least two attorneys to represent the indigent defendant at trial: one to serve as lead counsel and the other to serve as co-counsel.¹⁶⁹ On direct appeal, a capital defendant also is entitled to at least two attorneys to assist in his/her defense.¹⁷⁰ Despite making counsel available for indigent capital post-conviction petitioners, the State does not mandate the appointment of two attorneys for post-conviction proceedings.¹⁷¹ Similarly, indigent death-row inmates seeking federal habeas corpus relief are not entitled to two attorneys; federal law mandates only that an indigent defendant be represented by “one or more attorneys.”¹⁷²

Access to Investigators and Mitigation Specialists

An attorney appointed to represent an indigent capital defendant or a death-row inmate should be provided, but is not guaranteed, access to investigators and mitigation specialists at trial, on appeal, during state post-conviction proceedings, and through federal habeas corpus proceedings.¹⁷³ There are no provisions providing for access to investigators and mitigation specialists in clemency proceedings.

The procedures for obtaining such experts and their compensation will be discussed below under Subsection c.

- b. **At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or**

¹⁶⁹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(I)(A)-(C), II(A)(1).

¹⁷⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(B)(1).

¹⁷¹ OHIO REV. CODE § 2953.21(I)(1) (West 2007) (the statute makes no reference to the number of counsel to be appointed and says only that “the court shall appoint counsel”). Death-row inmates who raise the issue of mental retardation for the first time in state post-conviction proceedings, however, are entitled to two attorneys. *See State v. Burke*, 2005 WL 3557641, *11-12 (Ohio Ct. App. 10th Dist. Dec. 30, 2005) (unreported). The Office of the Ohio Public Defender uses two attorneys to represent death-row inmates in state post-conviction proceedings as a matter of course. Telephone Interview by Deborah Fleischaker with Joe Wilhelm, Chief Counsel, Death Penalty Division, Office of the Ohio Public Defender (Apr. 2, 2007).

¹⁷² 18 U.S.C. § 3599(a)(2); *see also* *McFarland v. Scott*, 512 U.S. 849, 856-57 (1994).

¹⁷³ *See supra* notes 140-152 and accompanying text.

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 Ohio does not require at least one member of the defense team to be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. The Rules of Superintendence for the Courts of Ohio, however, do require trial and appellate counsel to undergo specialized training in the trial and appeal of capital cases.¹⁷⁴ In fulfilling this requirement, an attorney could—but is not mandated to—receive training on mental or psychological disorders or impairments. In fact, continuing legal education courses on mental disorders are available in the State of Ohio. Various approved training programs for capital counsel, sponsored by the Ohio Association of Criminal Defense Lawyers, the Ohio State Bar Association, and the Cuyahoga County Bar Association, have included one-hour presentations on mental retardation, mental illness, and the effects of a capital defendant’s mental illness on a capital trial.¹⁷⁵ These included presentations on the importance of mental health experts, mental illness mitigation, various mental illnesses from which a capital defendant may be suffering, the insanity defense, litigating mental retardation issues, and using the *Atkins* decision to prohibit the imposition of the death penalty and as mitigation.¹⁷⁶

Additionally, through the Ohio Supreme Court’s “Advisory Committee on the Mentally Ill in the Courts,” some counties in Ohio have created a mental health docket¹⁷⁷ and, in those counties, counsel representing defendants assigned to the mental health docket must be specially trained in the recognition and effects of mental illness in criminal defendants.¹⁷⁸ Although there is no indication that a capital case has been assigned to the mental health docket, a capital defendant could be represented by an attorney who is qualified to try capital cases and is specially trained to represent defendants before the mental health court.¹⁷⁹

¹⁷⁴ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VII)(A)(1).

¹⁷⁵ See Marge Koosed, *Death Penalty Seminar Sessions Discussing Mental Health Issues 1995-present*, (on file with author).

¹⁷⁶ See *id.*

¹⁷⁷ Telephone Interview by Christine Waring with Kevin Lottes, Supreme Court of Ohio Specialized Dockets in Columbus, Ohio (Apr. 20, 2007).

¹⁷⁸ *Id.*; see, e.g., CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(I)(A)(4) (requiring training for defense counsel in mental health court regarding mental health issues in defendants).

¹⁷⁹ Telephone Interview by Christine Waring with Chris Hill, Bailiff for Judge Timothy McMonagle, Chair of the Mental Health Docket in Cuyahoga County, Ohio (Apr. 27, 2007). Despite the fact that the State of Ohio currently does not require at least one member of the defense team to be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments, the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 of the Rules of Superintendence for the Courts of Ohio that would require lead defense counsel to assemble a defense team that includes at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author). Furthermore, the proposed rule would provide that “[c]ounsel should have the right to have such services provided by persons independent of the government.” *Id.*

- c. **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.**
 - i. **Counsel should have the right to seek such services through *ex parte* proceedings, thereby protecting confidential client information.**
 - ii. **Counsel should have the right to have such services provided by persons independent of the government.**
 - iii. **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.**

In the State of Ohio, attorneys representing indigent defendants charged with or convicted of capital offenses have the right to ask for access to investigators and experts through all legal proceedings except clemency, and the costs associated with retaining investigators and experts are covered by state and county funds, subject to a variety of limitations.¹⁸⁰

Public defenders, assistant public defenders, and private court-appointed attorneys who are appointed to represent defendants charged with capital crimes should be provided “as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator, mitigation specialists, mental health professional, and other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings including, but not limited to, determinations relevant to competency to stand trial, a not guilty by reason of insanity plea, cross-examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for and presentation of mitigating evidence in the sentencing phase of the trial.”¹⁸¹ Each county’s Board of

¹⁸⁰ While not currently binding, the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 of the Rules of Superintendence for the Courts of Ohio to state that “[c]ounsel should 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.” *Id.* Furthermore, the proposed Rule would state that counsel “should have the right to have such services provided by persons independent of the government” and that “[c]ounsel 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.” *Id.*

¹⁸¹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(D). In addition, the Ohio Revised Code states that “[i]f the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant’s counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120 of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant’s counsel to obtain the necessary services

County Commissioners, however, has the authority to place limitations on the type of reimbursable expenses and caps on the amount of money that the court will provide for such expenses.¹⁸²

An indigent defendant “is entitled only to the basic and integral tools necessary to ensure a fair trial”¹⁸³ and it is within the “sound discretion” of the trial court to decide whether to grant funds for the defendant’s expert and investigative assistance.¹⁸⁴ According to the Ohio Supreme Court, the United States Constitution and Ohio law “requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial.”¹⁸⁵ The Ohio Supreme Court also has required that a defendant show that there was no alternative means of fulfilling the same function that the requested expert would provide.¹⁸⁶ “[D]ue process does not require the provision of expert assistance relevant to an issue that is not likely to be significant at trial” and that due process does not “require that an indigent defendant be provided all the assistance that a wealthier counterpart might buy.”¹⁸⁷

Notably, the Ohio Supreme Court has held that trial and post-conviction courts should rely on professional evaluations to determine if a capital defendant or death-row inmate is mentally retarded and therefore cannot be subject to the death penalty.¹⁸⁸ Furthermore, an Ohio Court of Appeals also has held that a capital defendant “must be allowed access to the resources that might permit him to rebut the presumption [that his/her I.Q. was over seventy]”¹⁸⁹ and the defendant must be afforded a “full and fair opportunity to litigate his[/her] claim of mental retardation as a complete bar” to a death sentence.¹⁹⁰ Experts and funds should be provided during post-conviction proceedings if the petitioner has demonstrated substantive grounds for relief based on *Atkins*, regardless of whether he/she raised the issue of mental retardation as mitigation at the penalty phase of the original trial.¹⁹¹

and order that payment of the fees and expenses for the necessary services be made as provided in this section.” OHIO REV. CODE § 2929.024 (West 2007).

¹⁸² OHIO REV. CODE § 2941.51(A)-(B) (West 2007).

¹⁸³ *State v. Mason*, 694 N.E.2d 932, 943 (Ohio 1998).

¹⁸⁴ *Id.* at 943-44.

¹⁸⁵ *Id.* at 944.

¹⁸⁶ *State v. Tibbetts*, 749 N.E.2d 226, 241 (Ohio 2001).

¹⁸⁷ *Mason*, 694 N.E.2d at 943.

¹⁸⁸ *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002).

¹⁸⁹ *State v. Bays*, 824 N.E.2d 167, 171-72 (Ohio Ct. App. 2d Dist. 2005).

¹⁹⁰ *State v. Hughbanks*, 823 N.E.2d 544, 547 (Ohio Ct. App. 1st Dist. 2004).

¹⁹¹ *See State v. Carter*, 813 N.E.2d 78, 82 (Ohio Ct. App. 1st Dist. 2004); *see also Bays*, 824 N.E.2d at 172 (noting the difference between expert testimony for mitigation purposes and expert testimony offered for *Atkins* purposes; finding that the trial court abused its discretion in denying an indigent defendant’s request for funds to specifically address his *Atkins* claim). However, a capital defendant is generally prohibited from presenting expert testimony during post-conviction proceedings to challenge a competency finding made at trial.

The Office of the Ohio Public Defender has five criminal investigators and four mitigation specialists on staff,¹⁹² and consequently does not need to seek court approval to use these resources. Some county and joint county public defender offices also appear to have investigators and mitigation specialists on staff. In some counties, however, private court-appointed attorneys are required to obtain approval from the court before retaining an investigator or expert, while in other counties the attorneys are authorized to retain the services of an investigator and expert for up to a certain amount of money without obtaining court approval.

For example, Cuyahoga County does not allow the hiring of investigators in capital cases without the court's permission¹⁹³ and does not allow the court to "consider approval of or payment for" or "approve or pay any amount for any expert or specialist relating to psychological, mitigation or similar services" unless the attorney files an application providing the name of the individual sought to be provided for research, investigation, testimony, and/or consultation, the hourly rate to be charged and the estimated number of hours, any additional expenses anticipated in connection with these services, and the total projected expense anticipated for each individual.¹⁹⁴ In Franklin County, court approval by the assigned judge is required for expert expenses above \$100 and court approval is required by the assigned judge and the administrative judge for expenses in excess of \$2,500.¹⁹⁵ In Allen County, allowable expenses include expert witness fees and investigation costs, but the county caps reimbursement for all expenses, without prior approval of the court, at \$2,000.¹⁹⁶

The United States Supreme Court in *Ake v. Oklahoma*¹⁹⁷ noted that defense counsel requests for expert assistance should be addressed *ex parte*.¹⁹⁸ Even so, there is no statewide provision requiring that the accused be allowed to seek expert services in *ex parte* proceedings. In *State v. Peeples*, an Ohio Court of Appeals found that the trial court had not committed any error in overruling the defendant's motion for an *ex parte* hearing regarding his request for funds to hire experts, stating that "[w]hile an *ex parte* hearing may be necessary at times to protect counsel's defense strategy, . . . there is no indication that such a hearing was necessary in this case."¹⁹⁹ Furthermore, counties may provide for the provision of an *ex parte* hearing in their local rules, although most do not. In Cuyahoga County, for example, applications for the hiring of experts "may be filed under seal and/or *ex parte* with the prior permission of the trial judge to whom the case is assigned."²⁰⁰

¹⁹² Office of the Ohio Public Defender, Death Penalty Division, About the Death Penalty Division, available at http://opd.ohio.gov/dp/dp_DeathPenalty.htm (last visited Sept. 13, 2007).

¹⁹³ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(E).

¹⁹⁴ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(G).

¹⁹⁵ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13.

¹⁹⁶ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(2).

¹⁹⁷ 470 U.S. 68 (1985).

¹⁹⁸ *Id.* at 82-83.

¹⁹⁹ *State v. Peeples*, 640 N.E.2d 208, 212 (Ohio Ct. App. 4th Dist. 1994).

²⁰⁰ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(G).

Despite the fact that attorneys often are required to request approval for funds for investigators and experts, it appears that once these attorneys obtain approval, they are authorized to hire investigators and experts of their choosing.

An indigent death-row inmate petitioning for federal habeas corpus relief may request and the court may authorize the inmate's attorney(s) to obtain investigative, expert, or other necessary services on behalf of the inmate.²⁰¹ The fees for these services may not exceed \$7,500 in any case, unless the court certifies payment in excess of this limit.²⁰²

Conclusion

Under state and federal law, individuals charged with a capital felony or sentenced to death must be appointed two attorneys at trial and on appeal, but only are guaranteed one attorney in state post-conviction and federal habeas corpus proceedings. Furthermore, the State of Ohio does not guarantee counsel to indigent defendants in clemency proceedings, on petitions for re-opening based on ineffective assistance of appellate counsel claims, on appeals not of right, or in preparation of petitions for writs of certiorari. No member of the defense team is required to be qualified by experience or training to screen for mental or psychological disorders or defects, and many public defenders and private court-appointed attorneys in capital cases may not be provided with the resources to retain the investigators and experts necessary to provide high quality legal representation.

The State of Ohio, therefore, is only in partial compliance with Recommendation #1.

B. Recommendation # 2

Qualified Counsel (Guideline 5.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

- a. **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.**
- b. **In formulating qualification standards, the jurisdiction should ensure:**
 - i. **That every attorney representing a capital defendant has:**
 - (a) **Obtained a license or permission to practice in the jurisdiction;**
 - (b) **Demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases;**
 - and
 - (c) **Satisfied the training requirements set forth in Guideline 8.1.**
 - ii. **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**

²⁰¹ 18 U.S.C. § 3599(f) (2007).

²⁰² 18 U.S.C. § 3599(g)(2) (2007).

ensure that the pool includes sufficient numbers of attorneys who have demonstrated:

- (a) Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;**
- (b) Skill in the management and conduct of complex negotiations and litigation;**
- (c) Skill in legal research, analysis, and the drafting of litigation documents;**
- (d) Skill in oral advocacy;**
- (e) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;**
- (f) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;**
- (g) Skill in the investigation, preparation, and presentation of mitigating evidence; and**
- (h) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.**

Rule 20 of the Rules of Superintendence for the Courts of Ohio provides minimum qualification standards for attorneys handling death penalty cases at trial, on appeal, and during state post-conviction proceedings.²⁰³ The qualification standards contained in Rule 20 differ for trial (lead and co-counsel) and appellate attorneys, but apply to all court-appointed attorneys handling death penalty cases at trial, on appeal, and during state post-conviction proceedings, including public defenders and private court-appointed attorneys. There are no state qualification standards for attorneys handling death penalty cases in clemency proceedings, petitions for re-opening based on ineffective assistance of appellate counsel claims, appeals not of right, or preparation of petitions for writs of certiorari.²⁰⁴

While Rule 20 relies on quantitative measures of experience to determine whether an attorney is qualified to serve as lead trial counsel, trial co-counsel, or appellate counsel, as required by Guideline 5.1, it does not set forth any qualitative measures that require these attorneys to demonstrate a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases.²⁰⁵

²⁰³ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20.

²⁰⁴ The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 of the Rules of Superintendence for the Courts of Ohio that, if implemented, would significantly strengthen the minimum qualification standards. *See* Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

²⁰⁵ Although in appointing counsel, the court is required to consider the “nature and volume of the workload of the prospective counsel to ensure that counsel, if appointed, could direct sufficient attention to the defense of the case and provide competent representation to the defendant.” RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(B)(1).

Rule 20 does contain specific qualification requirements for lead trial counsel and co-counsel and appellate counsel. The qualification requirements for lead counsel are more expansive than the requirements for co-counsel at trial and on appeal, but still include only some of the requirements contained in Guideline 5.1. For example, in addition to requiring a certain number of years of experience, Rule 20 requires lead trial attorneys to be admitted to the practice of law in the State of Ohio or admitted to practice *pro hac vice*; have specialized training on subjects that will assist him/her in the defense of people accused of capital crimes in the two-year period prior to submitting his/her application for certification; have been lead counsel in the jury trial of at least one capital case or been co-counsel in the trial of at least two capital cases; and have been lead counsel in the jury trial of at least one murder or aggravated murder case, lead counsel in ten or more criminal or civil jury trials, at least three of which were felony jury trials, or lead counsel in either three murder or aggravated murder jury trials, one murder or aggravated murder jury trial and three felony jury trials, or three aggravated or first- or second-degree felony jury trials in a court of common pleas in the three years prior to making the application for certification.²⁰⁶ However, Rule 20 does not require lead trial attorneys to have demonstrated skills in the areas contained in Guideline 5.1, such as legal research, analysis, and writing. The training required by Rule 20 also falls short of the requirements of Guideline 5.1 (which will be discussed in detail under Recommendation #5). Further, the qualification requirements are more expansive for lead trial counsel than for co-counsel at trial and lead appellate counsel; Rule 20 also does not require these attorneys to have demonstrated skills in the areas contained in Guideline 5.1.²⁰⁷

Under the proposed Rule 20 changes, the State of Ohio would require all capital defense lawyers to demonstrate “a commitment to providing high quality legal representation in the defense of capital cases.” See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

²⁰⁶ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(A)(2).

²⁰⁷ Additionally, an attorney may be certified as lead or co-counsel if he/she does not satisfy the qualification requirements if it can be demonstrated to the Committee that “competent representation will be provided to the defendant.” RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(C). In making this determination, the Committee may consider whether the attorney received specialized training that will assist him/her, has experience in the trial or appeal of criminal or civil cases, has experience in the investigation, preparation, and litigation of capital cases that were resolved prior to trial, and any other relevant considerations. *Id.*

Under the proposed Rule 20 changes, the State of Ohio would require “every attorney representing a capital defendant” to have:

- (1) Demonstrated a commitment to providing high quality legal representation in the defense of capital cases;
- (2) Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
- (3) Skill in the management and conduct of complex negotiations and litigation;
- (4) Skill in legal research, analysis, and the drafting of litigation documents;
- (5) Skill in oral advocacy;
- (6) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- (7) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

At all levels—at trial, on appeal, and through post-conviction proceedings in Ohio—the main criteria for qualification of counsel in death penalty cases is experience. Experience, however, does not automatically translate into high quality legal representation. For example, in *Glenn v. Tate*, the United States Court of Appeals for the Sixth Circuit affirmed the finding of ineffective assistance of counsel, as a result of defense counsel’s failure to raise during mitigation that Glenn’s school classified him as mentally retarded, that he committed his crime at “the instigation of an older brother,” that he was “highly susceptible to suggestion by people he admired,” and that he “suffered from global brain damage sustained before he was born.”²⁰⁸ As a result, the prosecution was able to present “uncontradicted expert evidence that the offense was not the product of mental retardation or organic brain disease.”²⁰⁹

Rule 20 does not ensure that unqualified lawyers will not be appointed to represent capital defendants. In fact, of the 239 Ohio Supreme Court capital cases decisions between 1984 and 2004, ineffective assistance of counsel claims were raised in 150. While only two cases were successful, the court criticized defense counsel for his/her performance in an additional 10 cases (though it found no ineffective assistance warranting relief), the dissent would have granted relief based on ineffective assistance of counsel in two other cases, and the court found that counsel’s representation was deficient, but that the deficiency was harmless error in a final two cases.

In *Hamblin v. Mitchell*, for example, one of Hamblin’s appointed trial defense counsel had no experience with death penalty cases, later was disbarred,²¹⁰ and “admitted . . . that he did essentially nothing by way of preparation for the penalty phase of this trial.”²¹¹ The court explained that his lawyer “did not try to find out any family history or any facts concerning defendant’s psychological background and mental illness, nor did counsel seek any advice or expert consultation for the penalty phase of the case. Despite a large body of mitigating evidence, counsel did nothing to discover what was available or introduce it in evidence.”²¹²

In *Richey v. Mitchell*, the U.S. Court of Appeals for the Sixth Circuit found that both trial and appellate counsel “failed to grasp that the State did not prove (and, indeed, had not even attempted to prove) that Richey specifically intended to cause the death of [the victim], as was required by the aggravated felony murder statute.”²¹³ In assessing this

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- (8) Skill in the investigation, preparation, and presentation of mitigating evidence; and
 - (9) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

²⁰⁸ 71 F.3d 1204, 1205 (6th Cir. 1995).

²⁰⁹ *Id.*

²¹⁰ 354 F.3d 482, 485 (6th Cir. 2003).

²¹¹ *Id.* at 490.

²¹² *Id.* at 485.

²¹³ 395 F.3d 660, 680-81 (6th Cir. 2005). The U.S. Supreme Court later vacated this decision and remanded the case, in part, because the United States Court of Appeals for the Sixth Circuit “improperly

claim of ineffective assistance of counsel, the court concluded, “that when both text and precedent compelled the conclusion, and the conclusion would have gutted, as a matter of law, the primary charge and death sentence, counsel was deficient for failing to raise it.”²¹⁴ Furthermore, the court found that there was “a massive failure by trial counsel in his handling of the expert witness”²¹⁵ and that “[t]he record indicates that a competent arson expert—fully informed and supervised, and using the methods available to him at the time of trial—would have all but demolished the State’s scientific evidence, and with it a large part of the case against Richey.”²¹⁶

Making matters even worse, relief for Richey was complicated because his appellate attorney’s supervisor was friends with Richey’s trial counsel and instructed him not to pursue any ineffective assistance of counsel claims.²¹⁷ As explained by Richey’s appellate counsel:

[My supervisor], who is a personal friend of [trial counsel], listened to my views regarding the prejudicial deficiencies of [trial counsel's] representation of Mr. Richey, and responded by saying that I should do the best job I could without raising the ineffective assistance of trial counsel issues. [My supervisor] did not tell me that the ineffectiveness arguments I wanted to make lacked merit. He simply told me not to make them [he] left me with no doubt that if I were to push on the ineffective assistance of counsel issues, he would not be pleased and my job rating would suffer.²¹⁸

Conclusion

Although the State of Ohio has established qualification standards for attorneys handling death penalty cases at trial, on appeal, and in state post-conviction proceedings, these standards fall well below those required by Guideline 5.1. Furthermore, the State of Ohio fails to provide counsel to indigent death-row inmates in clemency proceedings.

Thus, the State of Ohio is only in partial compliance with Recommendation #2.

C. Recommendation # 3

The selection and evaluation process should include:

- a. 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, American Bar Association Policy**

adjudicated” the ineffective assistance of counsel claim “by relying on evidence that was not properly presented to state habeas courts.” *Bradshaw v. Richey*, 546 U.S. 74 (2005).

²¹⁴ *Id.* at 681.

²¹⁵ *Id.* at 686.

²¹⁶ *Id.* at 687.

²¹⁷ *Id.* at 668.

²¹⁸ *Id.* at 668-69.

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:

- i. A defender organization that is either:**
 - (a) 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**
 - (b) 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**
- ii. An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.**

The State of Ohio does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent defendants charged with or convicted of a capital felony. Rather, this responsibility is split up among a number of entities, including the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, the Ohio Public Defender Commission, county and joint county public defender commissions, and the judiciary. In most cases, the judiciary is vested with the authority to appoint counsel in capital cases.

While the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases (Committee) has no appointing authority, it is responsible for, among other things, preparing and notifying attorneys of procedures for applying for certification to be appointed counsel for indigent defendants in capital cases; developing criteria and procedures for retention of certification including, but not limited to, mandatory continuing legal education on the defense and appeal of capital cases; expanding, reducing, or otherwise modifying the list of certified attorneys as appropriate and necessary in accord with recertification requirements; and reviewing and approving specialized training programs on subjects that will assist counsel in the defense and appeal of capital cases.²¹⁹ Unfortunately, the Committee is only partially independent of

²¹⁹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(G). The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 that would make the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases also responsible for:

- (1) Certifying attorneys as qualified to be appointed to represent defendants in death penalty cases;
- (2) Monitoring the performance of attorneys providing representation in capital proceedings; and
- (3) Investigating and maintaining records concerning complaints about the performance of attorneys providing representation in death penalty cases and taking appropriate corrective action.

See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

the judiciary, as three of its five members are appointed by a majority vote of the members of the Ohio Supreme Court.²²⁰

The Ohio Public Defender Commission (Commission) also is only partially independent of the judiciary as four of its nine members are appointed by the Supreme Court.²²¹ The Commission must “provide, supervise, and coordinate legal representation at state expense for indigent and other persons”²²² and is responsible for appointing the state public defender,²²³ establishing rules for the conduct of county and joint county public defender offices and county-appointed counsel systems in the state,²²⁴ and adopting rules prescribing minimum qualifications for counsel appointed under section 120.03 of the Ohio Rev. Code or appointed by the courts and special qualification standards for counsel and co-counsel in capital cases.²²⁵

Furthermore, county public defender commissions also are only partially independent of the judiciary since two of the five members on a county public defender commission are appointed by the presiding judge of the county court of common pleas.²²⁶ Joint county public defender commissions, on the other hand, are independent of the judiciary as each county is responsible for appointing three members, all of whom are appointed by the board of county commissioners.²²⁷ Each county or joint county public defender commission is responsible for appointing the county public defender²²⁸ or contracting with the state public defender or with one or more nonprofit organizations to provide the services that a county or joint county public defender would provide.²²⁹

Each court or division of a court is required to have adopted a local rule governing trial-level appointments made by the court or division of a court which includes: (1) a procedure for selecting appointees from a list maintained by the court or division of people qualified to serve in the capacity designated by the court or division; (2) a procedure by which all appointments made by the court or division are reviewed periodically to ensure the equitable distribution of appointments among people on each list maintained by the court or division; and (3) the manner of compensation and rate at

²²⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(B).

²²¹ OHIO REV. CODE § 120.01 (West 2007).

²²² *Id.*

²²³ OHIO REV. CODE § 120.03(A) (West 2007).

²²⁴ OHIO REV. CODE § 120.03(B) (West 2007).

²²⁵ OHIO REV. CODE § 120.03(C) (West 2007).

²²⁶ OHIO REV. CODE § 120.13(A) (West 2007).

²²⁷ OHIO REV. CODE § 120.23(A) (West 2007).

²²⁸ OHIO REV. CODE §§ 120.14(A)(1), .24(A)(1) (West 2007).

²²⁹ OHIO REV. CODE §§ 120.14(A)(2), .24(A)(2) (West 2007). To do this, the county public defender commission must obtain the approval of the board of county commissioners regarding all provisions that pertain to the financing of defense counsel for indigent people. A contract entered into for this purpose may provide for the payment for the services provided on a per case, hourly, or fixed contract basis. The state public defender and any nonprofit organization that contracts with a county public defender commission must comply with all standards established by the rules of the Ohio public defender commission, comply with all standards established by the state public defender, and comply with all statutory duties and other laws applicable to county public defenders. OHIO REV. CODE §§ 120.14(F), .24(F) (West 2007).

which people appointed will be compensated for services provided as a result of the appointment.²³⁰ Different counties have created differing appointment procedures. For example, in Franklin County, “[a]ppointment of either the Public Defender or private counsel shall be made . . . from the Master Appointment List . . . maintained by the Franklin County Court of Common Pleas”²³¹ with one appointment to private counsel for every two appointments to the public defender.²³² In comparison, Cuyahoga County assigns 35 percent of its cases for which counsel are selected for indigent defendants to the office of the Cuyahoga County Public Defender and the remaining 65 percent of cases are split between the Cuyahoga County Public Defender and private counsel.²³³

On appeal, the Ohio Supreme Court will appoint the Ohio Public Defender or other counsel to represent an unrepresented indigent death-row inmate or will order the trial court to appoint counsel.²³⁴ In state post-conviction proceedings, the court again is responsible for appointing counsel.²³⁵

The training, selection, and monitoring of counsel will be discussed in detail in Subparts b and c.

b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.

As indicated above, the State of Ohio does not have a statewide independent appointing authority. However, the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases is responsible for maintaining a list of certified attorneys and for providing the list to judges on county courts of common pleas, courts of appeal, the Ohio Supreme Court, and the Ohio Public Defender.²³⁶

c. The statewide independent appointing authority should perform the following duties:

As indicated above, the State of Ohio does not vest in one statewide independent appointing authority the responsibility for training, selecting, and monitoring attorneys who represent indigent defendants charged with or convicted of a capital felony. Rather, this responsibility is divided among a number of entities, including the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, the Ohio Public Defender Commission, county and joint county public defender commissions, and the judiciary.

i. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

²³⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 8(B)(1)-(3).

²³¹ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77. 01.

²³² FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.08.

²³³ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(C).

²³⁴ OHIO SUP. CT. RULES OF PRACTICE R. XIX(2).

²³⁵ OHIO REV. CODE § 2953.21(I)(1) (West 2007).

²³⁶ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(G).

As indicated above, the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases is responsible for preparing and notifying attorneys of procedures for applying for certification to be appointed counsel for indigent defendants in capital cases and expanding, reducing, or otherwise modifying the list of certified attorneys as appropriate and necessary in accord with recertification requirements.²³⁷ As of July 2007, there were 168 qualified lead trial counsel, 187 qualified trial co-counsel, and 108 qualified appellate lawyers.²³⁸

ii. Draft and periodically publish rosters of certified attorneys;

The Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases maintains a registry of attorneys qualified to handle death penalty cases at trial, on appeal, and in state post-conviction proceedings. The Commission's registry is available on the Ohio Supreme Court's website²³⁹ and the Commission is responsible for providing the list to judges on county courts of common pleas, courts of appeal, the Ohio Supreme Court, and the Ohio Public Defender.²⁴⁰

iii. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

The Ohio Supreme Court—rather than a statewide independent appointing authority—has adopted qualification requirements for trial counsel (both lead and co-counsel) and appellate counsel in death penalty cases. Specifically, the Ohio Supreme Court promulgated Rule 20 of the Rules of Superintendence for the Courts of Ohio, which delineates qualification standards for lead and co-counsel at trial and on appeal.²⁴¹ The Ohio General Assembly adopted qualification requirements for post-conviction counsel in death penalty cases. Specifically, section 2953.21(I)(2) of the Ohio Rev. Code requires that all attorneys appointed to represent death row inmates in state post-conviction proceedings be certified to represent capital defendants at trial or on appeal under Rule 20 of the Rules of Superintendence for the Courts of Ohio.²⁴²

²³⁷ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(G). Under proposed changes to Rule 20 of the Rules of Superintendence for the Courts of Ohio, the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases would be responsible for certifying attorneys as qualified to be appointed to represent defendants in death penalty cases. See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

²³⁸ See Supreme Court of Ohio, Attorneys Certified to be Court-Appointed Counsel For Indigent Defendants in Capital Cases, available at http://www.sconet.state.oh.us/Atty-Svcs/Rule20/R20_AtorneyFullList.asp (last visited Sept. 13, 2007).

²³⁹ *Id.*

²⁴⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(G).

²⁴¹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20.

²⁴² OHIO REV. CODE § 2953.21(I)(2) (West 2007).

iv. Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

The responsibility for assigning attorneys to represent indigent defendants in death penalty cases is vested solely in the judiciary. Under section 2953.21(I)(1) of the Ohio Rev. Code and Rule 44 of the Ohio Rules of Criminal Procedure, the court must appoint counsel for an indigent individual accused or convicted of a capital offense for trial, during the direct appeal, and through state post-conviction proceedings.²⁴³ Significantly, in appointing trial and appellate counsel, the court is required to consider the “nature and volume of the workload of the prospective counsel to ensure that counsel, if appointed, could direct sufficient attention to the defense of the case and provide competent representation to the defendant.”²⁴⁴ Attorneys who accept appointments may not “accept workloads that, by reason of their excessive size, interfere with the rendering of competent representation or lead to the breach of professional obligations.”²⁴⁵

A judicial appointing authority has caused some concern in the State of Ohio, including that appointments sometimes are awarded as a result of local connections and/or campaign contributions and not on the basis of an attorney’s qualifications. For example, one attorney is quoted as saying that “[a]ppointments in Hamilton County have gone to those who contribute or those whose relatives contribute to the judges You have to be an old boy, a product of the system here.”²⁴⁶

In Cuyahoga County, “about one dollar in every four contributed to sitting judges has come from defense attorneys who accept indigent-case assignments” and “[s]everal judges have received more than 40 percent of their campaign money from those attorneys.”²⁴⁷ “[W]hile there is no direct evidence that lawyers buy assignments with contributions, some of the most generous contributors to judicial election campaigns are also among the leaders in case assignments.”²⁴⁸ In fact, “[r]ecords show that 12 of the top 20 indigent-fee earners are also among the top 20 attorney contributors to judges.”²⁴⁹

The potential conflict of interest inherent in this situation is illustrated in the case of Common Pleas Judge Shirley Strickland Saffold and her appointment of Richard Agopian as defense counsel in a large number of cases. According to the *Plain Dealer*, between 2001 and 2003, Judge Saffold took away at least 130 cases from the county public defender office and gave more than 100 of them to Agopian, violating local rules of court which require certain cases be given automatically to the public defender’s

²⁴³ OHIO R. CRIM. P. 44(A); OHIO REV. CODE § 2953.21(I)(1) (West 2007).

²⁴⁴ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(B)(1).

²⁴⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(B)(2).

²⁴⁶ Nicole J. De Sario, *The Quality of Indigent Defense on the 40th Anniversary of Gideon: The Hamilton County Experience*, 32 CAP. U. L. REV. 43, 54 (2003).

²⁴⁷ Timothy Heider, *Bench Practice of Appointing Poses Conflict; Judges Assign Lawyers, Get Gifts*, PLAIN DEALER (Cleveland, Ohio), Nov. 24, 2003, at A1.

²⁴⁸ Timothy Heider, *Judge Criticized for Giving Cases to One Lawyer*, PLAIN DEALER (Cleveland, Ohio), Nov. 23, 2003, at A1.

²⁴⁹ Heider, *supra* note 247.

office.²⁵⁰ Agopian received \$330,000 in fees for the indigent cases he was appointed to since 2001 and almost 42% of those fees came from cases Saffold that gave him.²⁵¹ Agopian, along with his immediate family, contributed \$27,000 to judicial campaigns since 1994, including \$1,000 to Saffold, putting him among Saffold's largest contributors and making Agopian the biggest attorney giver to the Common Pleas bench as a whole.²⁵² He is also the biggest recent recipient of fees from court appointments.²⁵³

v. Monitor the performance of all attorneys providing representation in capital proceedings;

The appointing court is responsible for monitoring “the performance of assigned counsel to ensure that the defendant is receiving competent representation. If there is compelling evidence before any court, trial or appellate, that an attorney has ignored basic responsibilities of providing competent counsel, which results in prejudice to the defendant’s case, the court, in addition to any other action it may take, shall report this evidence to the Committee [on the Appointment of Counsel for Indigent Defendants in Capital Cases], which shall accord the attorney an opportunity to be heard.”²⁵⁴ Once a complaint has been received by the Committee, it is responsible for reviewing the representation in lights of its responsibility to (1) periodically review the list of certified counsel, all court appointments given to attorneys in capital cases, and the result and status of those cases; (2) develop criteria and procedures for retention of certification; and (3) expand, reduce, or otherwise modify the list of certified attorney as appropriate and necessary.²⁵⁵

vi. 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;

The Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases is responsible for periodically reviewing the list of certified counsel, all court appointments given to attorneys in capital cases and the result and status of those cases, and expanding, reducing, or modifying the list of certified attorneys as appropriate and necessary in accord with recertification requirements.²⁵⁶ The Committee appears to limit its review to determining whether attorneys have fulfilled the requirements

²⁵⁰ Heider, *supra* note 248.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(V)(A).

²⁵⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(V)(B). Under proposed changes to Rule 20 of the Rules of Superintendence for the Courts of Ohio, the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases would also be responsible for monitoring the performance of all defense counsel “to ensure that the client is receiving high quality legal representation.” *See* Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

²⁵⁶ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(G).

necessary to retain Rule 20 certification and does not appear to engage in any type of review to determine whether lawyers are providing high quality legal representation.²⁵⁷

vii. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and

The Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases is responsible for reviewing and approving “specialized training programs on subjects that will assist counsel in the defense and appeal of capital cases.”²⁵⁸ To be approved by the Committee, a death penalty trial seminar must include instruction on the investigation, preparation, and presentation of a death penalty trial,²⁵⁹ including specialized training in the following areas: an overview of current developments in death penalty litigation; death penalty voir dire; trial phase presentation; use of experts in the trial and penalty phase; investigation, preparation, and presentation of mitigation; preservation of the record; counsel’s relationship with the accused and the accused’s family; and death penalty appellate and post-conviction litigation in state and federal courts.²⁶⁰

²⁵⁷ Under proposed changes to Rule 20 of the Rules of Superintendence for the Courts of Ohio, once the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases receives a complaint from a judge that an attorney provided inadequate representation, it must investigate the complaint, provide the attorneys an opportunity to respond, and vote whether a violation of Rule 20 has occurred and whether the violation requires removal from the list of Rule 20 certified attorneys. *See* Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

²⁵⁸ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(G).

²⁵⁹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(A)(1).

²⁶⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(A)(2). The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 of the Rules for the Superintendence for the Courts of Ohio that would require approved training programs to include training in the following areas:

- (1) Relevant state, federal, and international law;
- (2) Pleading and motion practice;
- (3) Pretrial investigation, preparation, and theory development regarding trial and sentencing;
- (4) Jury Selection;
- (5) Trial Preparation and presentation, including the use of experts;
- (6) Ethical considerations particular to capital defense representation;
- (7) Preservation of the record and of issues for post-conviction review;
- (8) Counsel’s relationship with the client and his/her family;
- (9) Post-conviction litigation in state and federal courts;
- (10) The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
- (11) The unique issues relating to the defense of those charged with committing capital offenses when under the age of 18;
- (12) Death penalty appellate and post-conviction litigation in state and federal courts.

See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

A death penalty appeals seminar must include instruction on the appeal of a case in which the death penalty has been imposed,²⁶¹ including specialized training in the following areas: an overview of current developments in death penalty law; completion, correction, and supplementation of the record on appeal; reviewing the record for unique death penalty issues; motion practice for death penalty appeals; preservation and presentation of constitutional issues; preparing and presenting oral argument; unique aspects of death penalty practice in the courts of appeals, the Supreme Court of Ohio, and the United States Supreme Court; the relationship of counsel with the appellant and the appellant's family during the course of the appeals; and procedure and practice in collateral litigation, extraordinary remedies, state post-conviction litigation, and federal habeas corpus litigation.²⁶²

viii. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.

There is no one entity that is responsible for investigating and maintaining records concerning complaints about the performance of attorneys providing representation in death penalty cases. Trial and appellate courts are neutral referees responsible for ensuring fair proceedings and generally do not have the tools or information necessary to monitor attorneys' performance in death penalty cases or to take corrective action. Despite this, as indicated above, the appointing court is responsible for monitoring "the performance of assigned counsel to ensure that the defendant is receiving competent representation."²⁶³ If the court finds "compelling evidence . . . that an attorney has ignored basic responsibilities of providing competent counsel, which results in prejudice to the defendant's case, the court, in addition to any other action it may take, shall report this evidence to the Committee [on the Appointment of Counsel for Indigent Defendants in Capital Cases]."²⁶⁴ There is no indication that the Committee takes any corrective action in this situation beyond the possible removal of an attorney, although Rule 20 only provides for the removal of an attorney from the registry if he/she fails to maintain his/her recertification requirements.

In addition, the State of Ohio has entrusted the Board of Commissioners on Grievances and Discipline with disciplining practicing attorneys, including capital defense attorneys²⁶⁵ and "a judge who has knowledge that a lawyer has committed a violation of the Ohio Rules of Professional Conduct shall report the violation to a tribunal or other authority empowered to investigate or act upon the violation."²⁶⁶

²⁶¹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(B)(1).

²⁶² RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(B)(2).

²⁶³ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(V)(A).

²⁶⁴ *Id.*

²⁶⁵ SUPREME COURT RULES FOR THE GOV'T OF THE BAR OF OHIO V(2)(A).

²⁶⁶ OHIO CODE OF JUD. CONDUCT, Canon 3(D)(2). Under proposed changes to Rule 20 of the Rules of Superintendence for the Courts of Ohio, once the Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases receives a complaint from a judge that an attorney provided inadequate representation, it must investigate the complaint, provide the attorneys an opportunity to respond, and vote

Conclusion

The State of Ohio has not vested in one or more independent entities all of the responsibilities contained in Recommendation #3. Specifically, the State of Ohio has failed to remove the judiciary from the attorney appointment and monitoring process, thereby failing to protect against the appointment or retention of an attorney for reasons other than his/her qualifications. Based on this information, the State of Ohio fails to comply with Recommendation #3.

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):

Counties in Ohio are responsible for funding the cost of legal representation for indigent capital defendants at trial and on appeal. However, counties may apply for up to a 50% reimbursement of the costs associated with the defense of capital cases at trial, on appeal, and in state post-conviction and federal habeas proceedings, so long as the county complies with the Rule 20 qualification standards and the Office of the Ohio Public Defender maximum reimbursement rates.²⁶⁷ The State reimbursed eligible counties \$809,900 in Fiscal Year 2003, \$785,624 in Fiscal Year 2004, and \$725,999 in Fiscal Year 2005 for appointed counsel in death penalty cases.²⁶⁸

- a. **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.**²⁶⁹

The Office of the Ohio Public Defender

The State of Ohio provides funding for the Office of the Ohio Public Defender. The State of Ohio disbursed \$64,020,000 to the Ohio Public Defender Commission in 2007,

whether a violation of Rule 20 has occurred and whether the violation requires removal from the list of Rule 20 certified attorneys. *See* Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

²⁶⁷ OHIO REV. CODE § 120.35 (West 2007).

²⁶⁸ *See* 2005 ANNUAL REPORT, *supra* note 35, at 23.

²⁶⁹ 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* American Bar Association, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984-85 (2003).

\$59,060,000 in 2006, and \$57,863,430 in 2005.²⁷⁰ The Office of the Ohio Public Defender's State Legal Defense Services program, which includes the death penalty representation program and four other distinct programs, received \$6,928,156 in fiscal year 2007 and \$6,698,870 in fiscal year 2006.²⁷¹

Because the Office of the Ohio Public Defender is responsible for reimbursing counties for the partial cost of indigent defense, much of its money ultimately ends up with the counties.²⁷² For example, the Office of the Ohio Public Defender reimbursed counties a total of \$13,532,686 in 2004 and \$13,874,279 in 2005 for the cost of operating county and joint county public defender offices²⁷³ and \$785,624 was reimbursed for private appointed counsel in capital cases in 2004 and \$725,999 in 2005.²⁷⁴

The Office of the Ohio Public Defender presently has nineteen attorneys in its Death Penalty Division.²⁷⁵

County and Joint County Public Defender Offices

Counties provide initial funding for their county and joint county public defender offices, but are eligible for reimbursement for up to 50% of the costs and expenses of conducting defense in capital cases from the Office of the Ohio Public Defender.²⁷⁶

Counties set the local reimbursable rate, up to the maximum reimbursable hourly rate for capital work set by the Office of the Ohio Public Defender.²⁷⁷ Reimbursement is based on the state or county rate, whichever is lower.²⁷⁸ The maximum rate set by the Office of the Ohio Public Defender for capital trial work is \$95 an hour with a fee cap of \$75,000.²⁷⁹ The established maximum reimbursable hourly rate for capital appeals work is \$95 per hour with a fee cap of \$25,000.²⁸⁰ For state post-conviction and federal habeas corpus proceedings involving a death sentence, the maximum reimbursable hourly rate is \$95 and the fee cap is \$25,000 for services provided in the trial court, the Court of Appeals, and the Ohio Supreme Court.²⁸¹ The Office of the Ohio Public Defender does allow for "extraordinary fees" for cases involving "extraordinarily complex issues,

²⁷⁰ See 2006-2007 FINAL FISCAL ANALYSIS, *supra* note 34, at 658; 2005 ANNUAL REPORT, *supra* note 35, at 3; 2006 ANNUAL REPORT, *supra* note 35, at 4.

²⁷¹ See 2006-2007 FINAL FISCAL ANALYSIS, *supra* note 34, at 660.

²⁷² See 2005 ANNUAL REPORT, *supra* note 35.

²⁷³ See *id.* at 22.

²⁷⁴ See *id.* at 23.

²⁷⁵ See Office of the Ohio Public Defender, Death Penalty Division Staff List, *available at* http://opd.ohio.gov/Staff/dp_staff.htm#TRIAL_SECTION (last visited Sept. 13, 2007). This staff consists of the Chief Counsel, three supervisors, and fifteen assistant state public defenders. *Id.*

²⁷⁶ OHIO REV. CODE § 120.35 (West 2007).

²⁷⁷ STATE MAXIMUM FEE SCHEDULE, *supra* note 64, at 13.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 14-15.

²⁸¹ *Id.* at 15.

multiple offenses, lengthy trials, or other reasons,” although the judge hearing the case must approve of any extraordinary fees.²⁸²

Counties reported that it cost \$42,971,530 in Fiscal Year 2004 and \$44,755,739 in Fiscal Year 2005 to operate county and joint county public defender offices.²⁸³ The Office of the Ohio Public Defender reimbursed counties \$13,532,686 in Fiscal Year 2004 and \$13,874,279 in Fiscal Year 2005,²⁸⁴ resulting in a statewide reimbursement rate of approximately 31%.

Private Court-Appointed Attorneys

Private court-appointed attorneys are eligible for reimbursement from the county in which they are handling the appointment. Counties may then apply for reimbursement of up to 50% of the costs and expenses of conducting defense in capital cases from the Office of the Ohio Public Defender.²⁸⁵

Each board of county supervisors is responsible for establishing a schedule of fees by the case or on an hourly basis to be paid to counsel for legal services.²⁸⁶ Prior to setting a fee schedule, the board of county commissioners must ask the bar association or bar associations of the county to submit a proposed fee schedule.²⁸⁷ Counties will be reimbursed for a percentage of the amount spent, up to the maximum reimbursable hourly rate for capital work set by the Office of the Ohio Public Defender.²⁸⁸ Reimbursement is based on the state or county rate, whichever is lower.²⁸⁹ The Office of the Ohio Public Defender reimbursed counties \$809,900 in Fiscal Year 2003, \$785,624 in Fiscal Year 2004, and \$725,999 in Fiscal Year 2005 for private appointed counsel in capital cases.²⁹⁰ Counties spent \$2,337,473 on capital defense in Fiscal Year 2005,²⁹¹ resulting in a reimbursement rate of approximately 31%.

The level of payment in capital cases is problematic enough that some attorneys are unwilling to take court appointed capital cases.²⁹² While Miami County attorney Dennis Lieberman has defended 10 death penalty cases in the last 20 years, he says that he considers what he was paid to defend his most recent death penalty cases “inadequate for lawyers willing to be appointed for indigent defendants, and potentially harmful for

²⁸² *Id.* at 16.

²⁸³ See 2005 ANNUAL REPORT, *supra* note 35, at 22. A complete breakdown of total and reimbursed costs may be found in the 2005 Annual Report. *Id.*

²⁸⁴ *Id.*

²⁸⁵ OHIO REV. CODE § 120.35 (West 2007).

²⁸⁶ OHIO REV. CODE § 120.33(A)(3) (West 2007).

²⁸⁷ *Id.*

²⁸⁸ STATE MAXIMUM FEE SCHEDULE, *supra* note 64, at 13.

²⁸⁹ *Id.*

²⁹⁰ See 2005 ANNUAL REPORT, *supra* note 35, at 23. A complete county-by-county breakdown of reimbursed costs may be found in the 2005 Annual Report. *Id.*

²⁹¹ See *id.* at 25-41. A complete county-by-county breakdown of attorney’s fees and costs may be found in the 2005 Annual Report. *Id.*

²⁹² Nancy Bowman, *Lawyers Shun Death Penalty Cases Because of Low Pay*, DAYTON DAILY NEWS (Ohio), May 9, 2005, at A1.

people charged with capital crimes” and stated that he could make more money defending a DUI case.²⁹³ Another attorney, Roger Luring, defended four death penalty cases but let his certification to handle capital cases expire “in part because of ‘dramatically insufficient’ pay.”²⁹⁴ The only capitally certified attorney in Miami County, Jose Lopez said, “I’ve always perceived you are going to lose money any time you take a capital case.”²⁹⁵ Shelby County attorney William Zimmerman, who handled death penalty cases before letting his certification expire in the late 1990s explained that, “[y]ou have a man’s life in your hands You can’t make ends meet. I feel bad about that, but I find it unrealistic to expect people to work for free under such circumstances.”²⁹⁶

In 2003, a Richland County judge asked county commissioners to restore court-appointed attorneys fees to their original pre-2003 level.²⁹⁷ The judge said that at least one attorney had taken his name off the list of attorneys willing to be court-appointed because of the fee cut and that while Richland County cut the fee for court-appointed attorneys \$5 an hour, to \$55 an hour for in court work and \$45 an hour for out-of-court work, the going rate for complex felony cases was between \$125 and \$150 an hour.²⁹⁸

There have been a number of challenges to the amount of payment received for the representation of indigent capital defendants or death-row inmates. For example, in August 2000, a group of Hamilton County court-appointed attorneys “filed a petition requesting that the fee schedule for legal services” provided by appointed counsel be revised to provide adequate compensation rates.²⁹⁹ In part, the petitioners claimed that their rights were being violated because the fee schedule established to compensate attorneys who take appointments to represent indigent defendants:

precludes Relators from fully complying with the Code of Professional Responsibility, which requires Relators to “handle legal matters with appropriate preparation in the circumstances . . .” and . . . the fee schedule violates the rights of relators under the “Fifth Amendment to the United States Constitution for the reason that their hourly overhead expenses far exceed the hourly rate of compensation that Relators receive for taking assigned cases from the Hamilton County Public Defenders Office.”³⁰⁰

The court ultimately held that pursuant to section 120.33(A)(5) of the Ohio Rev. Code, the petitioners’ only remedy was to involve the Ohio Public Defender who would “notify the board of county commissioners of the county that the county appointed counsel system has failed to comply with its rules or the standards of the state public

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ Linda Martz, *Judge Says Defense Fees Too Low*, MANSFIELD NEWS JOURNAL (Ohio), June 6, 2003, at 11A.

²⁹⁸ *Id.*

²⁹⁹ *State ex rel. Felson v. McHenry*, 767 N.E.2d 298 (Ohio Ct. App. 1st Dist. 2001).

³⁰⁰ *Id.* at 546.

defender.”³⁰¹ After ninety days “[u]nless the board of county commissioners corrects the conduct of its appointed counsel system to comply with the rules and standards . . . the state public defender may deny all or part of the county’s reimbursement from the state.”³⁰² The court noted that while the available remedy was “harsh” the “statutes are unequivocal in giving the state public defender the right and a method to remedy noncompliance with the promulgated standards.”³⁰³

- b. 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.**
 - i. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**
 - ii. 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.**
 - iii. 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 representing a capital defendant or a death-row inmate depends on whether the attorney is employed by a county or joint county public defender office or the Office of the Ohio Public Defender, or is a private attorney appointed by the court.

County and Joint County Public Defender Offices and the Office of the Ohio Public Defender

County and Joint County Public Defenders and the Ohio Public Defender, along with their associate public defenders, receive an annual salary.³⁰⁴

The Ohio Administrative Code requires that the salaries paid to public defenders “should be equivalent to salaried paid to similar positions within the justice system.”³⁰⁵ The salary pay ranges for county and joint county public defenders and their staff may not “exceed the pay ranges . . . for comparable positions of the Ohio public defender and staff.”³⁰⁶

Private Court-Appointed Attorneys

³⁰¹ State *ex rel.* Felson v. McHenry, 814 N.E.2d 75, 77-78 (Ohio Ct. App. 1st Dist. 2004).

³⁰² *Id.* at 78.

³⁰³ *Id.*

³⁰⁴ See OHIO ADMIN. CODE § 120-1-15.

³⁰⁵ *Id.*

³⁰⁶ OHIO REV. CODE § 120.40 (West 2007).

In contrast to the salaries paid to public defenders, private court-appointed attorneys in capital cases are paid at an hourly rate with county funds, at an amount the court approves.³⁰⁷ Each county's board of supervisors, with the input of the local bar association(s), is responsible for establishing a schedule of fees to be paid to counsel for legal services.³⁰⁸

Counties who wish to receive reimbursement for expenses may not be reimbursed for rates and amounts exceeding the maximum hourly rates and total expenditures set by the Office of the Ohio Public Defender. The Office of the Ohio Public Defender has set forth the following maximum rates of compensation for appointed counsel in capital cases:

- (1) Lead and co-counsel at \$95 per hour for in- and out-of-court work, up to a maximum of \$75,000 for all appointed attorneys;
- (2) Appellate counsel at \$95 per hour for in- and out-of-court work, up to a total of \$25,000 for all appointed attorneys; and
- (3) Post-conviction counsel at \$95 per hour for in- and out-of-court work, up to a total of \$25,000 for all appointed attorneys.³⁰⁹

Various counties set different, and generally lower, maximum rates of compensation. For example, Cuyahoga County pays an hourly rate of \$45 an hour in death penalty cases, with a cap of \$25,000 for two attorneys handling a capital trial and \$12,500 for one attorney.³¹⁰ Attorneys may be paid up to \$5,000 for handling a capital appeal, up to \$170 for handling state post-conviction proceedings, and up to \$200 for handling federal *habeas corpus* or clemency proceedings.³¹¹ In comparison, Franklin County pays an hourly rate of \$50 an hour for out-of-court time and \$60 for in court time for appointed trial attorneys, with a cap of \$25,000 for one capital defense attorney and \$50,000 for two.³¹² The maximum fee is \$500 in state post-conviction proceedings and \$150 in habeas corpus and clemency proceedings.³¹³ And in Allen County, the hourly rate in capital cases for out-of-court time is \$40 per hour and for in-court time \$50 an hour, up to a maximum of \$20,000 for two attorneys and \$10,000 for one attorney.³¹⁴ The hourly rate for capital appeals is \$40 per hour four out-of-court time and \$50 an hour for in-court time, up to a maximum of \$7,500.³¹⁵ The hourly rate for state post-conviction and federal habeas corpus counsel is \$45 an hour for in- and out-of-court time, up to a cap of \$10,000 in capital cases.³¹⁶

³⁰⁷ OHIO REV. CODE § 120.33(A)(4) (West 2007).

³⁰⁸ OHIO REV. CODE § 120.33(A)(3) (West 2007).

³⁰⁹ STATE MAXIMUM FEE SCHEDULE, *supra* note 64, at 13-15.

³¹⁰ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(B).

³¹¹ *Id.*

³¹² FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.15(II)(B).

³¹³ *Id.*

³¹⁴ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(1).

³¹⁵ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(3).

³¹⁶ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(4).

County fee schedules are supposed to be “comparable to the fees paid to retained counsel in the same type of cases.”³¹⁷ The amount of compensation paid to court-appointed attorneys may not exceed the amount set by the board of county supervisors.³¹⁸ Counties are not eligible for reimbursement “if it can be demonstrated that its fee schedule is inadequate for an appointed attorney to cover the costs of overhead while working on an appointed case and to generate a reasonable income for work performed.”³¹⁹ In the State of Ohio, the 2004 mean hourly rate for criminal defense attorneys representing an indigent defendant was \$139 and the median hourly rate was \$125³²⁰ and the mean hourly rate for criminal defense attorneys representing private defendants was \$154 and the median hourly rate was \$150.³²¹ Despite the Ohio Administrative Code provision which states that counties are not eligible for reimbursement “if it can be demonstrated that its fee schedule is inadequate for an appointed attorney to cover the costs of overhead while working on an appointed case and to generate a reasonable income for work performed,”³²² however, private appointed attorneys in capital cases received an average of \$46 per hour in 2005, ranging from a low of \$17 per hour in Richland County, to \$35 per hour in Hamilton County, to a high of \$87 per hour in Lucas County.³²³

The fees requested by each attorney must be approved by the court and are then paid by the county. The county may then seek up to 50% reimbursement for all costs and expenses of conducting defense in capital cases from the Office of the Ohio Public Defender.³²⁴ Reimbursement to counties is based on the state or county rate, whichever is lower,³²⁵ and, to be eligible for reimbursement in capital cases, the appointed attorneys must be certified as qualified under Rule 20 or 21 of the Supreme Court Rules of Superintendence for the Courts of Ohio, or be granted a waiver by the Ohio Supreme Court Rule 20 Committee at the time the representation was provided.³²⁶ The total amount of money paid to counties in any fiscal year for reimbursement in capital cases may not exceed the total amount appropriated for that fiscal year by the general assembly for the purpose of reimbursements in capital cases.³²⁷ If the amount appropriated by the general assembly is insufficient to pay 50% of the counties’ total costs and expenses, the amount of money paid to each county will be reduced proportionately so that each county is paid an equal percentage of its costs and expenses.³²⁸

The Office of the Ohio Public Defender allows for periodic billing “[i]n cases where proceedings are carried out over an extended period of time, or where multiple trials are held for one case.”³²⁹ Individual counties set their own policies, however, and many do

³¹⁷ OHIO ADMIN. CODE § 120-1-15(A).

³¹⁸ OHIO REV. CODE § 120.33(A)(3) (West 2007).

³¹⁹ OHIO ADMIN. CODE § 120-1-15(A).

³²⁰ OHIO STATE BAR ASSOCIATION, 2004 ECONOMICS OF LAW PRACTICE IN OHIO SURVEY 19 (2004).

³²¹ *Id.*

³²² OHIO ADMIN. CODE § 120-1-15(A).

³²³ 2005 ANNUAL REPORT, *supra* note 35, at 25-41.

³²⁴ OHIO REV. CODE § 120.35 (West 2007).

³²⁵ STATE MAXIMUM FEE SCHEDULE, *supra* note 64, at 13.

³²⁶ *Id.* at 6.

³²⁷ OHIO REV. CODE § 120.34 (West 2007).

³²⁸ *Id.*

³²⁹ STATE MAXIMUM FEE SCHEDULE, *supra* note 64, at 11.

not provide for periodic billing. For example, in Cuyahoga County, bills for investigation are to be filed with defense counsel's application for attorney fees,³³⁰ which are not filed until the completion of the representation.³³¹ In contrast, Franklin County does not specify whether periodic billing is allowed and states only that appointed counsel must file a request for reimbursement no later than 30 days after the final disposition of the case.³³² Allen County does not address periodic billing either, instead providing that payment and/or reimbursement for expenses will be made upon submission of the attorney's fee certificate and Affidavit of Indigency, but that no fees will be paid if the request for payment is submitted more than 60 days after the termination of the case, except with the approval of the Administrative Judge.³³³

Federal Habeas Corpus Counsel

Attorneys appointed for federal habeas corpus proceedings are entitled to compensation at a rate of not more than \$125 per hour for in-court and out-of-court work.³³⁴

- c. 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.**
 - i. 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.**
 - ii. 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.**
 - iii. 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.**

Public Defender Offices

Public defender offices are authorized to hire investigators and appear to have access to funds for expert witnesses. The Office of the Ohio Public Defender has five criminal investigators and four mitigation specialists on staff.³³⁵

³³⁰ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(E).

³³¹ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(B).

³³² FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.19.

³³³ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(5)-(6).

³³⁴ 18 U.S.C. § 3599(g)(1) (2007).

³³⁵ Office of the Ohio Public Defender, Death Penalty Division, About the Death Penalty Division, available at http://opd.ohio.gov/dp/dp_DeathPenalty.htm (last visited Sept. 13, 2007).

Private Court-Appointed Attorneys

An appointing court should provide an appointed lawyer, “as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator, mitigation specialists, mental health professional, and other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings including, but not limited to, determinations relevant to competency to stand trial, a not guilty by reason of insanity plea, cross-examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for and presentation of mitigating evidence in the sentencing phase of the trial.”³³⁶ Each Board of County Commissioners has the authority to place caps on the amount of money that the court will provide for experts,³³⁷ however, and often do so at levels that make full compensation difficult, if not impossible.

Various counties have differing rules regarding the amount of funds that are available to appointed counsel for expert assistance in capital cases. For example, Cuyahoga County will reimburse appointed counsel for select expenses,³³⁸ but sets significant limitations, including that investigators may not be hired in capital cases without the court’s permission and limits payment to \$25 per hour, up to \$500, except in extraordinary cases when the fee is capped at \$1,000.³³⁹ In addition, the court “shall not consider approval of or payment for and shall not approve or pay any amount for any expert or specialist relating to psychological, mitigation or similar services” unless the attorney files an application providing the name of the individual sought to be provided for research, investigation, testimony, and/or consultation, the hourly rate to be charged and the estimated number of hours, any additional expenses anticipated in connection with these services, and the total projected expense anticipated for each individual.³⁴⁰

In Franklin County, “[s]ervices reasonably necessary for the proper representation of an indigent defendant” are reimbursable in capital cases, including expenses for investigators, interpreters, and experts.³⁴¹ The assigned judge must approve expenses above \$100 and the assigned judge and the administrative judge must approve expenses

³³⁶ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(D). In addition, the Ohio Rev. Code states that “[i]f the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant’s counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120 of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant’s counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made as provided in this section.” OHIO REV. CODE § 2929.024 (West 2007).

³³⁷ OHIO REV. CODE § 2941.51(A) (West 2007).

³³⁸ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(B).

³³⁹ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(E).

³⁴⁰ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(G).

³⁴¹ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13(B).

in excess of \$2,500.³⁴² In Allen County, allowable expenses include expert witness fees, but are capped at \$2,000 without prior approval of the court.³⁴³

Federal Habeas Corpus Proceedings

In federal habeas corpus proceedings, the court may authorize the appointed attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.³⁴⁴ The fees and expenses paid for these services may not exceed \$7,500 in any case, unless the court authorizes payment in excess of this limit.³⁴⁵

d. Additional compensation should be provided in unusually protracted or extraordinary cases.

The issue of additional compensation is technically not a concern in cases in which a county or joint county public defender office or the Office of the Ohio Public Defender is providing representation as these attorneys are salaried employees. In cases where a court-appointed attorney is providing representation, the Office of the Ohio Public Defender does allow for “extraordinary fees” for cases involving “extraordinarily complex issues, multiple offenses, lengthy trials, or other reasons,” although the judge hearing the case must approve of any extraordinary fees.³⁴⁶ Each county is responsible for setting its own policy on whether additional compensation is allowed in unusually protracted or extraordinary cases and, if it is allowed, how much. It appears that most counties do allow for additional compensation to be provided in theory,³⁴⁷ but it is unclear how often judges approve these expenses in practice.³⁴⁸

e. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

The issue of compensation for reasonable incidental expenses is not technically an issue in cases where a public defender 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.

³⁴² *Id.*

³⁴³ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(2).

³⁴⁴ 18 U.S.C. § 3599(f) (2007).

³⁴⁵ 18 U.S.C. § 3599(g)(2) (2007).

³⁴⁶ STATE MAXIMUM FEE SCHEDULE, *supra* note 64, at 16.

³⁴⁷ *See, e.g.*, CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(B); FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.16-.17; ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(7).

³⁴⁸ For example, in *State v. Luff*, the trial court’s discretion in awarding extraordinary attorney fees was an issue considered on appeal. 621 N.E.2d 493 (Ohio Ct. App. 6th Dist. 1993). Counsel requested ordinary fees for the 2,080 hours they spent working on the case over 14 months and extraordinary fees because of the change in venue for the case and “the unusual issues contained in the case such as the cult phenomenon, the dismissal of indictments, insanity, and *ex post facto* laws.” *Id.* at 508. Counsel requested a total of \$241,268 in normal fees and was awarded \$60,000. *Id.* Counsel also filed a motion for an additional \$240,375 in extraordinary fees and the court awarded \$25,000 in recognition of the number of hearings held “because the case involved a capital murder and a change of venue.” *Id.*

In cases where a private attorney is appointed, the Office of the Ohio Public Defender will “reimburse up to 50 percent of certain expenses reasonably related and necessary to the defense of an indigent client. These expenses include travel, transcripts, expert services, and certain other miscellaneous expenses,” including polygraph examinations, phone calls, and photocopies.³⁴⁹ In addition, “other expenses reasonably related and necessary to the defense of an indigent client (e.g. clothing for the client, haircuts for the client, etc.)” may be reimbursed.³⁵⁰

In addition to the Office of the Ohio Public Defender guidelines, each Board of County Commissioners has the authority to place caps on the amount of money that the court will provide for expenses, including experts.³⁵¹ For example, in Franklin County, “[s]ervices reasonably necessary for the proper representation of an indigent defendant” are reimbursable in capital cases, including costs for investigators, interpreters, experts, photocopies, psychological evaluations, polygraphs, transcripts, and other expenses “reasonably related and necessary to the defense of an indigent defendant.”³⁵² These expenses do not include travel time, mileage and parking, office overhead, daily copies of transcripts, or depositions.³⁵³ The assigned judge must approve expenses above \$100 and the assigned judge and the administrative judge must approve expenses in excess of \$2,500.³⁵⁴ In Allen County, allowable expenses include expert witness fees, polygraph examination costs, and investigation costs, but without prior approval of the court, exclude parking and meal expenses, long distance telephone calls, and copying and postage.³⁵⁵ Regardless of what expenses are approved, the maximum amount of reimbursement for expenses, without prior approval of the court, is capped at \$2,000.³⁵⁶

In 2005, private appointed counsel reported \$462,952 in expenses in capital cases after adjustments, including adjustments for exceeding the State or County fee schedule and for unallowable or undocumented expenses.³⁵⁷ An additional \$76,743 was spent obtaining capital case transcripts.³⁵⁸

Conclusion

The State of Ohio does not appear to be providing adequate funding for indigent defendants in death penalty cases. Additionally, it does not appear that attorneys handling death penalty cases are being fully compensated at a rate that is commensurate

³⁴⁹ STANDARDS AND GUIDELINES, *supra* note 152, at 7; *see also* OHIO REV. CODE § 120.33(A)(4) (West 2007).

³⁵⁰ STANDARDS AND GUIDELINES, *supra* note 152, at 10.

³⁵¹ OHIO REV. CODE § 2941.51(A) (West 2007).

³⁵² FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13(B).

³⁵³ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13(A).

³⁵⁴ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13.

³⁵⁵ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(2).

³⁵⁶ *Id.*

³⁵⁷ 2005 ANNUAL REPORT, *supra* note 35, at 41.

³⁵⁸ *Id.*

with the provision of high quality legal representation. The State of Ohio, therefore, is not in compliance with Recommendation #4.

E. Recommendation #5

Training (Guideline 8.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

The Ohio State Bar Association requires all attorneys to participate in a minimum of 24 hours of approved continuing legal education (CLE) every two years, including two and one half hours related to professional conduct, including thirty minutes of instruction on substance abuse, sixty minutes of instruction related to the Code of Professional Responsibility, and sixty minutes related to professionalism.³⁵⁹

In addition, trial, appellate, and post-conviction counsel litigating death penalty cases are required to attend twelve hours of specialized training within the last two years, involving at least six hours of instruction in the trial of capital cases for trial counsel (both lead and co-counsel) and in the appeal of capital cases for appellate counsel.³⁶⁰

The Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases (Committee) is responsible for reviewing and approving specialized training programs on subjects that will assist attorneys in the defense and appeal of capital cases.³⁶¹ To be approved by the Committee, a death penalty trial seminar must include instruction on the investigation, preparation, and presentation of a death penalty trial,³⁶² including specialized training in the following areas: an overview of current developments in death penalty litigation; death penalty voir dire; trial phase presentation; use of experts in the trial and penalty phase; investigation, preparation, and presentation of mitigation; preservation of the record; counsel's relationship with the accused and the accused's family; and death penalty appellate and post-conviction litigation in state and federal courts.³⁶³

³⁵⁹ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR R. X(3).

³⁶⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VII)(A)(1). Under proposed changes to Rule 20 of the Rules of Superintendence for the Courts of Ohio, appellate counsel would be required to attend six hours of instruction in the appeal of capital cases instead of twelve. *See* Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

³⁶¹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(III)(G)(6).

³⁶² RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(A)(1).

³⁶³ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(A)(2). Under the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases' proposed changes to Rule 20, a death penalty trial seminar would have to include instruction on:

- (1) Relevant state, federal, and international law;
- (2) Pleading and motion practice;
- (3) Pretrial investigation, preparation, and theory development regarding trial and sentencing;
- (4) Jury Selection;
- (5) Trial Preparation and presentation, including the use of experts;
- (6) Ethical considerations particular to capital defense representation;

A death penalty appeals seminar must include instruction on the appeal of a case in which the death penalty has been imposed,³⁶⁴ including specialized training in the following areas: an overview of current developments in death penalty law; completion, correction, and supplementation of the record on appeal; reviewing the record for unique death penalty issues; motion practice for death penalty appeals; preservation and presentation of constitutional issues; preparing and presenting oral argument; unique aspects of death penalty practice in the courts of appeals, the Supreme Court of Ohio, and the United States Supreme Court; the relationship of counsel with the appellant and the appellant's family during the course of the appeals; and procedure and practice in collateral litigation, extraordinary remedies, state post-conviction litigation, and federal habeas corpus litigation.³⁶⁵

- a. **The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.**

The State of Ohio provides some funding for the training, professional development, and continuing education of attorneys who represent indigent capital defendants and death-row inmates, but does not provide funding for all members of the defense team.

Each year, many organizations offer training programs for defense attorneys with indigent capital defendants. For example, the Ohio State Bar Association and the Ohio Association of Criminal Defense Lawyers both host regular death penalty training seminars.

While private attorneys generally must pay the fees associated with continuing legal education programming, the Public Defender “contracts with private and nonprofit training companies to provide continuing legal education (CLE) certified seminars at no cost to attorneys who practice criminal indigent defense law and provide one pro bono (for free) case for every seminar attended.”³⁶⁶ The seminar companies charge the Public

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- (7) Preservation of the record and of issues for post-conviction review;
 - (8) Counsel's relationship with the client and his/her family;
 - (9) Post-conviction litigation in state and federal courts;
 - (10) The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
 - (11) The unique issues relating to the defense of those charged with committing capital offenses when under the age of 18;
 - (12) Death penalty appellate and post-conviction litigation in state and federal courts.

See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

³⁶⁴ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(B)(1).

³⁶⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(B)(2).

³⁶⁶ *See* 2006-2007 FINAL FISCAL ANALYSIS, *supra* note 34, at 663.

Defender \$250 per attorney for the two-day Rule 20 seminars.³⁶⁷ The Office of the Ohio Public Defender designated \$31,324 in the 2006 and 2007 fiscal years for training.³⁶⁸

Other than the money set aside in the Pro Bono Training Program, however, the State of Ohio does not appear to provide private attorneys who are appointed to represent capital defendants or death row inmates any money for training. Nor does the State of Ohio provide funds for the training, development, and continuing education for investigators or other members of the defense team.

- b. 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:**
 - i. Relevant state, federal, and international law;**
 - ii. Pleading and motion practice;**
 - iii. Pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
 - iv. Jury selection;**
 - v. Trial preparation and presentation, including the use of experts;**
 - vi. Ethical considerations particular to capital defense representation;**
 - vii. Preservation of the record and of issues for post-conviction review;**
 - viii. Counsel's relationship with the client and his/her family;**
 - ix. Post-conviction litigation in state and federal courts;**
 - x. The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.**

In addition to the general CLE requirements mandated by law, an attorney who wishes to qualify for appointment in a capital case at the trial, appellate, or post-conviction level must have completed at least twelve hours of capital defense training prior to the first appointment and an additional twelve hours every two years thereafter.³⁶⁹ At least six hours of the training must be dedicated to instruction in the trial of capital cases for trial counsel (both lead and co-counsel) and in the appeal of capital cases for appellate counsel.³⁷⁰

Death penalty trial seminars must include instruction on the investigation, preparation, and presentation of a death penalty trial,³⁷¹ including specialized training in the following areas: an overview of current developments in death penalty litigation; death penalty voir dire; trial phase presentation; use of experts in the trial and penalty phase;

³⁶⁷ *Id.*

³⁶⁸ *Id.* at 662.

³⁶⁹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VII)(A)(1).

³⁷⁰ *Id.* Under proposed changes to Rule 20 of the Rules of Superintendence for the Courts of Ohio, appellate counsel would be required to attend six hours of instruction in the appeal of capital cases instead of twelve. See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

³⁷¹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(A)(1).

investigation, preparation, and presentation of mitigation; preservation of the record; counsel's relationship with the accused and the accused's family; and death penalty appellate and post-conviction litigation in state and federal courts.³⁷²

Death penalty appeals seminars must include instruction on the appeal of a case in which the death penalty has been imposed,³⁷³ including specialized training in the following areas: an overview of current developments in death penalty law; completion, correction, and supplementation of the record on appeal; reviewing the record for unique death penalty issues; motion practice for death penalty appeals; preservation and presentation of constitutional issues; preparing and presenting oral argument; unique aspects of death penalty practice in the courts of appeals, the Supreme Court of Ohio, and the United States Supreme Court; the relationship of counsel with the appellant and the appellant's family during the course of the appeals; and procedure and practice in collateral litigation, extraordinary remedies, state post-conviction litigation, and federal habeas corpus litigation.³⁷⁴

- c. 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.**

All attorneys seeking appointment to a death penalty case at trial, on direct appeal, or in state post-conviction proceedings are required to complete at least twelve hours of capital

³⁷² RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(A)(2). Under the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases' proposed changes to Rule 20, a death penalty trial seminar would have to include instruction on:

- (1) Relevant state, federal, and international law;
- (2) Pleading and motion practice;
- (3) Pretrial investigation, preparation, and theory development regarding trial and sentencing;
- (4) Jury Selection;
- (5) Trial Preparation and presentation, including the use of experts;
- (6) Ethical considerations particular to capital defense representation;
- (7) Preservation of the record and of issues for post-conviction review;
- (8) Counsel's relationship with the client and his/her family;
- (9) Post-conviction litigation in state and federal courts;
- (10) The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;
- (11) The unique issues relating to the defense of those charged with committing capital offenses when under the age of 18;
- (12) Death penalty appellate and post-conviction litigation in state and federal courts.

See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

³⁷³ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(B)(1).

³⁷⁴ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(B)(2).

defense training prior to the first appointment and an additional twelve hours every two years thereafter.³⁷⁵

- d. The jurisdiction should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.**

We were unable to determine whether the State provides continuing professional education that is related to their areas of expertise to all non-attorneys wishing to participate on the defense team.

Conclusion

The State of Ohio provides some limited funding for the training of capital defense attorneys, but not for all members of the defense team. Additionally, all attorneys who represent capital defendants or death-sentenced inmates are required to participate in specialized training on capital defense, including on the topics included in Recommendation #5. Therefore, the State of Ohio is only in partial compliance with Recommendation #5.

³⁷⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VII)(A)(1). Under proposed changes to Rule 20 of the Rules of Superintendence for the Courts of Ohio, appellate counsel would be required to attend six hours of instruction in the appeal of capital cases every two years instead of twelve. *See* Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

CHAPTER SEVEN

DIRECT APPEAL PROCESS

INTRODUCTION TO THE ISSUE

Every death-row inmate must be afforded at least one level of judicial review.¹ This process of judicial review is called the direct appeal. As the U.S. Supreme Court stated in *Barefoot v. Estelle*, “[d]irect appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception.”² 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/innocence and sentencing phases of the trial were unlawful, excessively severe, or an abuse of discretion.

One of the best ways to ensure that the direct appeals process works as it is intended is through meaningful comparative proportionality review. Comparative proportionality review is 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. Meaningful comparative proportionality review helps 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.

Comparative proportionality review is the most effective method of protecting against arbitrariness in capital sentencing. In most capital cases, juries determine the sentence, yet they are not equipped and do not have the information necessary to evaluate the propriety of that sentence in light of the sentences in similar cases. In the relatively small number of cases in which the trial judge determines the sentence, proportionality review still is 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.

Simply stating that a particular death sentence is proportional is not enough, however. Proportionality review should not only cite previous decisions, but should analyze their similarities and differences and the appropriateness of the death sentence. In addition, proportionality review should include 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, but was not.

Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the

¹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

² *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983).

review or that do so only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

I. FACTUAL DISCUSSION

Section 2929.05 of the Ohio Rev. Code requires that all death sentences be reviewed by the Ohio Supreme Court.³ Prior to the enactment of a 1995 amendment to the Ohio Constitution, all death penalty cases were appealed to a district court of appeals and then, if affirmed, automatically to the Supreme Court.⁴ The 1995 amendment provided that direct appeals of death penalty cases in which the crime was committed after January 1, 1995, proceed from the trial court directly to the Ohio Supreme Court.⁵ Consequently, two levels of appellate review are required for crimes committed before January 1, 1995, but only one for those committed after January 1, 1995.

A direct appeal is commenced by the filing of a notice of appeal or the filing of the trial court opinion.⁶ During the appeal process, counsel for the appellant and the state have access to the record,⁷ an opportunity to file appellate briefs,⁸ and an opportunity to make oral arguments before the Court.⁹

If the Ohio Supreme Court affirms the appellant's conviction and sentence, the appellant may file a petition for a writ of *certiorari* with the United States Supreme Court, seeking discretionary review of the Ohio Supreme Court's decision affirming appellant's conviction and sentence.¹⁰

A. Scope of Review

On direct appeal, the reviewing court(s) will review the claims of error in capital cases "in the same manner that it reviews other criminal cases,"¹¹ but it also will consider whether the evidence supports the findings of guilt and of any aggravating circumstances, and "shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the

³ OHIO REV. CODE § 2929.05(A) (West 2007). In *State v. Rojas*, the Ohio Supreme Court explained that Rojas wanted to withdraw his direct appeal, but was not permitted to withdraw it. 592 N.E.2d 1376 (Ohio 1992). Additionally, in *State v. Ashworth*, the Ohio Supreme Court interpreted section 2929.05 of the Ohio Revised Code as allowing defendants to waive review of their conviction but not of their death sentence. 706 N.E.2d 1231, 1238 (Ohio 1999).

⁴ See LEWIS R. KATZ & PAUL C. GIANNELLI, CRIMINAL LAW § 78.31, at 742 (West Group 1996).

⁵ OHIO CONST. art. IV(B)(2)(c).

⁶ OHIO SUP. CT. RULES OF PRACTICE R. XIX(1)(A)(1).

⁷ OHIO CONST. art. I, § 16; OHIO REV. CODE § 2929.03(G) (West 2007); OHIO REV. CODE § 2929.05(A) (West 2007). These provisions require that a defendant in a capital case be afforded a complete, full, and unabridged transcript of all proceedings against him, and mandamus is proper to enforce the defendant's right to a full transcript. *State ex rel. Spirko v. Judges of Court of Appeals, Third Appellate Dist.*, 501 N.E.2d 625 (Ohio 1986).

⁸ OHIO SUP. CT. RULES OF PRACTICE R. XIX(5)(A).

⁹ Rule 21 of the Ohio Rules of Appellate Procedure provides for the intermediate appeal in the district court of appeals. Rule 9(1)(A)(1) of the Ohio Supreme Court Rules of Practice provides for appeals in the Ohio Supreme Court. Oral arguments must be scheduled after the case has been briefed on the merits in accordance with Rules 6 or 19 of the Ohio Supreme Court Rules of Practice. *Id.*

¹⁰ 28 U.S.C. § 1257 (2006); U.S. SUP. CT. R. 13.

¹¹ OHIO REV. CODE § 2929.05(A) (West 2007); OHIO R. APP. P. 12 (A)(1)(c).

mitigating factors in the case, and whether the sentence of death is appropriate.”¹² In determining whether the sentence of death is appropriate, the court(s) “shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.”¹³ A determination by a majority of the members of the reviewing court that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors beyond a reasonable doubt and that the death sentence is appropriate is sufficient to affirm the sentence of death; unanimity is not required.¹⁴

Appellate courts are limited to a review of the record during direct appeal and cannot review new evidence or anything else that is not contained in the record.¹⁵

1. Sufficiency of the Evidence

The reviewing court(s) is required to “review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing.”¹⁶ This sufficiency of the evidence analysis considers whether a reasonable juror could conclude the prosecution proved each element of the crime beyond a reasonable doubt.¹⁷ It is a constitutional question on which the Ohio and federal courts have, at times, disagreed.¹⁸

¹² OHIO REV. CODE § 2929.05(A) (West 2007). The Ohio Supreme Court frequently starts out its capital opinions by explaining what it is required to review under this provision. For example, in *State v. Barnes*, the court started its opinion by saying:

In this case, as in all death penalty appeals, this court is faced with a number of tasks. First, we must answer the specific issues raised by appellant regarding the proceedings below. Next, we must, pursuant to R.C. 2929.05, independently weigh the aggravating circumstances in this case against any factors which mitigate against the imposition of the death penalty. Finally, we must independently consider whether appellant's sentence is disproportionate to the penalty imposed in similar cases.

495 N.E.2d 922, 925 (Ohio 1986).

¹³ OHIO REV. CODE § 2929.05(A) (West 2007).

¹⁴ *State v. Sowell*, 530 N.E.2d 1294 (Ohio 1988) (overruled on other grounds).

¹⁵ About the Death Penalty Division, Office of the Ohio Public Defender, *available at* http://opd.ohio.gov/dp/dp_DeathPenalty.htm (last visited Aug. 2, 2005); *see also* *State v. Harmon*, 158 N.E.2d 406 (Ohio Ct. App., Wayne County 1958) (holding that an appellate court reviewing a criminal case “can look only to the record made in the trial court”).

¹⁶ OHIO REV. CODE § 2929.05(A) (West 2007).

¹⁷ In *State v. Heinish*, 553 N.E.2d 1026, 1034-35 (Ohio 1990), a conviction for aggravated murder with specifications was set aside and a conviction of the lesser included offense of murder was imposed where there was not sufficient evidence to prove beyond a reasonable doubt the alleged attempted rape aggravating circumstance under section 2929.04(A)(7) of the Ohio Revised Code and companion element of aggravated felony-murder under section 2929.03(B) of the Ohio Revised Code.

¹⁸ For example, the Ohio Supreme Court was deeply divided on sufficiency of the evidence regarding the element of prior calculation and design in *State v. Taylor*, 676 N.E.2d 82 (Ohio 1997). In *Taylor v. Mitchell*, the federal court reversed the defendant's aggravated murder conviction due to insufficiency of the evidence. 296 F. Supp. 2d 784, 840 (N.D. Ohio 2003). The district court found, among other matters, that the Ohio Court of Appeals and the Ohio Supreme Court misread the record when it stated that the petitioner ordered another to go outside to the car, and there was no evidence that the petitioner strategically positioned a third person behind the victim as part of a plan to kill him. *Id.* at 827.

2. Independent Weighing of Facts and Circumstances

According to section 2953.02 of the Ohio Rev. Code, the Ohio Supreme Court is required to review the weight of the evidence in death penalty cases only when the issue is raised as an issue on appeal.¹⁹ Even when the issue is raised, it is not required to conduct such a review in capital cases involving crimes committed prior to January 1, 1995,²⁰ although the district courts of appeals may conduct such a review for crimes committed prior to that date.²¹ Before the Ohio Supreme Court was statutorily required to conduct a weight of the analysis review, it was inconsistent in its willingness to do so.²²

When conducting such a review, “the supreme court shall determine as to the weight of the evidence to support the judgment and shall determine as to the weight of the evidence to support the sentence of death.”²³ In weighing the evidence, the Court acts as though it was a thirteenth juror, and can reverse a conviction if it is against the “manifest weight” of the evidence.²⁴ Specifically, the reviewing court(s) is required to “review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing.”²⁵

The Ohio Supreme Court has reviewed over 250 death-imposed cases since it was required in 1981 to independently weigh the aggravating and mitigating circumstances to determine whether the aggravating circumstances were sufficient to outweigh the mitigating factors²⁶ and has vacated the death sentence in four cases under this provision. The first three cases were decided between 1989 and 1991 the fourth was decided in 2006.²⁷

3. Determining Whether the Sentence of Death is Appropriate

Section 2929.05 (A) of the Ohio Rev. Code states that an appellate court may affirm a death sentence “only if it is persuaded from the record... that the sentence of death is the appropriate sentence in the case” and defines the appropriate sentence as one which is not excessive or disproportionate to the penalty imposed in similar cases:

¹⁹ OHIO REV. CODE § 2929.05(A) (West 2007).

²⁰ *State v. Tenace*, 847 N.E.2d 386 (Ohio 2006).

²¹ OHIO CONST. art. IV, § 3(B)(3).

²² For instance, in cases decided one week apart in 1989, the Court declared itself powerless to overturn a verdict which is against the manifest weight of the evidence in *State v. Cooney*, 544 N.E.2d 895, 905-06 (Ohio 1989), and acknowledged its ability to consider the weight of the evidence but did not reach the issue in *State v. Johnson*, 545 N.E.2d 636, 640-41 (Ohio 1989).

²³ *State v. Johnson*, 723 N.E.2d 1054, 1070 (Ohio 2000).

²⁴ *See State v. Smith*, 684 N.E. 2d 668 (Ohio 1997); *see also Tibbs v. Florida*, 457 U.S. 31 (1982).

²⁵ OHIO REV. CODE § 2929.05(A) (West 2007).

²⁶ *Id.*

²⁷ *State v. Lawrence*, 541 N.E.2d 451 (Ohio 1989); *State v. Watson*, 572 N.E.2d 97 (Ohio 1991); *State v. Claytor*, 574 N.E.2d 472 (Ohio 1991); *State v. Tenace*, 847 N.E.2d 386 (Ohio 2006).

In determining whether a death sentence before the Court is appropriate, [a reviewing court] shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.²⁸

If the sentence is deemed to be inappropriate on this ground, the court must vacate the death sentence and remand the case to the trial court to re-sentence the offender to life in prison without the possibility of parole, life in prison without the possibility of parole for 25 years, or life in prison with the possibility of parole for 30 years.²⁹

Reviewing courts do not need to consider or compare cases where a life sentence was imposed, or where capital charges could have been, but were not, filed, as “proportionality review is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed.”³⁰

²⁸ OHIO REV. CODE § 2929.05(A) (West 2007). In sections 2929.021 and 2929.03(F) of the Ohio Revised Code, the Ohio legislature set up a mechanism for reporting the outcomes of all capital charges to the appellate courts, requiring the reporting of all capital indictments and their eventual processing and outcome, including any dismissal of the charges. Section 2929.03(F) of the Ohio Revised Code further requires that the trial judge (or panel of three judges if a jury is waived):

“when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating factors the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors.”

OHIO REV. CODE § 2929.03(F) (West 2007).

That section further provides that for cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence; and that for cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. OHIO REV. CODE § 2929.021 (West 2007).

The legislature further mandated that judicial opinions be prepared in all cases where life or death sentences were imposed, and that these be filed with the reviewing courts. *Id.* These opinions, each identifying the aggravating and mitigating circumstances and giving the reasons why the aggravating circumstances did or did not outweigh those in mitigation, provide the means for an effective comparison of sentences by the reviewing court. *Id.*

²⁹ OHIO REV. CODE § 2929.06(A) (West 2007).

³⁰ *State v. Steffen*, 509 N.Ed.2d 383, 395 (1987). District Courts of Appeals need only consider death-imposed cases within their geographical district. *Id.*; *see also State v. Rogers*, 478 N.E.2d 984, 996 (1985). The Ohio Supreme Court later stated “[a]n appellate court does not have the breadth and scope of experience that this court has to review the death sentences of all eighty-eight counties and to measure the appropriateness and proportionality of all the cases in the state.” *State v. Smith*, 684 N.E.2d 668, 683 (1997).

B. *Types of Reviewable Trial Errors*

1. Errors Properly Preserved in the Trial Court and Raised and/or Argued in the Ohio Supreme Court

The Ohio Supreme Court will review claims that were properly preserved at trial for error.³¹ Even when an error is preserved at trial, the Ohio Supreme Court will subject non-structural error to a harmless error analysis.³²

2. Procedurally Defaulted Claims³³

The Ohio Supreme Court has held that “[c]laims appearing on the face of the record must be raised on direct appeal, or they will be waived.”³⁴ Further, “[a]s a general rule an appellate court will not consider an alleged error that the complaining party did not bring to the trial court’s attention at the time the alleged error is said to have occurred.”³⁵ In practice, the Ohio Supreme Court sometimes will examine procedurally defaulted matters raised in direct appeals and in some instances, claims may be entitled to review even if there was no objection in the court below.³⁶ As explained in the capital case of *State v. Campbell*, the court stated that “we sometimes discuss the merits of a waived proposition of law as an alternative basis for *rejecting* it.”³⁷

3. Structural Errors

Structural error “deprive[s] defendants of ‘basic protections’ without which ‘a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.’”³⁸ In the limited circumstances where a court finds structural error, the court automatically will reverse the conviction and/or sentence. The issues identified by the United States Supreme Court as

³¹ *State v. Ferguson*, 844 N.E.2d 806 (Ohio 2006).

³² OHIO R. CRIM. P. 52(B).

³³ A procedural default occurs when a claim is not preserved due to a failure to object or file a motion. The Ohio Supreme Court does not generally require a knowing, understanding, and voluntary, or deliberate bypass of state procedural rules to refuse to consider a claim due to default. Inadvertent errors by counsel or the defendant then will often foreclose consideration of issues.

³⁴ *State v. Perry*, 226 N.E.2d 104 (Ohio 1967).

³⁵ *State v. Slagle*, 605 N.E.2d 916, 924-25 (Ohio 1992); *see also State v. Greer*, 530 N.E.2d 382, 396 (Ohio 1988); *State v. Wiles*, 571 N.E.2d 97, 121 (Ohio 1991).

³⁶ *See State v. Yarbrough*, 817 N.E.2d 845 (Ohio 2004); *State v. Campbell*, 738 N.E.2d 1178 (Ohio 2000); *State v. Filiaggi*, 714 N.E.2d 867, 877 (Ohio 1999) (stating that it has “consistently required strict compliance with Ohio statutes when reviewing the procedures in capital cases.” “We have repeatedly recognized that use of the term ‘shall’ in a statute or rule connotes the imposition of a mandatory obligation unless other language is included that evidences a clear and unequivocal intent to the contrary.”); *State v. Golphin*, 692 N.E.2d 608, 611 (Ohio 1998).

³⁷ *State v. Campbell*, 630 N.E.2d 339 (Ohio 1994) (emphasis in original); *State v. Maurer*, 473 N.E.2d 768 (Ohio 1984); *State v. Jackson*, 565 N.E.2d 549, 561 (Ohio 1991); *Greer*, 530 N.E.2d at 382.

³⁸ *Neder v. United States*, 527 U.S. 1, 8-9 (1999). Structural error stands in contrast to trial error, which is defined as error that occurs “during the presentation of the case to the jury” and may be “quantitatively assessed in the context of other evidence presented.” *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991).

structural error include a biased trial judge,³⁹ complete denial of criminal defense counsel,⁴⁰ denial of access to criminal defense counsel during an overnight trial recess,⁴¹ denial of self-representation in criminal cases,⁴² defective reasonable doubt jury instructions,⁴³ exclusion of jurors of the defendant's race from a grand jury,⁴⁴ erroneously excusing a juror because of his views on capital punishment,⁴⁵ and denial of a public criminal trial.⁴⁶

4. Plain Error

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."⁴⁷ To constitute plain error, it must appear that "but for the error, the outcome of the trial clearly would have been otherwise."⁴⁸

In applying the plain error rule in the death penalty case of *State v. Noling*, the Ohio Supreme Court explained that Rule 52(B) "places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial:"

(1) there must be an error, *i.e.*, a deviation from a legal rule, (2) the error must be plain, which means that it must be an "obvious" defect in the trial proceedings, and (3) the error must have affected "substantial rights," which means that the trial court's error must have affected the outcome of the trial.⁴⁹

The court also stated that "[t]he decision to correct a plain error is discretionary and should be made with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice."⁵⁰

³⁹ See *Turney v. Ohio*, 273 U.S. 510, 522-23 (1927).

⁴⁰ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁴¹ *Geders v. United States*, 425 U.S. 80, 88-89 (1976).

⁴² *McKaskle v. Wiggins*, 465 U.S. 168, 177-78, n.8 (1984).

⁴³ *Sullivan v. Louisiana*, 508 U.S. 275, 280-81 (1993).

⁴⁴ *Vasquez v. Hillery*, 474 U.S. 254, 262-63 (1986).

⁴⁵ *Gray v. Mississippi*, 481 U.S. 648, 659 (1987).

⁴⁶ *Waller v. Georgia*, 467 U.S. 39, 50 n.9 (1984).

⁴⁷ OHIO R. CRIM. P. 52(B).

⁴⁸ *State v. Long*, 372 N.E.2d 804 (1978). This is a more stringent plain error standard than that imposed in federal court, where an outcome change may be shown by a preponderance, rather than clear and convincing evidence, and may not be necessary at all in some instances. See *U.S. v. Olano*, 507 U.S. 725, 731-36 (1993) (Rule requires that "defendant show that the error was prejudicial;" "[w]e have never held the R. 52(b) remedy is *only* warranted in cases of actual innocence"; "An error may seriously affect the fairness, integrity, or public reputation of the process, independent of the defendant's innocence."; "There may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome."); see also *State v. Gross*, 776 N.E.2d 1061, 1082, n. 2 (2002) ("We note—without deciding the issue in this case—that the phrase "affecting substantial rights" may not *always* be synonymous with "prejudicial.") (citing *U.S. v. Olano*, 507 U.S. 725 (1993)).

⁴⁹ *State v. Noling*, 781 N.E.2d 88, 103 (Ohio 2002).

⁵⁰ *Id.*

As explained by the Ohio Supreme Court in *State v. Slagle*, “[a]s a general rule an appellate court will not consider an alleged error that the complaining party did not bring to the trial court’s attention at the time the alleged error is said to have occurred,”⁵¹ but that Rule 52(B) of the Ohio Rules of Criminal Procedure allows courts “to consider a trial error that was not objected to when that error was a ‘plain error.’”⁵² The Ohio Supreme Court sometimes will conduct a plain error review, but sometimes is “unwilling to look at the merits of unpreserved constitutional claims, despite the power to do so under their plain error rules.”⁵³

C. *Standards of Review*

1. Abuse of Discretion

Ohio courts periodically conduct review under an abuse of discretion standard that greatly defers to the judge’s ruling below. Abuse of discretion involves a determination “. . . so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.”⁵⁴ “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary, or unconscionable.”⁵⁵ This standard is applied to many errors, including those of constitutional dimension.⁵⁶

In holding that a trial court does not abuse its discretion unless it acts arbitrarily, unreasonably, or unconscionably,⁵⁷ a great deference is accorded to trial court decision-making. The Sixth Circuit Court of Appeals has found that the Ohio Supreme Court’s review for abuse of discretion has, on occasion, violated the federal constitution. For example, in *White v. Mitchell*,⁵⁸ the Sixth Circuit granted sentencing phase relief, concluding the trial judge’s failure to excuse a juror for cause and the Ohio Supreme Court’s finding that the trial court did not abuse its discretion in making that determination “were contrary to or an unreasonable application of Supreme Court precedent.”⁵⁹

2. Harmless Error

⁵¹ *State v. Slagle*, 605 N.E.2d 916, 924-25 (Ohio 1992).

⁵² *Id.*

⁵³ Ira P. Robbins, *Toward a More Just and Effective System of Review in Death Penalty Cases*, 40 AM. U. L. REV. 1, 30-31 (1990); *see also* *State v. Bradley*, 538 N.E.2d 373, 378 (1989) (holding that plain error analysis would not be applied to the admission of the entire investigative report in sentencing phase, despite its being replete with otherwise inadmissible information).

⁵⁴ *State v. Jenkins*, 473 N.E.2d 264, 313 (1984) (quoting *Spalding v. Spalding*, 355 Mich. 382, 384-85 (1959)).

⁵⁵ *State v. Myers*, 780 N.E.2d 186, 206 (Ohio 2002); *State v. Keenan*, 689 N.E.2d 929, 937 (Ohio 1998) (quoting *State v. Adams*, 404 N.E.2d 144 (Ohio 1980)).

⁵⁶ *Keenan*, 689 N.E.2d at 937; *State v. Montgomery*, 575 N.E.2d 167, 171 (Ohio 1991); *State v. Coleman*, 544 N.E.2d 622 (Ohio 1989); *State v. McNeill*, 700 N.E.2d 596, 605 (1998).

⁵⁷ *State v. LaMar*, 767 N.E.2d 166, 187 (Ohio 2002).

⁵⁸ *White v. Mitchell*, 431 F.3d 517 (6th Cir. 2005).

⁵⁹ *Id.* at 542.

Rule 52(A) of the Ohio Rules of Criminal Procedure provides that “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.”⁶⁰ In *State v. Fisher*, the Ohio Supreme Court explained the application of the state rule:

Thus, Crim. R. 52(A) sets forth two requirements that must be satisfied before a reviewing court may correct an alleged error. First, the reviewing court must determine whether there was an “error”--i.e., a “[d]eviation from a legal rule.” Second, the reviewing court must engage in a specific analysis of the trial court record--a so-called “harmless error” inquiry--to determine whether the error “affect[ed] substantial rights” of the criminal defendant. This language has been interpreted to “mean[] that the error must have been *prejudicial*: It must have affected the outcome of the [trial] court proceedings.”⁶¹

For instance, in *State v. Lundgren*, the appellant objected at trial to the admission of autopsy photographs.⁶² While the court found that it was error to admit the photographs since their probative value did not outweigh their prejudicial affect,⁶³ it ultimately held that “even where a court abuses its discretion in the admission of evidence, we must review whether the evidentiary ruling affected a substantial right of the defendant.”⁶⁴ The court found that Lundgren was not prejudiced by the admission of the photographs in light of the overwhelming evidence of guilt and Lundgren’s confession.⁶⁵ The court also concluded that any prejudice to Lundgren during the sentencing phase from the photos was minimized by the court’s independent review of the death sentence.⁶⁶

In another case, *State v. Webb*, the state introduced hospital records to contradict the defendant’s statements about his whereabouts at the time of the crime.⁶⁷ The court of appeals found that the admission of the hospital records was error and violated doctor-patient confidentiality.⁶⁸ The Ohio Supreme Court agreed, but explained that “error involving privilege is not a constitutional violation” and “[n]onconstitutional error is harmless if there is substantial other evidence to support the guilty verdict.”⁶⁹

Ohio courts have occasionally recognized the doctrine of cumulative error, and that errors harmless in the trial phase may carry over and be harmful in the penalty phase. For example, in *State v. Thompson*, the court explained:

⁶⁰ OHIO R. CRIM. P. 52(B).

⁶¹ *State v. Fisher*, 789 N.E.2d 222, 225 (Ohio 2003) (citations omitted) (alteration and emphasis in original).

⁶² *State v. Lundgren*, 653 N.E.2d 304, 318 (Ohio 1995).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *State v. Webb*, 638 N.E.2d 1023, 1032 (Ohio 1994).

⁶⁸ *Id.*

⁶⁹ *Id.*

[T]he combination of the prosecutor's prejudicial argument in the penalty phase aimed at inflaming the passions of the jury, and his resurrection of the gruesome photographic slides, created a climate in which the jury herein was unable to dispassionately weight the aggravating circumstances against the mitigating factors.⁷⁰

The court had found the prosecutor's use of the gruesome slides during the guilt phase was harmless error, but continued to explain that an aggravated murder trial is bifurcated:⁷¹ "We would be naïve not to recognize that those matters which occur in the guilt phase carry over and become part and parcel of the entire proceeding as the penalty phase is entered."⁷² The court concluded:

In the case before us, the prosecutor's persistent references to the appellant's silence, continuing even after the trial court has sustained an objection to such comments, are errors so egregious that regardless of where they occurred in the overall trial, they cannot be ignored or overlooked.... When we add to this the prosecutor's improper conduct and remarks at the guilt phase, we are forced to conclude that the ultimate effect was such that the penalty phase of appellant's trial was fundamentally flawed and prejudicially unfair.⁷³

Federal courts have concluded that harmless error rules have not been properly applied in some Ohio cases, and that the Ohio Supreme Court has a duty to consider matters beyond guilt when considering penalty phase errors in particular. For instance, in *DePew v. Anderson*, the United States Court of Appeals for the Sixth Circuit found that the multiple instances of prosecutorial misconduct presented were not harmless, chastised the Ohio Supreme Court for not conducting a proper harmless error review, and granted federal habeas relief.⁷⁴ In reaching its conclusion, The Sixth Circuit noted that the Ohio Supreme Court did not actually find that the multiple prosecutorial errors in this case were harmless.⁷⁵ Rather, the state court had simply "found that the crime was 'brutal' and that 'in the interest of the public, which has every right to expect is criminal justice system to work effectively', the court could not grant reversal."⁷⁶ The United States Court of Appeals for the Sixth Circuit concluded the Ohio Supreme Court had failed to redress constitutional error: "The public's or the voter's feelings in favor of capital punishment for brutal crimes are a well-known part of our political tradition, but these feelings cannot rise above or displace constitutional provisions insuring a fair trial."⁷⁷

⁷⁰ State v. Thompson, 514 N.E.2d 407, 421 (Ohio 1987).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *DePew v. Anderson*, 311 F.3d 742 (6th Cir. 2002).

⁷⁵ *Id.* at 751.

⁷⁶ *Id.*

⁷⁷ *Id.*

Similarly, in *Madrigal v. Bagley*,⁷⁸ the Sixth Circuit found the Ohio Supreme Court's holding that the admission of co-defendant's statements implicating Madrigal as the murderer was harmless error was unreasonable as it relied solely on there being other sufficient evidence from which a reasonable jury could convict the defendant, rather than the influence such evidence would have on the trial jury's determination of guilt.⁷⁹

Even on the Ohio Supreme Court, determinations of harmless error have been divisive. For example, Justice J. Craig Wright, then a sitting member of the Ohio Supreme Court, publicly stated his displeasure that the Court on which he sat "has raised the doctrine of harmless error to an art form."⁸⁰ His testimony urged the federal courts to maintain close scrutiny of Ohio court decision-making because of the Ohio Supreme Court's inadequate review.⁸¹

⁷⁸ 413 F.3d 548 (6th Cir. 2005)

⁷⁹ *Id.* at 550.

⁸⁰ Testimony of Justice J. Craig Wright before the American Bar Association Criminal Justice Section Task Force on Death Penalty Habeas Corpus (on file with author); *see also* Robbins, *supra* note 53, at 30-31, n. 54.

⁸¹ *Id.* at 31.

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 appeals 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 but was not.

In death penalty cases, the Ohio Supreme Court is required to “consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.”⁸² While the Ohio Supreme Court has reviewed over 250 death-imposed cases since the law requiring proportionality review went into effect, it has never vacated a death sentence on this ground.

In conducting its review, reviewing courts do not need to consider or compare cases where a life sentence was imposed or where death could have been, but was not, sought.⁸³ The Court has held that “proportionality review is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed.”⁸⁴ The present approach that looks only to other death-imposed cases (and on occasional a life sentence imposed on an accomplice) ultimately deprives the judicial system of an ability to ensure that sentences are being consistently and fairly meted out.

The Ohio Supreme Court’s refusal to consider the life sentence imposed in similar cases has sometimes led to a refusal to consider a co-defendant’s sentence, even in the case of a co-defendant who admitted killing the victim and was sentenced to life imprisonment.⁸⁵ In one leading case, the Court simply stated that the life sentence imposed on the co-defendant was irrelevant as it was the product of a separate trial.⁸⁶ On occasion, the Court will address the sentences of accomplices and co-defendants in the case under review, sometimes in its reweighing of aggravating and mitigating circumstances,⁸⁷ and

⁸² OHIO REV. CODE § 2929.05(A) (West 2007).

⁸³ *State v. Steffen*, 509 N.E.2d 383, 386 (Ohio 1987). The Court’s syllabus is arguably inconsistent with the text of the opinion, but the syllabus controls and has been the ruling relied on since the decision was announced.

⁸⁴ *Id.* at 395. District Courts of Appeal need only consider death-imposed cases within their geographical district. *Id.*; *see also State v. Rogers*, 478 N.E.2d 984, 996 (Ohio 1985). The Ohio Supreme Court later stated that “[a]n appellate court does not have the breadth and scope of experience that this court has to review the death sentences of all eighty-eight counties and to measure the appropriateness and proportionality of all the cases in the state.” *State v. Smith*, 684 N.E.2d 668, 683 (Ohio 1997).

⁸⁵ *State v. Stumpf*, 512 N.E.2d. 598 (Ohio 1987).

⁸⁶ *Id.*

⁸⁷ For example, in *State v. Getsy*, 702 N.E.2d 866 (Ohio 1998), Getsy and two accomplices were involved in the killing of one person and injuring of another on the orders of another man, John Santine. As part of its independent reweighing of the aggravating circumstances and mitigating factors, the court considered the lesser sentences imposed on the three other individuals involved in the crime, two of whom

sometimes in its proportionality review.⁸⁸ However, it has refused to do so in other instances, even when the codefendants were brothers and committed the same offense.⁸⁹

The risk of arbitrary sentencing among codefendants under the Ohio system was recently addressed by the *en banc* United States Court of Appeals for the Sixth Circuit in *Getsy v. Mitchell*.⁹⁰ A divided Sixth Circuit panel had found Getsy's death sentence was imposed in an arbitrary and capricious manner in violation of the Eighth Amendment.⁹¹ Getsy was convicted of murder for hire and sentenced to death; Santine, who hired him, was sentenced to life in prison, having been convicted at a separate trial of aggravated murder, but found not guilty of having hired others to commit murder for him. Another participant was permitted to enter a plea bargain and received a life sentence.⁹² The opinion found Getsy's "death sentence violates [U.S. Supreme Court precedent] because like crimes are not being punished alike in the very same case and because of the inconsistent jury verdicts in this case."⁹³

The *en banc* Sixth Circuit reversed, however, upholding Getsy's death sentence despite even the majority's "concern" about "the incongruous results" obtained in the Ohio capital sentencing system.⁹⁴ In response to the panel opinion's holding that Getsy's death sentence "was unconstitutionally arbitrary and disproportionate in relation to the

had pled guilty and one was found not guilty of capital murder, as entitled to some weight in mitigation. *Getsy*, 702 N.E.2d at 892.

⁸⁸ In *State v. Bies*, for instance, as part of its proportionality review, the court considered the death sentence received by Bies' accomplice, Darryl Gumm, and explained that "the penalty is appropriate and proportionate when compared to the capital case of Biess [sic] accomplice." 658 N.E.2d 754, 762 (Ohio 1995).

⁸⁹ In *State v. Hutton*, the court refused to take into account the sentence of Hutton's co-defendant, Bruce Laster, who pled guilty to involuntary manslaughter and was sentenced to 7 to 25 years. Hutton argued that Laster's case was a "similar case" that the court should consider in its proportionality review. 797 N.E.2d 948, 963 (Ohio 2003). Hutton further argued that "because there was no proof of who actually shot Mitchell, it cannot be justified to sentence Hutton to death when Laster received a sentence of only 7 to 25 years." *Id.* The court concluded that "Laster's case is not a 'similar case' for the purposes of section 2929.04 of the Ohio Rev. Code. Laster was not convicted of aggravated murder, nor did he receive a death sentence." *Id.*

In *State v. Smith*, the appellant challenged the appropriateness of the death sentence he received for crimes he committed with his brother, Randy, when the jury sentencing Randy did not recommend the death penalty. 684 N.E.2d 668 (Ohio 1997). The appellant argued that "[s]ince both brothers had the same background and upbringing, and committed the same offenses . . . he should not receive a death sentence when Randy did not." *Smith*, 684 N.E.2d at 697. The court explained that "the jury's independent verdict of a life sentence in Randy's case cannot control the jury's recommendation in defendant's case; nor can the verdict in Randy's case affect our own independent evaluation of defendant's case." *Id.* The court added that it has previously held that "disparity of sentence does not justify reversal of a death sentence when that sentence is neither illegal nor an abuse of discretion." *Id.*; see also *State v. Jamison*, 552 N.E.2d 180, 189 (Ohio 1990).

⁹⁰ *Getsy v. Mitchell*, 2007 WL 2118956 (6th Cir. 2007) (*en banc*).

⁹¹ Originally reported at 456 F.3d 575 (6th Cir. 2006), opinion withdrawn and rehearing *en banc* granted, Nov. 22, 2006.

⁹² *Id.*

⁹³ *Getsy*, 456 F.3d at 577.

⁹⁴ *Getsy*, 2007 WL 2118956, at *10.

life sentence received by Santine in a separate trial,”⁹⁵ the majority held that, with the tightened federal habeas corpus relief statutes, it could only grant relief if the Ohio Supreme Court’s refusal to consider the co-defendant’s life sentence was contrary to clearly established law from the U.S. Supreme Court, and ruled it was not.⁹⁶

In addition to the erratic consideration of co-defendants, the Ohio Supreme Court’s review of relevant cases in its proportionality review is at best spotty, and often consists of a recitation that the Court has compared a number of cases. This recitation usually includes a citation or series of citations,⁹⁷ but not always,⁹⁸ and often there is no explanation or analysis to support the conclusion how or why the case where death was imposed was “similar.” If an explanation or statement is offered beyond a string of citations, it often is a statement that the Court has previously affirmed the death sentence when the defendant’s aggravating factor was present.⁹⁹ While that reaffirms death-eligibility, however, it does not address whether death is *commonly* imposed in the presence of this aggravating factor and does not address, let alone examine, the frequency of imposition of death in the presence of the defendant’s mitigating factors.¹⁰⁰

On occasion the Ohio Supreme Court does conduct what may be termed a comparative proportionality review analysis.¹⁰¹ The Court’s proportionality review more often,

⁹⁵ *Id.* at *5.

⁹⁶ *Id.* at *8-10.

⁹⁷ The following is an example of a typical proportionality review undertaken by the Ohio Supreme Court:

In this case, the sentences of death are both appropriate and proportionate when compared with other similar murder cases. *State v. Lott*, supra; *State v. Henderson*, supra; *State v. Van Hook* (1988), 39 Ohio St.3d 256, 530 N.E.2d 883; *State v. Greer*, supra; *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Steffen*, supra.

State v. Smith, 574 N.E.2d 510, 521 (Ohio 1991); *see also, e.g., State v. Frazier*, 652 N.E.2d 1000, 1018 (Ohio 1995) (listing cases).

⁹⁸ In *State v. Franklin*, the court explained its obligation to undertake a proportionality review and stated only that “[w]e have undertaken such a comparison and find that a sentence of death in this case is neither excessive nor disproportionate.” 580 N.E.2d 1, 11 (Ohio 1991).

⁹⁹ This is exemplified in *Zuern*, the case in which the Court commented that Ohio’s system well documents why particular murderers receive the death sentence. The Court’s “proportionality review” in *Zuern* was “we note that the penalty of death was upheld in prior cases where the murder victim was a police officer.” *State v. Zuern*, 512 N.E.2d 585, 593 (Ohio 1987); *see also State v. Cooley*, 544 N.E.2d at 919-920 (Ohio 1989) (involving other aggravating circumstances); *State v. Bradley*, 538 N.E.2d 373, 386 (Ohio 1989); *State v. Wiles*, 571 N.E.2d 97, 125 (Ohio 1991); *State v. Jalowiec*, 744 N.E.2d 163, 182 (2001).

¹⁰⁰ *See Ellen Liebman, Appellate Review of Death Sentences: A Critique of Proportionality Review*, 18 U.C. DAVIS L. REV. 1433, 1444-58 (1985).

¹⁰¹ For instance, in *State v. Williams*:

The death penalty is both appropriate and proportionate when we compare the appellant’s case with similar capital cases. The appellant murdered four people. He experienced an unfortunate childhood with little to no moral guidance. However, such experiences do not mitigate the horrible crimes he committed. Since 1986, this court has reviewed eight death penalty cases where the R.C. 2929.04(A)(5) multiple-murder aggravating circumstance was the only one present. *See State v. Brooks* (1986), 25 Ohio St. 3d 144,

however, is like that undertaken by the court in *State v. Richey* where the majority's proportionality review consisted of the following statement:

The death penalty is appropriate and proportionate when compared with similar felony murder cases. See *State v. Bonnell* (1991), 61 Ohio St.3d 179, 573 N.E.2d 1082 (felony murder); *State v. Lott, supra* (felony murder, victim set on fire); *State v. Seiber* (1990), 56 Ohio St.3d 4, 564 N.E.2d 408 (felony murder); *State v. Powell* (1990), 49 Ohio St.3d 255, 552 N.E.2d 191 (felony murder, seven-year-old victim); *State v. DePew, supra* (felony murder including arson, three victims including a seven-year-old); *State v. Morales* (1987), 32 Ohio St.3d 252, 513 N.E.2d 267 (felony murder, twelve-year-old victim); *State v. Buell* (1986), 22 Ohio St.3d 124, 22 OBR 203, 489 N.E.2d 795 (felony murder, eleven-year-old victim); *State v. Maurer, supra* (felony murder, seven-year-old victim).¹⁰²

The dissent took issue with the four-justice-majority's proportionality review in *Richey*, however, reviewing each case cited by the majority as being similar to *Richey* and explaining that "if one reads those cases (which are merely listed and not analyzed by the majority), it is obvious that not one is remotely similar to this one."¹⁰³ The dissent concluded that in each of the cases cited by the majority:

25 Ohio B. Rep. 190, 495 N.E.2d 407; *Bedford*, 39 Ohio St. 3d 122, 529 N.E.2d 913; *State v. Sowell* (1988), 39 Ohio St. 3d 322, 530 N.E.2d 1294; *State v. Lawrence* (1989), 44 Ohio St. 3d 24, 541 N.E.2d 451; *State v. Coleman* (1989), 45 Ohio St. 3d 298, 544 N.E.2d 622; *State v. Moreland* (1990), 50 Ohio St. 3d 58, 552 N.E.2d 894; *State v. Combs* (1991), 62 Ohio St. 3d 278, 581 N.E.2d 1071; and *State v. Awkal* (1996), 76 Ohio St. 3d 324, 667 N.E.2d 960. Out of the eight cases, this court has affirmed death penalties in seven. In many of those cases, the defendant was either under significant emotional stress or lacked substantial capacity to conform to the law due to mental disease or defect. See, e.g., *Moreland*; *Awkal*. In this case, the appellant labored under neither impediment. In addition, like the appellant, the defendants in *Moreland* and *Awkal* could point to bad childhoods. *Lawrence* was the eighth case where the multiple-murder aggravating circumstance was the only aggravating circumstance present. In *Lawrence*, this court found that the mitigating factors outweighed a single multiple-murder aggravating circumstance and, therefore, vacated the death sentences. However, the mitigating factors in *Lawrence* included provocation, post-traumatic stress disorder rising to the level of a diminished-capacity mitigating factor under R.C. 2929.04(B)(3), a severe depression following the death of the defendant's infant son, lack of a significant criminal history, the defendant's voluntary military service, and his care for his family. In comparison, the mitigating factors in this case are nearly nonexistent. Moreover, this court affirmed the death penalty in *State v. Hawkins* (1993), 66 Ohio St. 3d 339, 612 N.E.2d 1227, a similar case involving the murder of two drug dealers. In *Hawkins*, there were two aggravating circumstances, but there also were only two victims, as compared to four victims here. Accordingly, we conclude that the death penalty in this case is neither excessive nor disproportionate when compared to the penalties approved in the above cases. Therefore, the judgment of the court of appeals is affirmed.

State v. Williams, 679 N.E.2d 646, 662-63 (Ohio 1997).

¹⁰² *State v. Richey*, 595 N.E.2d 915 (Ohio 1992).

¹⁰³ *Id.* at 933.

[T]he defendant had clear animus toward the victim, or harmed the victim in a direct, face-to-face encounter, or both. I find no case in Ohio where a defendant in a felony murder case has been put to death unless he had a specific animus towards the victim, or a direct, violent, face-to-face encounter with the victim, or both. As discussed above, there is no evidence that Richey had specific animus towards Cynthia Collins [the victim]. On the contrary, he showed concern for her life while the fire was in progress . . . There is a stunning difference between this case and those cited as comparable by the majority.¹⁰⁴

The dissent concluded its discussion by stating that:

Under the Eighth and Fourteenth Amendments to the United States Constitution, as well as R.C. 2929.05, we are obligated to perform a *meaningful* proportionality review of the death penalty in every case. Such a review deserves more than lip service and a listing of cases which are in no sense comparable to this one. There has been no meaningful proportionality review in this case. The death penalty is not warranted, and I must dissent.¹⁰⁵

At one point the Ohio Supreme Court did seem to recognize the importance of including cases which resulted in sentences of death and sentences of life in its comparative proportionality review. In relying on Ohio's legislatively mandated appellate review system to uphold the constitutionality of the 1981 capital sentencing law, the Ohio Supreme Court stated that:

The fundamental purpose behind proportionality review is to ensure that sentencing authorities do not retreat to the pre-*Furman* era when sentences were imposed arbitrarily, capriciously and indiscriminately.... The system currently in place in Ohio enables this court to obtain a vast quantity of information with which to effectuate proportionality review, beginning with data pertinent to *all* capital indictments and concluding with the sentence imposed on the defendant.¹⁰⁶

In reaching its decision, the Court described the materials legislatively mandated "to aid the courts in conducting their proportionality review," referring to the information provided with respect to capital indictments issued or dismissed,¹⁰⁷ and added that "under R.C. 2929.03(F), trial judges rendering opinions in capital cases are required to file copies of those opinions with their courts of appeals and with the Ohio Supreme Court."¹⁰⁸ This referenced statutory section requires that trial judges prepare an opinion in both settings, i.e., "when it imposes sentence of death," or "when it imposes life

¹⁰⁴ *Id.*

¹⁰⁵ *Richey*, 595 N.E.2d at 934 (citations omitted).

¹⁰⁶ *State v. Jenkins*, 473 N.E.2d 264, 279 (Ohio 1986) (emphasis in original).

¹⁰⁷ *Id.*; see also OHIO REV. CODE § 2929.021 (West 2007).

¹⁰⁸ *Id.*

imprisonment.”¹⁰⁹ Consequently, it appears that the Ohio Supreme Court, in analyzing the Ohio capital sentencing statutes, believed it was to consider both life and death sentence cases in its proportionality review, and it would appear also, the outcomes in capitally charged cases.¹¹⁰ Though this universe of cases did not take into account cases where the death penalty had not been sought,¹¹¹ it did assure comparison of cases where death had been sought and refused.

Thus, although the Ohio legislature appeared to mandate it, and the Ohio Supreme Court once accepted it, the Ohio Supreme Court has since refused to consider cases in which the death penalty was sought but not imposed.¹¹² It has also refused to consider cases in which the death penalty could have been sought but was not.¹¹³ Although the Ohio Supreme Court claims that “Ohio’s system well-documents why particular murderers receive the death sentence, which has removed the vestiges of arbitrariness,”¹¹⁴ it does not appear that this occurs in practice.

Ohio Supreme Court Justice Paul Pfeifer, a lead sponsor of the bill who “chaired the Senate committee that helped shape Ohio’s death penalty” when he was serving as a legislator in 1981, has expressed great concern over the court’s present proportionality review process, calling it “little more than lip service.”¹¹⁵ While Justice Pfeifer was concerned with statistics on race and geography, a greater concern “is why nearly identical facts will result in the death penalty in some cases but not others.”¹¹⁶

Justice Pfeifer’s dissent in *State v. Murphy* addressed the narrow interpretation of “similar cases,”¹¹⁷ acknowledging that the Court’s interpretation of “similar cases” was a possible one, but that “[a]nother is that ‘similar cases’ refers more broadly to all factually

¹⁰⁹ OHIO REV. CODE § 2929.03(F) (West 2007).

¹¹⁰ In *Jenkins*, the Court only rejected two arguments: (1) that a jury was to write its own opinion when it recommended a life sentence, and (2) that the court consider “the relative sentences imposed in all *non-capitally* charged murder cases.” *Jenkins*, 473 N.E.2d at 279 (emphasis added). When it proceeded to engage in the first proportionality review, the Court evaluated “the sentencing opinions filed with this court.” *Id.* at 304. This review necessarily included both death and life sentence opinions, as both must be prepared and filed with the reviewing courts under section 2929.03(F) of the Ohio Revised Code.

¹¹¹ *Id.*

¹¹² See *State v. Steffen*, 509 N.E.2d 383, 386 (1987).

¹¹³ *Id.* at 395.

¹¹⁴ *State v. Zuern*, 512 N.E.2d 585, 593 (Ohio 1987). There, the Court’s response to Zuern’s claim that his sentence lacked proportionality was: “This court has never held that a proportionality review requires equal treatment of all capital defendants. The variety of reasons the state seeks the death penalty in a case, as well as the many varying mitigation factors, precludes such a possibility. The purpose of a proportionality review is therefore to insure that the death penalty is not imposed in a random, freakish, arbitrary, or capricious manner.” *Zuern*, 512 N.E.2d at 593. The Court did not explain how these two statements can both be accurate.

¹¹⁵ Sandy Theis, *Death Penalty Applied Unfairly, Pfeifer Declares; Punishment Varies for Same Crimes*, PLAIN DEALER (Cleveland, Ohio), Apr. 23, 2001, at 1B.

¹¹⁶ *Id.* In the same article, Chief Counsel for the Ohio Public Defender’s Death Penalty Division Greg Meyers, stated that the death penalty is supposed to be reserved for the worst of the worst, but is not and compared the cases of Wilford Berry and Wendell Rutledge as an example. *Id.* According to Meyers, a reason for the problems with proportionality review is that the courts do not look at cases where the death penalty was not imposed as part of the review process. *Id.*

¹¹⁷ *State v. Murphy*, 747 N.E.2d 765, 813-15 (Ohio 2001).

similar cases, whether or not a capital specification was charged or proved.”¹¹⁸ Murphy had been convicted and sentenced to death for murder committed during the course of an aggravated robbery.¹¹⁹ Justice Pfeiffer explained:

In my view, Murphy should be compared to the universe of all Ohio cases in which a person was killed during the course of a robbery, not just to cases in which a person was killed during the course of a robbery and in which a sentence of death was imposed. When we compare a case in which the death penalty was imposed only to other cases in which the death penalty was imposed, we continually lower the bar of proportionality. The lowest common denominator becomes the standard. This result is ethically indefensible.¹²⁰

Justice Pfeiffer continued that the court should be provided with information on race and other “constitutionally significant factors that this court could use to determine whether our justice system fairly treats all the defendants that come before it.”¹²¹ He concluded his discussion of Ohio’s proportionality review with the following words:

We must be willing to do serious proportionality review. Even though approximately two hundred males currently reside on death row, this court has never overturned a death sentence based on proportionality review. “Proportionality review” must be more than hollow words, it must someday mean that this court will overturn a sentence of death based solely on proportionality review.¹²²

A consistent practice of thorough comparative review is essential to assure against excessive, disproportionate, arbitrary, capricious and discriminatory death-sentencing. However, the Ohio Supreme Court’s review appears to be more in the nature of a mechanical rule of affirmance that provides no assurance of justice. The Ohio Supreme Court generally fails to conduct a meaningful proportionality review in capital cases.

Because the Ohio Supreme Court does not compare a death sentence case to cases in which the death penalty was sought but not imposed, or to cases in which the death penalty could have been sought but was not, excepting on rare occasions a co-defendant’s case, the State of Ohio is not in compliance with Recommendation #1.

Based on this information, the Ohio Death Penalty Assessment Team recommends that the State of Ohio:

1. Employ a more searching sentencing review in capital cases. This review should consider not only other death penalty cases, but also those cases in

¹¹⁸ *Id.* at 813.

¹¹⁹ *Id.* at 765.

¹²⁰ *Id.* at 813.

¹²¹ *Id.*

¹²² *Id.* at 814.

which the death penalty could have been sought or was sought and not imposed; and

2. Create a publicly accessible database on all potentially death-eligible murder cases. Relevant information on all death-eligible cases should be included in the database and specifically provided to prosecutors to assist them in making informed charging decisions and the Ohio Supreme Court for use in ensuring proportionality; and
3. Engage in more thorough review of the issues presented to the court(s) in capital appeals, relax the application of waiver standards, and lessen the use of the harmless error standard of review.

CHAPTER EIGHT

STATE POST-CONVICTION PROCEEDINGS

INTRODUCTION TO THE ISSUE

The availability of state post-conviction and federal habeas corpus relief through collateral review of state court judgments long has been an integral part of the capital punishment process. Very 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 claims.

The importance of such collateral review to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on direct appeal, and it is often not possible until after direct appeal to uncover prosecutorial misconduct or other crucial evidence, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. Due to doctrines of exhaustion and procedural default, such claims, no matter how valid, must almost always be presented first to the state courts 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. Among the latter are: a one-year statute of limitations on bringing federal habeas proceedings; tight restrictions on evidentiary hearings with respect to facts not presented in state court (no matter how great the justification for the omission) unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts conclude that the rulings are erroneous.

In addition, United States Supreme Court decisions and the Anti-Terrorism 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. Another factor limiting grants of federal habeas corpus relief is the more frequent invocation of the harmless error doctrine; under recent decisions, prosecutors no longer are required to show in federal habeas that the error was harmless beyond a reasonable doubt in order to defeat meritorious constitutional claims.

Changes permitting or requiring courts to decline consideration of valid constitutional claims, as well as the federal government's de-funding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage

frivolous claims in federal courts. In fact, however, a principal effect of these changes has been to prevent death-row inmates from having valid claims heard or reviewed at all.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier to get state court rulings on the merits of valid claims of harmful constitutional error. The numerous rounds of judicial proceedings do not mean that *any* court, state or federal, ever rules on the merits of the inmate's claims—even when compelling new evidence of innocence comes to light shortly before an execution. 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

A. Overview of State Post-Conviction Proceedings

Sections 2953.21 through 2953.23 of the Ohio Revised Code govern all state post-conviction proceedings, including those initiated by death-row inmates.¹ These provisions provide the exclusive remedy by which a person may bring a collateral challenge to the validity of a conviction or sentence in a death penalty case.²

1. The Filing of a Post-Conviction Petition

Any person who has been convicted of a criminal offense, including those convicted of a death-eligible felony and sentenced to death by an Ohio court may petition the trial court to vacate the judgment or sentence or grant other appropriate relief if there was “such a denial or infringement of the person’s rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States.”³

The petitioner may raise any claim of constitutional magnitude so long as it is not barred by the doctrine of *res judicata* or other rules of waiver or default. Ohio law specifically provides that the petitioner who was denied equal protection of the laws in violation of the Ohio or United States Constitutions because the sentence imposed upon the petitioner was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence, with regard to the petitioner’s race, gender, ethnic background, or religion.⁴

Any inmate who was convicted of a felony and who has DNA evidence showing his/her actual innocence may file a petition for post-conviction relief if:

DNA testing . . . was performed under sections 2953.71 to 2953.81 of the Ohio Revised Code or under section 2953.82 of the Ohio Revised Code and analyzed in the context of and upon consideration of all available admissible evidence . . . , by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.⁵

Ohio law defines “actual innocence” for purposes of post-conviction relief as follows:

¹ OHIO REV. CODE §§ 2953.21-.23 (West 2007).

² OHIO REV. CODE § 2953.21(J) (West 2007).

³ OHIO REV. CODE § 2953.21(A)(1)(a), (A)(3) (West 2007).

⁴ OHIO REV. CODE § 2953.21(A)(5) (West 2007). If the Ohio Supreme Court adopts rules requiring the documentation by the trial court of information with regard to the enumerated characteristics of offenders, the supporting evidence for such a claim must include, but need not be limited to, a copy of documentation of such characteristics as it relates to the petitioner and all other persons sentenced by the same judge. *Id.*

⁵ OHIO REV. CODE § 2953.21(A)(1)(a) (West 2007). For a comprehensive discussion of these procedures, see Chapter Two: Collection, Preservation, and Testing of DNA and Other Types of Evidence, *supra* at pp. 53-76.

[H]ad the results of the DNA testing conducted [pursuant to the post-conviction DNA testing statutes] been presented at trial, and had those results been analyzed in the context of and upon consideration of all available admissible evidence related to the inmate's case . . . , no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted, or . . . guilty of the aggravating circumstance or circumstances the petitioner was found guilty of committing and that is or are the basis of that sentence of death.⁶

The petition must be filed and decided in the trial court in which the petitioner was sentenced.⁷

2. Time Limit for Filing a Post-Conviction Petition and Post-Filing Matters

Generally, section 2953.21 of the Ohio Revised Code allows a death-sentenced individual to file a post-conviction petition no later than 180 days after 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.⁸

Regardless of whether a hearing is held, the court may not entertain a post-conviction petition filed after the expiration of the 180 days for filing such a petition⁹ unless either of the following exceptions apply:

- (1) The petitioner shows:
 - (a) That he/she was unavoidably prevented from discovery of the facts upon which he/she must rely to present the claim for relief, or, after the expiration of the time for filing the petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right;¹⁰ and
 - (b) By clear and convincing evidence that, but for constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty of the offense of which the petitioner was convicted or found the petitioner eligible for the death sentence;¹¹ or
- (2) Post-Conviction DNA testing was performed in the death-sentenced petitioner's case pursuant to the Ohio Revised Code,¹² and the results of

⁶ OHIO REV. CODE § 2953.21(A)(1)(b) (West 2007).

⁷ OHIO REV. CODE § 2953.21(A)(1)(a) (West 2007).

⁸ OHIO REV. CODE § 2953.21(A)(2) (West 2007).

⁹ OHIO REV. CODE § 2953.23(A) (West 2007); *see also* State v. Beaver, 722 N.E.2d 1046, 1049 (Ohio Ct. App. 11th Dist. 1998) (holding that besides the two exceptions enumerated in the statute, "[n]o other excuses will be accepted" for the lateness of a post-conviction petition).

¹⁰ OHIO REV. CODE § 2953.23(A)(1)(a) (West 2007).

¹¹ OHIO REV. CODE § 2953.23(A)(1)(b) (West 2007).

¹² The State of Ohio's post-conviction DNA testing procedures are contained in sections 2953.71 through 2953.84 of the Ohio Revised Code. OHIO REV. CODE §§ 2953.71-.84 (West 2007).

the DNA testing establish, by clear and convincing evidence, “actual innocence”¹³ of the aggravated murder or the aggravating circumstance(s) the person was found guilty of committing, which are the basis of his/her sentence of death.¹⁴

After the petition is filed, the clerk of court must docket the petition, bring it to the attention of the court in a prompt manner, and immediately forward a copy of the petition to the prosecuting attorney of that county.¹⁵ Within ten days of the docketing of the petition, or within an extended time upon a showing of good cause, the prosecuting attorney must respond to the petition by answer or motion for summary judgment.¹⁶ Either party, within twenty days of filing the petition, may move for summary judgment.¹⁷ The right of summary judgment must appear on the face of the record.¹⁸

At any time before the prosecuting attorney files his/her answer to or motion for summary judgment on the post-conviction petition, the petitioner may amend his/her petition as a matter of right without leave of the court or prejudice to the proceedings.¹⁹ After the prosecuting attorney files such an answer or motion, the petitioner may still amend his/her petition with leave of the court.²⁰

3. Appointment of Post-Conviction Counsel

Death-sentenced post-conviction petitioners must be appointed counsel at the state’s expense if:

- (1) The defendant intends to file a post-conviction petition;
- (2) The court determines that the petitioner is indigent; and
- (3) The petitioner either accepts the appointment or is unable to make a competent decision whether to accept for reject the appointment of counsel.²¹

The court may only refuse to appoint counsel if it finds, after a hearing if necessary, that the petitioner is not indigent or that the petitioner rejects the counsel and understands the consequences of such a decision.²² The court may not appoint an attorney who represented the petitioner at trial unless such an attorney and the petitioner expressly request such an appointment.²³

¹³ “Actual innocence” has the same meaning as described above. *See supra* note 6 and accompanying text.

¹⁴ OHIO REV. CODE § 2953.23(A)(2) (West 2007).

¹⁵ OHIO REV. CODE § 2953.21(B) (West 2007).

¹⁶ OHIO REV. CODE § 2953.21(D) (West 2007).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ OHIO REV. CODE § 2953.21(F) (West 2007).

²⁰ *Id.*

²¹ OHIO REV. CODE § 2953.21(I)(1) (West 2007).

²² *Id.*

²³ OHIO REV. CODE § 2953.21(I)(2) (West 2007).

The petitioner may hire his/her own private counsel. If, however, he/she only retains one private attorney, he/she is not entitled to appointment of any additional attorneys by the court.²⁴

4. Contents of Petition

Section 2953.21(A)(4) of the Ohio Rev. Code requires the petitioner, in his/her original or amended petition, to allege all available grounds for post-conviction relief²⁵ and specific facts that support those grounds for relief.²⁶ A bare allegation that a constitutional right has been violated, without more, is not sufficient to warrant an evidentiary hearing.²⁷ Post-conviction petitions must also “contain a case history, statement of facts, and separately identified grounds for relief” and “[e]ach ground for relief shall not exceed three pages in length.”²⁸ In its discretion, a trial court may extend page limits of pleadings, request further briefing on any ground for relief presented, or direct the petitioner to file a supplemental petition in the recommended form.²⁹ All claims must be supported by evidence outside of the record or the petition will be summarily dismissed.³⁰

5. Types of Claims Usually Raised in a Post-Conviction Petition

Claims of ineffective assistance of trial counsel form the bulk of claims in post-conviction proceedings.

a. Ineffective Assistance of Trial Counsel

In order to make a legally sufficient claim of ineffective assistance of trial counsel, the petitioner first must show his/her counsel’s deficient performance by demonstrating that his/her trial counsel’s performance “fell below an objective standard of reasonableness” to such a degree that by making such serious errors, counsel was “not functioning as the ‘counsel’ guaranteed the [petitioner] by the Sixth Amendment.”³¹ The petitioner next must demonstrate the prejudicial effect of trial counsel’s deficient performance by proving that a reasonable probability exists that, but for the trial counsel’s deficient performance, the result of the proceeding would have been different.³² Because the resolution of both prongs of the ineffective assistance of counsel test generally requires more than a simple review of the trial record and would require further development of

²⁴ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(I)(C).

²⁵ OHIO REV. CODE § 2953.21(A)(4) (West 2007).

²⁶ State v. Jackson, 413 N.E.2d 819, 822 (Ohio 1980).

²⁷ *Id.*

²⁸ OHIO R. CRIM. P. 35(A).

²⁹ *Id.*

³⁰ Jackson, 413 N.E.2d at 819; State v. Kapper, 448 N.E.2d 823 (1983).

³¹ Strickland v. Washington, 466 U.S. 668, 687-88 (1984); State v. Bradley, 538 N.E.2d 373, 379 (Ohio 1989). Counsel will enjoy a “strong presumption that [his/her] conduct falls within the wide range of reasonable professional assistance.” *Id.* at 380.

³² Strickland, 466 U.S. at 694; Bradley, 538 N.E.2d at 380. A “reasonable probability” is a probability sufficient to undermine the confidence in the outcome of the proceeding. *Id.*

the record through a post-conviction evidentiary hearing, the Ohio courts have recognized a clear preference for raising such claims in post-conviction petitions.³³

Where the petitioner, however, was represented by new counsel on direct appeal and the petitioner could have, but did not, raise the issue of trial counsel's ineffectiveness in that direct appeal, the petitioner is precluded by the doctrine of *res judicata* from raising that claim for the first time in his/her post-conviction petition.³⁴

b. Ineffective Assistance of Appellate Counsel

Claims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings because, among other reasons, the Ohio Supreme Court has determined that: (1) appellate judges are in the best position to determine whether appellate counsel was ineffective before that court based on the appellate record and the counsel's conduct, and (2) to allow such claims in a post-conviction proceeding would permit the trial court to second-guess superior appellate courts.³⁵

Claims of ineffective assistance of appellate counsel are generally cognizable in an application for reconsideration of the direct appeal.³⁶ However, where it would be unjust to bar such a claim as *res judicata* when not raised in an application for reconsideration, the individual may raise a claim of ineffective assistance of appellate counsel in an application for reopening of the direct appeal pursuant to Rule 26(B) of the Ohio Rules of Appellate Procedure.³⁷ An application for reopening must be filed within ninety days of the journalization of the appellate judgment or at a later time for good cause shown.³⁸ Such an application must, among other things, include:

- (1) A showing of good cause for untimely filing if the application is filed more than ninety days after journalization of the appellate judgment;
- (2) One or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by

³³ See, e.g., *State v. Keeling*, 2002 WL 1393615, *2 (Ohio Ct. App. 1st Dist. June 28, 2002).

³⁴ *State v. Jenkins*, 536 N.E.2d 667, 669-70 (Ohio Ct. App. 8th Dist. 1987). The fact that a petitioner is represented by different counsel within the same public defender office at trial and on direct appeal does not relieve the petitioner's burden to raise his/her trial counsel's ineffectiveness on direct appeal. *Id.* at 670; see also *State v. Cole*, 443 N.E.2d 169, syl. (Ohio 1982).

³⁵ *State v. Murnahan*, 584 N.E.2d 1204, 1208 (Ohio 1992). If an individual has put forth a colorable claim of ineffective assistance of appellate counsel, where the circumstances render the application of *res judicata* unjust, and the time periods for reconsideration in courts of appeals and direct appeal to the Ohio Supreme Court have expired, he/she must apply for delayed reconsideration in the court where the alleged error took place and if delayed reconsideration is denied, then file for delayed appeal in Ohio Supreme Court. *Id.* at 1209.

³⁶ OHIO SUP. CT. RULES OF PRACTICE R. XI(2)(A); OHIO R. APP. P. 26(A) (This rule applies only for cases in which the offense was committed prior to January 1, 1995. All capital cases based on crimes that took place after that date are appealed directly to the Ohio Supreme Court.). Such an application must be filed with the appellate court before it reports its decision to the clerk or within ten days of the announcement of the courts decision, whichever is later. *Id.*

³⁷ OHIO SUP. CT. RULES OF PRACTICE R. XI (6); OHIO R. APP. P. 26(B); *State v. Murnahan*, 584 N.E.2d 1204, 1209 (Ohio 1992).

³⁸ OHIO SUP. CT. RULES OF PRACTICE R. XI (6)(A); OHIO R. APP. P. 26(B)(1).

- any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation;
- (3) A sworn statement of the basis for the claim that appellate counsel's representation was deficient with respect to the assignments of error or arguments raised pursuant and the manner in which the deficiency prejudicially affected the outcome of the appeal, which may include citations to applicable authorities and references to the record;³⁹ and
 - (4) Any parts of the record available to the applicant and all supplemental affidavits upon which the applicant relies.⁴⁰

The appellate court must grant an application for reopening if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal.⁴¹ When granting the application, the court must appoint counsel to represent the applicant if he/she is indigent and not currently represented and preserve the *status quo* during pendency of the reopened appeal.⁴² If the application is granted, the case will proceed in the same manner as any other direct appeal, except that the scope of review may be limited to those assignments of error and arguments not previously considered.⁴³ The appellate court may also hold an evidentiary hearing, if necessary, to determine the claims of appellate counsel's effectiveness.⁴⁴ If the appellate court does in fact find that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court must vacate its prior judgment and enter the appropriate judgment.⁴⁵

c. Ineffective Assistance of Previous Post-Conviction Counsel

Although indigent post-conviction petitioners, including those under a sentence of death, receive access to counsel at the public's expense in connection with their post-conviction claims,⁴⁶ they do not have a state or federal constitutional right to such counsel or to assert a claim of ineffective assistance of post-conviction counsel.⁴⁷ Indeed, section 2953.21(I)(2) of the Ohio Revised Code specifically states that the "ineffectiveness or incompetence of counsel during post-conviction proceedings . . . does not constitute grounds for relief" in post-conviction proceedings.⁴⁸

³⁹ The standard for claims for ineffective assistance of appellate counsel mirrors the standard for similar claims of trial counsel's ineffectiveness. *See* State v. Hughbanks, 800 N.E.2d 1152, 1154 (Ohio 2004).

⁴⁰ OHIO SUP. CT. RULES OF PRACTICE R. XI (6)(B)(1)-(5); OHIO R. APP. P. 26(B)(2)(b)-(e).

⁴¹ OHIO SUP. CT. RULES OF PRACTICE R. XI (6)(E); OHIO R. APP. P. 26(B)(5).

⁴² OHIO SUP. CT. RULES OF PRACTICE R. XI (6)(F); OHIO R. APP. P. 26(B)(6)(a)-(b).

⁴³ OHIO SUP. CT. RULES OF PRACTICE R. XI (6)(G); OHIO R. APP. P. 26(B)(7).

⁴⁴ OHIO SUP. CT. RULES OF PRACTICE R. XI (6)(H); OHIO R. APP. P. 26(B)(8).

⁴⁵ OHIO SUP. CT. RULES OF PRACTICE R. XI (6)(I); OHIO R. APP. P. 26(B)(9).

⁴⁶ OHIO REV. CODE § 2953.21(I) (West 2007).

⁴⁷ State v. Scudder, 722 N.E.2d 1054, 1057 (Ohio Ct. App. 10th Dist. 1998).

⁴⁸ OHIO REV. CODE § 2953.21(I)(2) (West 2007).

It appears, however, that a post-conviction petitioner can seek relief alleging that his/her counsel did not meet the qualification requirements for appointed counsel in a capital collateral case.⁴⁹

6. Decisions on Post-Conviction Petitions

The court must consider all timely-filed petitions even if the petitioner's direct appeal is still pending.⁵⁰

a. Summary Disposition of a Post-Conviction Petition without an Evidentiary Hearing

In its consideration of timely-filed petitions, the court is not required to grant an evidentiary hearing on every petition.⁵¹ The court may summarily dispose of a petition if (1) the petition is untimely, (2) the petition raises claims that could have been raised on direct appeal or in a previous post-conviction petition,⁵² or (3) the court determines that no substantive grounds exist upon the face of the record⁵³ which would entitle the petitioner to post-conviction relief.⁵⁴ If the court dismisses the petition, it must include in its order findings of fact and conclusions of law with respect to the dismissal.⁵⁵

b. The Post-Conviction Evidentiary Hearing

In order to obtain an evidentiary hearing, the petitioner must demonstrate that there are substantive grounds for relief.⁵⁶ In determining whether substantive grounds for relief exist on the face of the record, the court must consider, in addition to the petition, the "supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the

⁴⁹ See, e.g., *State v. Brown*, 2003 WL 21518723, *2 (Ohio Ct. App. 7th Dist. 2003) (noting the importance of properly characterizing the petitioner's claim because claims of ineffective assistance of post-conviction counsel are not cognizable on subsequent post-conviction petitions, but claims that post-conviction counsel was unqualified may seek post-conviction relief on that claim); see also OHIO REV. CODE § 2953.23(I)(2) (West 2007) (noting that counsel appointed to represent a indigent capital post-conviction petitioner must be certified pursuant to Rule 20 of the Rules of Superintendence for the Courts of Ohio).

⁵⁰ OHIO REV. CODE § 2953.21(C) (West 2007).

⁵¹ *State v. Milanovich*, 325 N.E.2d 540, 543 (Ohio 1975); *State v. Fuller*, 1993 WL 208331, *1 (Ohio Ct. App. 9th Dist. June 16, 1993) (noting that section 2953.21 does not require a trial court to hold an evidentiary hearing on a petition for post-conviction relief if the petitioner presents insufficient evidence of a constitutional claim establishing a denial of his/her rights).

⁵² See *infra* notes 70-78 and accompanying text.

⁵³ OHIO REV. CODE § 2953.21(C) (West 2007).

⁵⁴ *Id.*; see also *State v. Jenkins*, 536 N.E.2d 667, 668-69 (Ohio Ct. App. 8th Dist. 1987) (holding that a petition for post-conviction relief must be dismissed when no substantial constitutional issue is established so as to sustain a claimed denial of rights).

⁵⁵ *Id.*

⁵⁶ OHIO REV. CODE § 2953.21(C) (West 2007); *State v. Jackson*, 413 N.E. 2d 819, 822 (Ohio 1980). Stated another way, the petitioner has the initial burden of presenting evidence that demonstrates a "cognizable claim of constitutional error." *State v. Campbell*, 2003 WL 22783857, *3 (Ohio Ct. App. 10th Dist. Nov. 25, 2003).

court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript."⁵⁷ Additionally, the evidence produced in support of the claim must not be fully rebutted by the record of the original criminal proceedings.⁵⁸

If the petitioner meets this burden and the court does not summarily dismiss the petition, the court must promptly set an evidentiary hearing on the issues presented in the petition, even if direct appeal is still pending.⁵⁹ The petitioner is permitted to attend the hearing.⁶⁰ Testimony by the petitioner or other witnesses may be offered by deposition.⁶¹

c. Decisions on Post-Conviction Petitions after an Evidentiary Hearing

If, after holding an evidentiary hearing, the court does not find grounds for granting relief, it must enter a judgment, including findings of fact and conclusions of law, denying relief on the petition.⁶² If, however, the court does find grounds for granting relief and direct appeal is still pending, it may notify the parties of this finding and either party may request the appellate court hearing the appeal to remand the pending case back to the trial court.⁶³ Regardless of whether the direct appeal is still pending, if the court finds in favor of the petitioner, it must issue an order that (1) includes findings of fact and conclusions of law as to the claims in the petition; (2) vacates and sets aside the petitioner's conviction and/or sentence; and (3) makes any supplementary orders as necessary regarding such matters as arraignment, retrial, custody, bail, discharge, or correction of sentence.⁶⁴ Such an order must be made within 180 days of the filing of the petition.⁶⁵

7. Appealing Decisions on Post-Conviction Petitions

The court's order on a post-conviction petition is a final judgment and is appealable as a matter of right.⁶⁶ The courts of appeal entertain all appeals of right in capital post-conviction proceedings and further appeals to the Ohio Supreme Court are discretionary.⁶⁷ In reviewing whether the trial court erred in denying a petitioner's motion for post-conviction relief, the appellate court applies an abuse of discretion

⁵⁷ OHIO REV. CODE § 2953.21(C) (West 2007).

⁵⁸ *State v. Perry*, 226 N.E.2d 104, syl. #3 (Ohio 1967); *State v. Williams*, 220 N.E.2d 837, 838 (Ohio Ct. App. 10th Dist. 1966).

⁵⁹ OHIO REV. CODE § 2953.21(E) (West 2007).

⁶⁰ OHIO REV. CODE § 2953.22 (West 2007).

⁶¹ *Id.*

⁶² OHIO REV. CODE § 2953.21(G) (West 2007); *State v. Lester*, 322 N.E. 2d 656, syl. #2 (Ohio 1975).

⁶³ OHIO REV. CODE § 2953.21(G) (West 2007).

⁶⁴ *Id.*

⁶⁵ OHIO R. CRIM. P. 35(C).

⁶⁶ OHIO REV. CODE § 2953.23(B) (West 2007).

⁶⁷ OHIO CONST. art. IV, §§ 2-3. If the trial court's order granting post-conviction relief is reversed by an appellate court and direct appeal has been remanded from the appellate court, the appellate court reversing the post-conviction order must notify the appellate court handling the direct appeal and reinstate the direct appeal. OHIO REV. CODE § 2953.21(G) (West 2007).

standard.⁶⁸ If the court of appeals and Ohio Supreme Court either affirms or denies review, the petitioner may file a request for *certiorari* with the United States Supreme Court.⁶⁹ If the U.S. Supreme Court declines to hear the appeal or affirms the lower court decision, the state post-conviction appeal is complete.

B. Procedural Restrictions on Post-Conviction Petitions

A petitioner will be precluded from receiving consideration of post-conviction claims that were raised at trial or on appeal and finally adjudicated against the petitioner, or that could have been raised at trial or on appeal, but were not so raised.⁷⁰ Such claims are barred by the doctrine of *res judicata*, because post-conviction proceedings do “not provide a petitioner a second opportunity to litigate his or her conviction.”⁷¹

Additionally, the petitioner may generally only file one post-conviction petition. In order to file a second or successive⁷² post-conviction petition, the petitioner must demonstrate that either of the following exceptions apply:

- (1) The petitioner shows:
 - (a) That he/she was unavoidably prevented at the time of the first petition from discovery of the facts upon which he/she must rely to present the claim for relief,⁷³ or, after filing the first petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation, and the successive petition asserts a claim based on that right;⁷⁴ and

⁶⁸ State v. Decker, 502 N.E.2d 647, 648 (Ohio 1986); State v. Back, 2006 WL 2575961, *2 (Ohio Ct. App. 10th Dist. Aug. 31, 2006).

⁶⁹ 28 U.S.C. § 1257 (2004).

⁷⁰ State v. Campbell, 2003 WL 22783857, *3 (Ohio Ct. App. 10th Dist. Nov. 25, 2003) (holding that a defendant who was represented by counsel is barred from raising an issue in a petition for post-conviction relief if defendant raised or could have raised the issue at trial or on direct appeal); see also State v. Perry, 226 N.E. 2d 104, syl. #9 (Ohio 1967).

⁷¹ Campbell, 2003 WL 22783857, at *3. A petitioner may avoid dismissal of the petition by operation of *res judicata* if the evidence supporting the claims in the petition is competent, relevant, and material evidence outside the trial court record that did not exist or was not available for use at the time of trial. *Id.* at *4.

⁷² Successive petitions are those petitions that challenge a judgment of conviction or sentence filed subsequent to the initial post-conviction petition challenging the same judgment of conviction and sentence.

⁷³ It also appears that newly discovered evidence claims can be raised in a motion for new trial, outside or alongside the normal post-conviction process. See, e.g., State v. Mitchell, 2004 WL 225464 (Ohio Ct. App. 2d Dist. Feb. 6, 2004) (noting that post-conviction petitioner also filed a belated motion for new trial based on newly discovered evidence). When new evidence material to the petitioner is discovered which he/she could not with reasonable diligence have discovered and produced at the trial, the petitioner may file a motion for new trial within 120 days of the verdict in his/her trial. OHIO R. CRIM. P. 33(A)(6), (B). If, however, it is proven at a hearing by clear and convincing evidence that the defendant was unavoidably prevented from filing his motion for a new trial in a timely manner, the motion may be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such a timely motion. OHIO R. CRIM. P. 33(B).

⁷⁴ OHIO REV. CODE § 2953.23(A)(1)(a) (West 2006).

- (b) By clear and convincing evidence that, but for constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty of the offense of which the petitioner was convicted or found the petitioner eligible for the death sentence;⁷⁵ or
- (2) Post-Conviction DNA testing was performed in the death-sentenced petitioner's case pursuant to the Ohio Revised Code,⁷⁶ and the results of the DNA testing establish, by clear and convincing evidence, "actual innocence"⁷⁷ of the aggravated murder or the aggravating circumstance(s) the person was found guilty of committing, which are the basis of his/her sentence of death.⁷⁸

Thus, the court must summarily dismiss a successive petition that raises post-conviction claims already litigated in the first petitions or claims that were known to the petitioner, but not raised, at the time of the first petition.

2. Plain Error Exception to a Waiver of a Claim

In addition to the aforementioned exceptions to the procedural bars to a post-conviction claim, a litigant may overcome a procedural bar, *i.e.* waiver of a claim, by alleging that the asserted error constitutes "plain error." Plain errors or defects affecting substantial rights "may be noticed although they were not brought to the attention of the court."⁷⁹ In order to find plain error, the petitioner bears the burden to demonstrate that, but for the error, the outcome of the trial clearly would have been otherwise.⁸⁰ Even if the defendant satisfies this burden, an appellate court has discretion to disregard the error and should correct it only where "the error complained of seriously affect[ed] the fairness or integrity of the trial"⁸¹ and correction would "prevent a manifest miscarriage of justice."⁸²

C. *Review of Error*

If a post-conviction court finds error, it may deny the post-conviction petition on the ground that the error was harmless if it does not affect the substantial rights of the petitioner.⁸³

Generally, for errors involving a petitioner's constitutional rights, the error is not harmless unless the post-conviction court finds that the error is harmless beyond a

⁷⁵ OHIO REV. CODE § 2953.23(A)(1)(b) (West 2007).

⁷⁶ The State of Ohio's post-conviction DNA testing procedures are contained in sections 2953.71 through 2953.84 of the Ohio Revised Code Annotated. OHIO REV. CODE §§ 2953.71-.84 (West 2006).

⁷⁷ "Actual innocence" has the same meaning as described above. *See supra* note 6 and accompanying text.

⁷⁸ OHIO REV. CODE § 2953.23(A)(2) (West 2007).

⁷⁹ OHIO R. CRIM. P. 52(B).

⁸⁰ *State v. Long*, 372 N.E.2d 804, 805, 807 (Ohio 1978).

⁸¹ *Id.* at 807 n.5 (citing *United States v. Beasley*, 519 F.2d 233, 238 (5th Cir. 1975)).

⁸² *State v. Barnes*, 759 N.E.2d 1240 (Ohio 2002) (quoting *Long*, 372 N.E.2d at 805).

⁸³ OHIO R. CRIM. P. 52(A).

reasonable doubt.⁸⁴ The state generally has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence.⁸⁵

However, certain claims of constitutional error, such as ineffective assistance of counsel claims and *Brady*⁸⁶ claims, place the burden on the petitioner to demonstrate that he/she was prejudiced by the constitutional error. For example, if the petitioner raises a claim of ineffective assistance of counsel, he/she must demonstrate a “reasonable probability” that counsel’s deficient performance affected the outcome of the proceeding,⁸⁷ rather than the State bearing the burden of proving that the deficient performance was harmless beyond a reasonable doubt. Similarly, in asserting a *Brady* violation—wherein the State failed to disclose favorable evidence and this failure was unknown to the petitioner on direct appeal—the burden again rests with the petitioner to show a “reasonable probability” that the disclosure of the evidence would have affected the outcome of the proceeding.⁸⁸

D. Retroactivity of Rules

A new rule of criminal procedure applies only to those cases on direct review or not yet final, and would not be applicable to those cases on post-conviction review.⁸⁹ Thus, new rules of criminal procedure are not retroactively applied in collateral post-conviction proceedings unless (1) the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe;⁹⁰ or (2) the new rule is a “watershed” rule of criminal procedure that requires the “observance of procedures that . . . are implicit in the concept of ordered liberty” and whose non-application would seriously diminish the “likelihood of an accurate conviction.”⁹¹

⁸⁴ See, e.g., *State v. Losey*, 1998 WL 295505, *3 (Ohio Ct. App. 4th Dist. June 3, 1998) (citing *Chapman v. California*, 386 U.S. 18 (1967)).

⁸⁵ *Chapman*, 386 U.S. at 23-24.

⁸⁶ *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (stating that state and federal law entitles a defendant to receive all exculpatory information or evidence in the state’s possession).

⁸⁷ *State v. Bradley*, 538 N.E.2d 373, 380 (Ohio 1989).

⁸⁸ *State v. Reedy*, 1999 WL 787927, *3 (Ohio Ct. App. 4th Dist. Sept. 27, 1999) (citing *U.S. v. Bagley*, 473 U.S. 667, 682 (1985)).

⁸⁹ *State v. Bruggerman*, 2005 WL 517511, *2 (Ohio Ct. App. 3d Dist. Mar. 7, 2005) (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)); see also OHIO REV. CODE § 2953.23(A)(1)(a) (West 2007).

⁹⁰ *Id.*

⁹¹ *Id.*

II. ANALYSIS

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.

Some aspects of Ohio law governing post-conviction proceedings perpetuate the adequate development and judicial consideration of all post-conviction claims. For example, Ohio law: (1) allows, in practice, for an automatic stay of execution during the pendency of post-conviction proceedings; and (2) provides post-conviction counsel to indigent death-sentenced inmates who can assist with the preparation of a post-conviction petition.

Stay of Execution

In all death penalty cases, where a written motion for stay of execution pending exhaustion of state post-conviction proceedings has been filed, a stay will be granted for a period of six months, during which time period a petition for post-conviction relief must be filed.⁹² If a petition is not filed within the six-month time frame, the stay expires.⁹³ If a petition is filed within the six months, “the previous stay granted shall remain in effect until exhaustion of all state post-conviction proceedings, including any appeals.”⁹⁴ No further time will be granted, however, except in unusual circumstances.⁹⁵

Individuals filing second or successive post-conviction petitions do not have a similar right to an automatic stay of execution during the pendency of successive proceedings. In such cases, a petitioner trying to pursue further state proceedings must petition the Ohio Supreme Court for a stay.⁹⁶ In order for a stay to be granted, the petitioner must demonstrate “either cause for failing previously to raise a ground for litigation or circumstances constituting a fundamental miscarriage of justice, if the conviction were to stand.”⁹⁷

⁹² State v. Glenn, 514 N.E.2d 869 (Ohio 1987).

⁹³ *Id.*

⁹⁴ *Id.* Stays are usually granted during direct appeal and usually last through the course of the post-conviction process making it unnecessary to request a separate stay specifically for the pendency of post-conviction proceedings. Telephone Interview with Richard Vickers, Assistant Public Defender, Ohio State Public Defender (July 26, 2005).

⁹⁵ *Glenn*, 514 N.E.2d at 869.

⁹⁶ State v. Steffen, 639 N.E.2d 67, 77 (Ohio 1994).

⁹⁷ *Id.* (citing *McCleskey v. Zant*, 499 U.S. 467 (1991)).

Thus, it appears that Ohio law does allow, upon request, an automatic stay of execution during the pendency of initial post-conviction proceedings and a discretionary stay during second or successive post-conviction proceedings, to allow the petitioner to fully develop grounds for post-conviction relief and permit the court the ability to consider those grounds.

Problematically, however, Ohio does not allow courts of common pleas and appeals courts to stay the execution of a death sentence once the Ohio Supreme Court has set an execution date.⁹⁸ Consequently, a court of common pleas or a court of appeals that believes that a conviction or death sentence is void or voidable is unable to stay the execution.⁹⁹ This limitation will be most problematic in the situation where a death row inmate has filed a successive, second, or late post-conviction petition that makes a claim of actual innocence.¹⁰⁰ In this situation, the Ohio Supreme Court likely will have reviewed the direct appeal and set an execution date, but the trial court or court of appeals may believe that the petitioner has presented a valid claim which requires a hearing.¹⁰¹ In this situation, the lower court may not stay the execution and leaves the system open to the possibility that a death row inmate could be executed despite not have exhausted all legitimate claims of relief.¹⁰²

Post-Conviction Counsel

Indigent post-conviction petitioners under a sentence of death may receive access to state-funded appointed counsel in connection with their post-conviction claims,¹⁰³ although it appears that appointments are made only when an attorney requests that counsel be appointed.¹⁰⁴ Because appointments are made only upon request, the petitioner sometimes will receive counsel before the filing of the petition or upon the granting of an evidentiary hearing and sometimes will not. Consequently, while counsel and petitioner often have an opportunity to work together to fully develop all available claims for relief and amend the petition to include all such claims, it does not appear that this happens as a matter of course.¹⁰⁵

Numerous aspects of Ohio law inhibit the adequate development and judicial consideration of grounds for post-conviction relief. For example, Ohio law: (1) provides only a short period of time to file an initial post-conviction petition; (2) allows the post-conviction judge to summarily deny the petition without an evidentiary hearing; and (3)

⁹⁸ OHIO REV. CODE §§ 2953.09-.10 (West 2007); OHIO REV. CODE § 2953.21(H) (West 2007).

⁹⁹ *Id.*

¹⁰⁰ See S. Adele Shank, *The Death Penalty in Ohio: Fairness, Reliability, and Justice at Risk – A Report on Reforms in Ohio's Use of the Death Penalty Since the 1997 Ohio State Bar Association Recommendations Were Made*, 63 OHIO ST. L.J. 371 (2002).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ OHIO REV. CODE § 2953.21(I)(1) (West 2007).

¹⁰⁴ Telephone Interview by Deborah Fleischaker with Joe Wilhelm, Chief Counsel, Death Penalty Division, Office of the Ohio Public Defender (Apr. 2, 2007).

¹⁰⁵ E-mail Interview by Phyllis Crocker with David Stebbins, Law Office of David C. Stebbins (Apr. 2, 2007).

permits the post-conviction judge to simply adopt the findings of fact and conclusions of law proposed by one party to the post-conviction proceeding as its own.

Filing Deadlines and the Post-Conviction Evidentiary Hearing

A death-row petitioner must file his/her initial post-conviction petition, with limited exceptions,¹⁰⁶ no later than 180 days after 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.¹⁰⁷ The petitioner may amend his/her petition as a matter of right before the prosecuting attorney answers and thereafter with leave of the court.¹⁰⁸

Post-conviction courts in Ohio can summarily dispose of any petition without an evidentiary hearing if (1) the petition is untimely, (2) the petition raises claims that could have been raised on direct appeal or in a previous post-conviction petition,¹⁰⁹ or (3) the court determines that no substantive grounds exist upon the face of the record¹¹⁰ which would entitle the petitioner to post-conviction relief.¹¹¹ The court must hold an evidentiary hearing only if the allegations in the post-conviction petition demonstrate the existence of substantive grounds for relief.¹¹²

Given the multiple ways the court may summarily dispose of a petition without first holding an evidentiary hearing, it is imperative that post-conviction petitioners be provided with meaningful post-conviction discovery¹¹³ and adequate time to fully develop their claims to avoid such disposal on procedural grounds. It is unclear whether the 180-day period for filing a post-conviction petition, which begins to run before the completion of direct appeal, provides adequate time for all death-sentenced inmates to fully develop viable claims and file legally sufficient petitions.

Wholesale Adoption of Proposed Orders and State's Answers to the Petition

Within 180 days of the filing of the post-conviction petition, the court must issue an order, making specific written findings of fact and conclusions of law relating to each claim presented, either granting or denying the petition.¹¹⁴ It appears that in preparation for rendering the order, the parties may propose findings of fact and conclusions of law to the judge and there is nothing precluding the court from using them in its order. There have been appeals based on the post-conviction court's apparent wholesale adoption of

¹⁰⁶ See *supra* notes 10-14 and accompanying text.

¹⁰⁷ OHIO REV. CODE § 2953.21(A)(2), (F) (West 2007).

¹⁰⁸ OHIO REV. CODE § 2953.21(F) (West 2007).

¹⁰⁹ See *supra* notes 70-78 and accompanying text.

¹¹⁰ OHIO REV. CODE § 2953.21(C) (West 2007).

¹¹¹ *Id.*; see also *State v. Jenkins*, 536 N.E.2d 667, 668-69 (Ohio Ct. App. 8th Dist. 1987) (holding that a petition for post-conviction relief must be dismissed when no substantial constitutional issue is established so as to sustain a claimed denial of rights).

¹¹² OHIO REV. CODE § 2953.21(C) (West 2007). Stated another way, the petitioner has the initial burden of presenting evidence that demonstrates a “cognizable claim of constitutional error.” *State v. Campbell*, 2003 WL 22783857, *3 (Ohio Ct. App. 10th Dist. Nov. 25, 2003).

¹¹³ See *infra* notes 116-124 and accompanying text.

¹¹⁴ OHIO REV. CODE § 2953.21(G) (West 2007); OHIO R. CRIM. P. 35(C).

the State's proposed findings of fact and conclusions of law, although in one such case, the Ohio Court of Appeals held that the practice of a judge adopting the State's proposed findings of fact, conclusions of law, and/or answer to the petition in a post-conviction proceeding is not prohibited.¹¹⁵ Despite concerns of judicial economy, a court's wholesale adoption or copying of either party's proposed findings of fact and conclusions of law undermines the judge's duty to exercise independent judgment in deciding these complex cases, which should require careful consideration of the evidence and applicable law before rendering findings of fact and conclusions of law in the written order.

Conclusion

We commend the State of Ohio for providing a mandatory stay of execution during the duration of initial state post-conviction proceedings and providing state-funded counsel, both of which allow the petitioner a greater ability to fully develop his/her claims in order to have them fully considered by the court. There are other aspects of the Ohio post-conviction laws, however, which serve to potentially inhibit the full development and judicial consideration of claims by (1) giving an extremely short time for filing post-conviction petitions; (2) allowing for the disposal of alleged claims without an evidentiary hearing, to give full judicial consideration to those claims; and (3) permitting the wholesale adoption of a party's proposed findings and conclusions. Thus, the State of Ohio's post-conviction framework only partially complies with the requirements of Recommendation #1.

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.

In Ohio, "there is no right to conduct discovery in post-conviction proceedings."¹¹⁶ Although post-conviction proceedings are civil in nature, the rules for discovery in the Ohio Rules of Civil Procedure do not apply to post-conviction proceedings and section 2953.21 of the Ohio Revised Code, which governs post-conviction proceedings, does not explicitly provide for post-conviction discovery.¹¹⁷

¹¹⁵ State, v. Scott, 2006 WL 173171, *2 (Ohio Ct. App. 5th Dist. Jan. 23, 2006) (not prohibiting verbatim adoption of State's answer into post-conviction order); State v. Poindexter, 1991 WL 30613, *14 (Ohio Ct. App. 1st Dist. Mar. 6, 1991) (not prohibiting verbatim adoption of State's proposed findings of fact and conclusions of law into post-conviction order). The court in *Poindexter* found that the trial court's adoption of the findings of fact and conclusions of law tendered by the state, by itself, does not amount to error and does not indicate a denial of due process and meaningful review. *Poindexter*, 1991 WL 30613, at *14.

¹¹⁶ State v. Smith, 2005 WL 1225931, *4 (Ohio Ct. App. 9th Dist. May 25, 2005) (holding that the trial court properly dismissed petitioner's motion for discovery in capital post-conviction proceeding).

¹¹⁷ State v. Chinn, 2000 WL 1458784, *7 (Ohio Ct. App. 2d Dist. Aug. 21, 1998) (holding that the civil discovery rules do not apply to post-conviction proceedings because section 2953.21 of the Ohio Revised Code does not explicitly provide for the application of the Ohio Rules of Civil Procedure to post-conviction proceedings).

A post-conviction petitioner must establish entitlement to a hearing before being entitled to conduct discovery.¹¹⁸ In order to obtain an evidentiary hearing, the petitioner must demonstrate that there are substantive grounds for relief.¹¹⁹ In determining whether substantive grounds for relief exist on the face of the record, the court must consider, in addition to the petition, the “supporting affidavits, and the documentary evidence, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court’s journal entries, the journalized records of the clerk of the court, and the court reporter’s transcript.”¹²⁰

Once the petitioner has met his/her burden in demonstrating the right for an evidentiary hearing and, in turn, post-conviction discovery, the exact scope of the discovery is unclear. At least one Ohio appellate court, however, has held that it is proper for a trial court to limit post-conviction discovery to the narrow issues set for resolution in the evidentiary hearing.¹²¹ Moreover, death-sentenced petitioners are not provided a broader discovery scope than non-death-sentenced inmates.¹²² Thus, it does not appear that Ohio post-conviction judges, when armed with the discretion to determine the scope of post-conviction discovery, opt to allow “full” discovery.

This discovery procedure is problematic because it fails to recognize the barriers facing post-conviction petitioners in obtaining the necessary evidentiary materials to craft and present post-conviction claims which demonstrate sufficient “substantive grounds for relief.” This illusory discovery procedure creates a paradoxical situation for death-sentenced inmates. While they are required to successfully obtain an evidentiary hearing in order to partake in post-conviction discovery, their ability to assert the well-founded post-conviction claims necessary for an evidentiary hearing is thwarted because petitioners are denied access to the discovery procedures necessary to develop those claims.¹²³

The inadequacy of Ohio’s post-conviction discovery procedures is exacerbated by the fact that Ohio statutes and case law prohibit a petitioner from using the public records laws to obtain materials in support of post-conviction claims and, if the petitioner does somehow obtain evidence in support of such claims through the public records process, it

¹¹⁸ *Id.*

¹¹⁹ OHIO REV. CODE § 2953.21(C) (West 2007). Stated another way, the petitioner has the initial burden of presenting evidence that demonstrates a “cognizable claim of constitutional error.” *State v. Campbell*, 2003 WL 22783857, *3 (Ohio Ct. App. 10th Dist. Nov. 25, 2003).

¹²⁰ OHIO REV. CODE § 2953.21(C) (West 2007).

¹²¹ *State v. Bays*, 2003 WL 21419173, *4 (Ohio Ct. App. 2d Dist. Jun. 20, 2003).

¹²² *Id.* (noting that “[r]egardless of whether a petitioner for post-conviction relief is sentenced to a period of confinement or to death, he[/she] receives no more rights than those granted by [section] 2953.21”).

¹²³ Joseph E. Wilhelm & Kelly L. Culshaw, *Ohio’s Death Penalty Statute: The Good, the Bad, and the Ugly*, 63 OHIO ST. L.J. 549, 644-45 (2002). Wilhelm and Culshaw address the absurdity created by these post-conviction discovery procedures: “[a]ccess to the avenues required to develop materials necessary to secure the right to a hearing are not made available until that hearing is granted.” *Id.* at 644-45. “Without access to discovery, most avenues to secure information to support the capital post-conviction petition have been cut off.” *Id.* at 645.

appears that these records cannot be offered as attachments in support of his/her post-conviction petition.¹²⁴

Because the Ohio law does not provide meaningful, “full” discovery, it appears that the State of Ohio is not in compliance with the requirements of Recommendation #2.

Based on this information, the Ohio Death Penalty Assessment Team recommends that the State of Ohio amend its rules and statutes to allow a defendant to engage in discovery and develop the factual basis of his/her claims prior to filing his/her post-conviction petition. In addition, Ohio Death Penalty Assessment Team recommends that the State of Ohio amend its laws to allow petitioners to use the public records laws to obtain materials in support of post-conviction claims.

C. Recommendation #3

Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.

Ohio law does not provide a specific time limit for post-conviction discovery in instances where the court grants an evidentiary hearing and allows for discovery. Although there is no stated amount of time after the filing of the petition within which the court must hold an evidentiary hearing, it is instructive to note that the post-conviction court must issue its order on the post-conviction petition within 180 days of the filing of the petition.¹²⁵ Although 180 days may be sufficient time to perform full and meaningful discovery in preparation for the capital post-conviction evidentiary hearing, it is far more likely that

¹²⁴ State *ex rel.* Steckman v. Jackson, 639 N.E.2d 83 (Ohio 1994) (prohibiting the use of the public records law to support a petition for post conviction relief); State v. Apanovitch, 667 N.E.2d 1041, 1051-52 (Ohio Ct. App. 8th Dist. 1995) (interpreting *Steckman* to mean not only that the Public Records Act, section 149.43 of the Ohio Revised Code, “cannot be employed to obtain material for use in support of a petition for post-conviction relief, but also that materials obtained through the Public Records Act cannot be used in support of a petition”); *see also* OHIO REV. CODE § 149.43(B)(4) (West 2007) (prohibiting incarcerated persons from making use of the Public Records Act). *See also*, Regina Brett, *Let’s Try Again to Reform Justice*, PLAIN DEALER (Cleveland, Ohio), Jan. 28, 2007, at B1 (noting that journalists have access to documents that defense attorneys do not). Ohio Courts of Appeals have recognized in a number of cases that *Steckman* bars the use of public records to support a post conviction petition. State v. Storer, 1994 Ohio App. LEXIS 5210, *4-5 (Ohio Ct. App. Nov. 4, 1994) (rejecting any use of public records to support a petition for post conviction relief); State v. Walker, 657 N.E.2d 798 (Ohio Ct. App. 2d Dist. 1995) (holding that *Steckman* precludes use of public records to support a post-conviction petition); State v. Apanovitch, 667 N.E.2d 1041, 1051-52 (Ohio Ct. App. 8th Dist. 1995) (“We take that [syllabus ¶ 6 of *Steckman*] to mean not only that the Public Records Act, R.C. 149.43 cannot be employed to obtain material for use in support of a petition for post-conviction relief, but also that materials obtained through the Public Records Act cannot be used in support of a petition); State *ex rel.* Blankenship v. Baden, 684 N.E.2d 1255 (Ohio Ct. App. 12th Dist. 1996) (citing as an alternative basis for denying a writ of mandamus the fact that petitioner could not use public records to support a post conviction petition); State v. Poindexter, 1997 WL 605086 (Ohio Ct. App. 1st Dist. 1997) (citing *Steckman* and *Walker* approvingly); State v. M. Sneed, 1997 WL 777765, *2 (Ohio Ct. App. 8th Dist. 1999) (court found that *Steckman* required it to “disregard” “any argument of appellant’s based on the” public records); State v. D. Sneed, 2000 WL 1476140 (Ohio Ct. App. 5th Dist. 2000) (refusing to consider claims based on information disclosed under Ohio’s public records statute).

¹²⁵ OHIO R. CRIM. P. 35(C).

the time between the grant of an evidentiary hearing and the date of such a hearing will be less than 180 days.

We are unable, therefore, to conclude whether the State of Ohio fully complies with the requirements of Recommendation #3.

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.

Capital petitioners may appeal the denial of their post-conviction petition as a matter of right to the Ohio Court of Appeals, with an additional discretionary appeal to the Ohio Supreme Court.¹²⁶ Both appellate courts must decide each assignment of error and give reasons in writing for its decision.¹²⁷ The explanation of its decision may be “brief” and in “conclusionary form.”¹²⁸ Thus, while the appellate courts in Ohio are required to issue opinions that address each issue raised on appeal, they are not required to fully explain the bases for the disposition of those claims.

The State of Ohio, therefore, only partially meets the requirements of 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.

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.

Ohio post-conviction courts, including the trial-level court considering an initial post-conviction petition and the Ohio Court of Appeals hearing an appeal from the denial of a post-conviction petition, do not use a “knowing, understanding, and voluntary” standard for determining whether the petitioner has waived a claim of constitutional error not properly raised at trial or on direct appeal. Specifically, a petitioner will be precluded

¹²⁶ OHIO REV. CODE § 2953.23(B) (West 2007). The Ohio Supreme Court has never taken such an appeal, however.

¹²⁷ OHIO R. APP. P. 12(A)(1)(b)-(c).

¹²⁸ OHIO R. APP. P. 11.1(E).

from receiving consideration of post-conviction claims which could have been raised at his/her trial or on direct appeal, but were not, in the trial court and on appeal.¹²⁹ Such claims are barred by the doctrine of *res judicata*, as post-conviction proceedings do “not provide a petitioner a second opportunity to litigate his or her conviction.”¹³⁰

Ohio law does permit, however, a petitioner to overcome this procedural default in two ways:

- (1) Assert a claim of ineffective assistance of counsel for failure to object to a trial court error that, if raised at trial, would have changed the outcome of the proceeding;¹³¹ or
- (2) The defaulted claim asserted in the post-conviction is a “plain error.”¹³²

Plain errors or defects affecting substantial rights “may be noticed” at any time, including in a post-conviction petition, “although they were not brought to the attention of the court.”¹³³ In order to find plain error, the petitioner must demonstrate that the error “seriously affect[ed] the fairness or integrity of the trial”¹³⁴ and correction would “prevent a manifest miscarriage of justice.”¹³⁵ It appears that plain error is noticed by the courts in post-conviction proceedings very rarely.¹³⁶

Based on this information, the State of Ohio fails to comply with the requirements of Recommendations #5 and 6.

F. Recommendation #7

The states should establish post-conviction defense organizations, similar in nature to the capital resources centers de-funded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.

State Post-Conviction Proceedings

Indigent death-sentenced post-conviction petitioners in Ohio must receive access to counsel at the public’s expense if he/she intends to file a petition for post-conviction relief.¹³⁷ In order to comply with this statutory requirement, the State of Ohio has

¹²⁹ *State v. Campbell*, 2003 WL 22783857, *3 (Ohio Ct. App. 10th Dist. Nov. 25, 2003) (holding that a defendant who was represented by counsel is barred from raising an issue in a petition for post-conviction relief if defendant raised or could have raised the issue at trial or on direct appeal).

¹³⁰ *Id.*

¹³¹ *State v. Hester*, 341 N.E.2d 304 (1976).

¹³² OHIO R. CRIM. P. 52(B).

¹³³ *Id.*

¹³⁴ *State v. Long*, 372 N.E.2d 804, 807 n.5 (Ohio 1978) (citing *United States v. Beasley*, 519 F.2d 233, 238 (5th Cir. 1975)).

¹³⁵ *State v. Barnes*, 759 N.E.2d 1240 (Ohio 2002) (quoting *Long*, 372 N.E.2d at 805).

¹³⁶ *But see, e.g., State v. Campbell*, 2003 WL 22783857, *3 (Ohio Ct. App. 10th Dist. Nov. 25, 2003); *Barnes*, 759 N.E.2d at 1240.

¹³⁷ OHIO REV. CODE § 2953.21(I)(1) (West 2007).

established the Office of the Ohio Public Defender mainly to represent those convicted of criminal offenses in state post-conviction proceedings,¹³⁸ with approximately one half of the office's staff and resources devoted to capital cases.¹³⁹

The Office of the Ohio Public Defender may also:

- (1) Provide other services, including technical services, educational programs, and assistance to court-appointed attorneys throughout the state.¹⁴⁰
- (2) Conduct investigations, obtain expert testimony, take depositions, use other discovery methods, order transcripts, and make all other preparations which are appropriate and necessary to an adequate defense or the prosecution of appeals and other legal proceedings;
- (2) Seek, solicit, and apply for grants for the operation of programs for the defense of indigent persons from any public or private source, and receive donations, grants, awards, and similar funds from any lawful source;
- (3) Make all the necessary arrangements to coordinate the services of the office with any federal, county, or private programs established to provide legal representation to indigent persons and others, and to obtain and provide all funds allowable under any such programs;
- (4) Consult and cooperate with professional groups concerned with the causes of criminal conduct, the reduction of crime, the rehabilitation and correction of persons convicted of crime, the administration of criminal justice, and the administration and operation of the state public defender's office;
- (5) Accept the services of volunteer workers and consultants at no compensation other than reimbursement for actual and necessary expenses;
- (6) Contract with a county public defender commission or a joint county public defender commission to provide all or any part of the services that a county or joint county public defender is required or permitted to provide, or contract with a board of county commissioners of a county that is not served by a county public defender commission or joint county public defender commission for the provision of services;¹⁴¹ and
- (7) Authorize persons employed as criminal investigators to attend the Ohio peace officer training academy or any other peace officer training school for training.¹⁴²

¹³⁸ Office of the Ohio Public Defender, About the Office of the Ohio Public Defender, *available at* http://opd.ohio.gov/us/US_AboutUs.htm (last visited Sept. 13, 2007).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ The Ohio Office of the Public Defender has contracted with the following counties to represent its capital defendants at trial: Adams, Brown, Meigs, Jackson, Pike, Washington, Athens, Ross, Pickaway, Fayette, and Trumbull. *See*, Office of the Ohio Public Defender, County Indigent Defense Systems, *available at* http://www.opd.ohio.gov/pub/pub_cty.htm (last visited Sept. 13, 2007).

¹⁴² OHIO REV. CODE § 120.04(C) (West 2007).

The Office of the Ohio Public Defender, however, is not required to represent any death-sentenced individual in a post-conviction proceeding unless the state public defender is satisfied that there is “arguable merit to the proceedings.”¹⁴³ In the event the Office of the Ohio Public Defender cannot represent a death-sentenced individual, in the case of a conflict or otherwise, the petitioner can request the court to appoint a private attorney.

Federal Habeas Corpus Proceedings

Federal law requires that a death-sentenced inmate petitioning for federal habeas corpus in one of Ohio’s two federal judicial districts—the Northern or Southern—is entitled to appointed counsel and other resources if he/she “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.”¹⁴⁴ While the federal court could appoint any qualified attorney, attorneys from the Office of the Ohio Public Defender often are appointed to handle these cases.¹⁴⁵ In addition to counsel, the court also may authorize the attorneys to obtain investigative, expert, or other services as are reasonably necessary for representation.¹⁴⁶

Clemency Proceedings

The State of Ohio does not have any laws, rules, procedures, standards, or guidelines requiring the appointment of counsel to inmates petitioning for clemency. Federal law, however, provides that a death-sentenced inmate has the right to petition the federal court to have counsel represent him/her in state clemency proceedings.¹⁴⁷

Conclusion

Although death-sentenced inmates receive counsel during state post-conviction and federal habeas corpus, and may be appointed counsel by the federal court for state clemency proceedings, only the appointment of the Office of the Ohio Public Defender to represent indigent capital inmates in state post-conviction proceedings and federal habeas corpus proceedings is similar to the representation scheme provided by the now-defunded capital resource centers. The State of Ohio, therefore, is only in partial compliance with Recommendation #7.

G. 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*

¹⁴³ OHIO REV. CODE § 120.06(B) (West 2007).

¹⁴⁴ 18 U.S.C. § 3599(a)(2) (2006).

¹⁴⁵ See Office of the Ohio Public Defender, Death Penalty Division, available at http://www.opd.ohio.gov/dp/dp_DeathPenalty.htm (last visited Sept. 13, 2007) (“Death Penalty Division attorneys focus on three areas of appeal: Direct Appeal, Post-Conviction, and Federal Habeas Corpus.”).

¹⁴⁶ 18 U.S.C. § 3599(f) (2007).

¹⁴⁷ 21 U.S.C. § 848(q)(8) (2007).

Penalty Cases. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.

Qualifications of Post-Conviction Counsel

The Office of the Ohio Public Defender represents indigent individuals sentenced to death in post-conviction proceedings.¹⁴⁸ The state Public Defender is appointed by the Ohio Public Defender Commission and must be an attorney with at least four years of experience in the practice of law and have been admitted to practice law in the State of Ohio for at least one year prior to his/her appointment.¹⁴⁹ Section 2953.21(I)(2) of the Ohio Revised Code requires that all attorneys appointed to represent death-sentenced inmates in state post-conviction proceedings must be certified under Rule 20 of the Rules of Superintendence for the Courts of Ohio to represent capital defendants at trial or death-row inmates on direct appeal.¹⁵⁰ The court may not appoint the same attorney who represented the inmate at trial, unless the inmate and attorney “expressly request the appointment.”¹⁵¹

Consequently, to be qualified to represent a death row inmate in state post-conviction proceedings, a lawyer must:

- (1) Maintain a law office in the State of Ohio;
- (2) Have experience in Ohio criminal trial practice;
- (3) Be admitted to the practice of law in the State of Ohio or admitted to practice *pro hac vice*;
- (4) Have at least five years of civil or criminal litigation or appellate experience;

¹⁴⁸ Office of the Ohio Public Defender, About the Office of the Ohio Public Defender, *available at* http://opd.ohio.gov/us/US_AboutUs.htm (last visited Sept. 13, 2007).

¹⁴⁹ OHIO REV. CODE § 120.04(A) (West 2007).

¹⁵⁰ OHIO REV. CODE § 2953.21(I)(2) (West 2007). A proposed revision of Rule 20 would require that “every attorney representing a capital defendant also should have:

- (1) Demonstrated a commitment to providing high quality legal representation in the defense of capital cases;
- (2) Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
- (3) Skill in the management and conduct of complex negotiations and litigation;
- (4) Skill in legal research, analysis, and the drafting of litigation documents;
- (5) Skill in oral advocacy;
- (6) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- (7) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- (8) Skill in the investigation, preparation, and presentation of mitigating evidence; and
- (9) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.”

See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

¹⁵¹ OHIO REV. CODE § 2953.21(I)(2) (West 2007).

- (5) Have specialized training, as approved by the Committee, on subjects that will assist him/her in the defense of people accused of capital crimes in the two-year period prior to submitting his/her application for certification;
- (6) Have been lead counsel in the jury trial of at least one capital case or been co-counsel in the trial of at least two capital cases;¹⁵² and
- (7) Have at least one of the following:
 - (a) been lead counsel in the jury trial of at least one murder or aggravated murder case,
 - (b) been lead counsel in ten or more criminal or civil jury trials, at least three of which were felony jury trials, or
 - (c) been lead counsel in either three murder or aggravated murder jury trials, one murder or aggravated murder jury trial and three felony jury trials, or three aggravated or first- or second-degree felony jury trials in a court of common pleas in the three years prior to making the application for certification.¹⁵³

Alternatively, a lawyer may be deemed qualified to represent a death-row inmate in state post-conviction proceedings if he/she:

- (1) Maintains a law office in the State of Ohio;¹⁵⁴
- (2) Is admitted to the practice of law in the State of Ohio or admitted to practice *pro hac vice*;
- (3) Has at least three years of civil or criminal litigation or appellate experience;
- (4) Has specialized training, as approved by the Committee, on subjects that will assist in the defense of people accused of capital crimes in the two years prior to applying for certification;
- (5) Has specialized training, as approved by the Committee, on subjects that will assist counsel in the appeal of cases in which the death penalty was imposed in the two years prior to applying for certification; and
- (6) Has counsel experience in the appeal of at least three felony convictions in the three years prior to applying for certification.¹⁵⁵

An attorney may be certified as although he/she does not satisfy the qualification requirements if it can be demonstrated to the Committee that “competent representation will be provided to the defendant.”¹⁵⁶ In making this determination, the Committee may consider whether the attorney has received specialized training, has experience in the trial or appeal of criminal or civil cases, has experience in the investigation, preparation, and

¹⁵² The proposed changes to Rule 20 also would require that this experience have been in jury trials on the side of the defense. *See* Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

¹⁵³ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(I)(A)(2).

¹⁵⁴ *Id.*

¹⁵⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(B)(2).

¹⁵⁶ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(C).

litigation of capital cases that were resolved prior to trial, and any other relevant considerations.¹⁵⁷

These specific minimum qualifications appear to apply to all attorneys at the State Public Defender Office and any other appointed attorneys charged with representing death-sentenced inmates in post-conviction proceedings.

Compensation for Public Defender and Private Contract Attorneys

The Office of the Ohio Public Defender Office is responsible for representing death-sentenced inmates in state post-conviction proceedings. While we assume that attorneys at this office are compensated through a state-paid salary, we were unable to ascertain the exact amount of the salary. Ohio law requires that the salaries paid to public defenders should be “equivalent to salaries paid to similar positions within the justice system.”¹⁵⁸ Additionally, the salary ranges set by each board of county commissioners for the county or joint county public defender and his/her staff may not exceed the pay ranges set for comparable positions in the Office of the Ohio Public Defender.¹⁵⁹ Thus, the attorneys at the Office of the Ohio Public Defender likely receive a salary that is equivalent or greater than the salary paid to county or joint county public defenders handling trial and direct appellate work in capital cases. Because we were unable to determine the salary of these attorneys, we cannot properly assess whether such a salary is adequate for a capital post-conviction attorney.

When the Office of the Ohio Public Defender is unable to represent a capital post-conviction petitioner, the court may appoint a private attorney. All private court-appointed attorneys are paid at an hourly rate set by the board of county commissioners in the county in which they are appointed.¹⁶⁰ Various counties set differing rates of compensation for capital post-conviction counsel. For example, a post-conviction attorney handling a capital post-conviction proceeding can be paid not more than \$170 total compensation if an evidentiary hearing is held and not more than \$100 without such a hearing in Cuyahoga County,¹⁶¹ and not more than \$500 in Franklin County.¹⁶² While each county allows for extraordinary fees in the discretion of the judge, these paltry amounts practically eliminate any chance for a death-sentenced inmate to receive adequate post-conviction representation. In Allen County, appointed private attorneys in capital post-conviction proceedings receive compensation at an hourly rate of \$45 an

¹⁵⁷ *Id.* The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 that would delete the above-listed considerations for exceptional appointments and instead require that the factors listed in footnotes 150 and 152 be met. See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author).

¹⁵⁸ OHIO ADMIN. CODE § 120-1-15(B).

¹⁵⁹ OHIO REV. CODE § 120.40 (West 2007).

¹⁶⁰ OHIO REV. CODE § 120.33(A)(3) (West 2007).

¹⁶¹ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(B). Extraordinary fees are allowed if approved by the judge. *Id.*

¹⁶² FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.15(II)(B).

hour for in- and out-of-court time, up to a cap of \$10,000.¹⁶³ While this amount could be adequate, it is possible that the cap on compensation in Allen County could inhibit quality post-conviction representation.

Funding for Investigators and Experts

The Office of the Ohio Public Defender has five criminal investigators and four mitigation specialists on staff,¹⁶⁴ to assist office attorneys in adequately representing capital post-conviction litigants. To the extent it is required by Ohio and federal law, the court must also provide an appointed lawyer, “with the investigator, mitigation specialists, mental health professional, and other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings including, but not limited to, determinations relevant to competency to stand trial, a not guilty by reason of insanity plea, cross-examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for and presentation of mitigating evidence in the sentencing phase of the trial.”¹⁶⁵ Each Board of County Commissioners, however, has

¹⁶³ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(4). Extraordinary fees are allowed if approved by the judge, up to 50% of the fee caps otherwise proscribed. ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(4)(7).

¹⁶⁴ Office of the Ohio Public Defender, About the Death Penalty Division, *available at* http://opd.ohio.gov/dp/dp_DeathPenalty.htm (last visited Sept. 13, 2007).

¹⁶⁵ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(D). In addition, the Ohio Revised Code states that “[i]f the court determines that the defendant is indigent and that investigation services, experts, or other services are reasonably necessary for the proper representation of a defendant charged with aggravated murder at trial or at the sentencing hearing, the court shall authorize the defendant’s counsel to obtain the necessary services for the defendant, and shall order that payment of the fees and expenses for the necessary services be made in the same manner that payment for appointed counsel is made pursuant to Chapter 120 of the Revised Code. If the court determines that the necessary services had to be obtained prior to court authorization for payment of the fees and expenses for the necessary services, the court may, after the services have been obtained, authorize the defendant’s counsel to obtain the necessary services and order that payment of the fees and expenses for the necessary services be made as provided in this section.” OHIO REV. CODE § 2929.024 (West 2007).

The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has proposed changes to Rule 20 that would greatly increase these requirements and would require that “lead counsel should assemble a defense team” “[a]s soon as possible after designation” by consulting with co-counsel and “[s]electing and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:”

- (1) At least on mitigation specialist and one fact investigator;
- (2) At least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments;
- (3) Any other members needed to provide high quality legal representation.

See Memorandum from the Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, to Rule 20 certified attorneys (July 27, 2007) (on file with author). In addition, counsel should:

the authority to place caps on the amount of money that the court may provide for expenses, including experts.¹⁶⁶

Various counties have differing rules regarding the resources that are available to appointed counsel in capital cases. For example, Cuyahoga County will reimburse appointed counsel for select expenses,¹⁶⁷ but sets significant limitations, including that investigators may not be hired in capital cases without the court's permission¹⁶⁸ and limits payment to \$25 per hour, up to \$500, except in extraordinary cases when the fee is capped at \$1,000.¹⁶⁹ In Franklin County, appointed counsel may be reimbursed for reasonable expenses, including costs for investigators, interpreters, experts, photocopies, psychological evaluations, polygraphs, transcripts, and other expenses "reasonably related and necessary to the defense of an indigent defendant."¹⁷⁰ These expenses do not include travel time, mileage and parking, office overhead, daily copies of transcripts, or depositions.¹⁷¹ The assigned judge must approve expenses above \$100 and the assigned judge and the administrative judge must approve expenses in excess of \$2,500.¹⁷² In Allen County, allowable expenses include expert witness fees, polygraph examination costs, and investigation costs, but without prior approval of the court, exclude parking and meal expenses, long distance telephone calls, and copying and postage.¹⁷³ Regardless of what expenses are approved, the maximum amount of reimbursement for expenses, without prior approval of the court, is capped at \$2,000.¹⁷⁴ The Office of the Ohio Public Defender will "reimburse up to 50% of certain expenses reasonably related and necessary to the defendant of an indigent client. These expenses include travel, transcripts, expert services, and certain other miscellaneous expenses," including polygraph examinations, phone calls, and photocopies.¹⁷⁵

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- (1) Demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for review;
 - (2) 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;
 - (3) Have the right to have such services provided by persons independent of the government; and
 - (4) 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.

Id.

¹⁶⁶ OHIO REV. CODE § 2941.51(A) (West 2007).

¹⁶⁷ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(B).

¹⁶⁸ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(G).

¹⁶⁹ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(E).

¹⁷⁰ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13(B).

¹⁷¹ FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13(A).

¹⁷² FRANKLIN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 77.13.

¹⁷³ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(2).

¹⁷⁴ ALLEN COUNTY RULES OF THE COURT OF COMMON PLEAS R. 13.04(2).

¹⁷⁵ OFFICE OF THE OHIO PUBLIC DEFENDER, STANDARDS AND GUIDELINES FOR APPOINTED COUNSEL REIMBURSEMENT 7, available at http://opd.ohio.gov/reimb/rm_stnd.pdf (last visited Sept. 13, 2007).

While it appears that the State of Ohio does provide funds for experts, investigators, and other services necessary for adequate representation during capital post-conviction proceedings, the caps set by certain counties on the amount of reimbursable expenses and the fact that reimbursement is in the sole discretion of the court, in conjunction with the paltry rate provided to many appointed attorneys in capital post-conviction proceedings, is likely to undermine the appointed counsel's ability to properly represent a death-sentenced inmate. Because we could only review a sample of counties in their effort to provide funds for experts and investigators, we were unable to conclude the extent to which funds provided by all Ohio counties are sufficient to meet the investigative needs of post-conviction counsel in providing optimum post-conviction representation.

Conclusion

We commend the State of Ohio for providing funding for certain non-lawyer services within the Office of the Ohio Public Defender that are integral to obtaining post-conviction relief for death-sentenced inmates and for improving its minimum qualifications for post-conviction representation in capital cases. However, in certain cases, the compensation provided to appointed attorneys and the funding for other services, such as investigators and experts, provided to those appointed attorneys, does not appear to be sufficient to allow for optimum representation. Based on this information, the State of Ohio only partially meets the requirements of Recommendation #8.

H. 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.

Post-conviction courts in Ohio give full retroactive effect to changes in the law announced by the United States Supreme Court, but only in limited circumstances. Specifically, post-conviction courts will give retroactive effect to new rules of criminal procedure in collateral post-conviction proceedings when (1) the new rule places certain kinds of conduct beyond the power of the criminal law-making authority to proscribe,¹⁷⁶ or (2) the new rule is a “watershed” rule of criminal procedure that requires the “observance of procedures that . . . are implicit in the concept of ordered liberty” and whose non-application would seriously diminish the “likelihood of an accurate conviction.”¹⁷⁷ All other new rules of criminal procedure, including those announced by the United States Supreme Court, will be applied retroactively only to those cases still on direct appeal.¹⁷⁸

¹⁷⁶ State v. Bruggeman, 2005 WL 517511, *2 (Ohio Ct. App. 3d Dist. Mar. 7, 2005) (citing Teague v. Lane, 489 U.S. 288, 310 (1989)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

Because Ohio law only gives retroactive effect to changes in the law announced by the United States Supreme Court in limited circumstances, the State of Ohio only partially complies with the requirements of Recommendation #9.

I. 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.

A petitioner generally may not file second or successive¹⁷⁹ post-conviction petitions raising claims:

- (1) That were raised and adjudicated against the petitioner in a previous post-conviction proceeding;¹⁸⁰
- (2) That could have been, but were not, raised in a previous post-conviction proceeding;¹⁸¹ or
- (3) That otherwise are precluded in the post-conviction proceeding.¹⁸²

The petitioner, however, may file a second or successive petition for post-conviction relief if:

- (1) The petitioner shows:
 - (a) That he/she was unavoidably prevented at the time of the first petition from discovery of the facts upon which he/she must rely to present the claim for relief,¹⁸³ or, after filing the first petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's

¹⁷⁹ Successive petitions are those petitions that challenge a judgment of conviction or sentence filed subsequent to the initial post-conviction petition challenging the same judgment of conviction and sentence.

¹⁸⁰ See *State v. Hester*, 341 N.E.2d 304, 307 (Ohio 1976) holding that the ineffective assistance of counsel claim was not barred by *res judicata* where the issue had not been adjudicated in a prior post-conviction petition).

¹⁸¹ OHIO REV. CODE § 2953.21(A)(4) (West 2007). Thus, all grounds for relief available to the petitioner must be raised in his/her first petition. *Id.* Grounds not raised are generally waived. *Id.*

¹⁸² See *supra* notes 70-78 and accompanying text.

¹⁸³ It also appears that newly discovered evidence claims can be raised in a motion for new trial, outside or alongside the normal post-conviction process. See, e.g., *State v. Mitchell*, 2004 WL 225464 (Ohio Ct. App. 2d Dist. Feb. 6, 2004) (noting that post-conviction petitioner also filed a belated motion for new trial based on newly discovered evidence). When new evidence material to the petitioner is discovered which he/she could not with reasonable diligence have discovered and produced at the trial, the petitioner may file a motion for new trial within 120 days of the verdict in his/her trial. OHIO R. CRIM. P. 33(A)(6), (B). If, however, it is proven at a hearing by clear and convincing evidence that the defendant was unavoidably prevented from filing his motion for a new trial in a timely manner, the motion may be filed within seven days from the order of the court finding that the defendant was unavoidably prevented from filing such a timely motion. OHIO R. CRIM. P. 33(B).

situation, and the successive petition asserts a claim based on that right;¹⁸⁴ and

- (b) By clear and convincing evidence that, but for constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty of the offense of which the petitioner was convicted or found the petitioner eligible for the death sentence;¹⁸⁵ or
- (2) Post-Conviction DNA testing was performed in the death-sentenced petitioner’s case pursuant to the Ohio Revised Code,¹⁸⁶ and the results of the DNA testing establish, by clear and convincing evidence, “actual innocence”¹⁸⁷ of the aggravated murder or the aggravating circumstance(s) the person was found guilty of committing, which are the basis of his/her sentence of death.¹⁸⁸

One of the exceptions to the bar against successive petitions required by this Recommendation—an intervening court decision that changed the law subsequent to the first petition, resulting in a meritorious claim not being raised and litigated in the first petition—appears to be contemplated by the aforementioned exceptions to the bar against successive petitions. Specifically, the petitioner may raise in a successive petition a claim predicated on a new federal or state right announced by the United States Supreme Court, provided that but for the claimed violation of that right, the petitioner would not have been convicted or wouldn’t have received a death sentence.¹⁸⁹

Ohio law, however, provides no exception to the bar against successive petitions for omissions by previous post-conviction counsel, as required by this recommendation. In fact, a successive petitioner is prohibited from raising the claim that his/her previous post-conviction counsel was ineffective.¹⁹⁰

The State of Ohio, therefore, only partially complies with the requirements of Recommendation #10.

J. 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.

¹⁸⁴ OHIO REV. CODE § 2953.23(A)(1)(a) (West 2007).

¹⁸⁵ OHIO REV. CODE § 2953.23(A)(1)(b) (West 2007).

¹⁸⁶ The State of Ohio’s post-conviction DNA testing procedures are contained in sections 2953.71 through 2953.84 of the Ohio Revised Code Annotated. OHIO REV. CODE §§ 2953.71-.84 (West 2007).

¹⁸⁷ See *supra* note 6 and accompanying text for a definition of “actual innocence.”

¹⁸⁸ OHIO REV. CODE § 2953.23(A)(2) (West 2007).

¹⁸⁹ OHIO REV. CODE § 2953.23(A)(1)(a)-(b) (West 2007).

¹⁹⁰ OHIO REV. CODE § 2953.21(I)(2) (West 2007); *State v. Scudder*, 722 N.E.2d 1054, 1057 (Ohio Ct. App. 10th Dist. 1998).

In *Chapman v. California*, the United States Supreme Court stated that “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.”¹⁹¹ The burden to show that the error was harmless falls on the “beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.”¹⁹²

There is some case law in Ohio indicating that during post-conviction proceedings, errors involving a petitioner’s constitutional rights are generally not harmless unless the post-conviction court finds that the error is harmless beyond a reasonable doubt.¹⁹³ The state generally has the burden of proving beyond a reasonable doubt that the error did not contribute to the verdict and/or sentence.¹⁹⁴

However, in following U.S. Supreme Court precedent, certain claims of constitutional error, such as ineffective assistance of counsel and *Brady*¹⁹⁵ claims, provide an exception to the harmless error test in Ohio post-conviction proceedings by placing the burden on the petitioner to demonstrate that he/she was prejudiced by the constitutional error.

For example, if the petitioner raises a claim of ineffective assistance of counsel, he/she bears the burden of demonstrating a “reasonable probability” that counsel’s deficient performance affected the outcome of the proceeding,¹⁹⁶ rather than the state bearing the burden of proving that the deficient performance was harmless beyond a reasonable doubt. Similarly, in asserting a *Brady* violation—wherein the stated failed to disclose favorable evidence—the burden again rests with the petitioner to show a “reasonable probability” that the disclosure of the evidence would have affected the outcome of the proceeding.¹⁹⁷

Because claims of ineffective assistance of trial counsel form the bulk of claims raised in Ohio post-conviction proceedings, it is more likely that the petitioner regularly bears the burden of proving that he/she was prejudiced by the constitutional error (failure to receive effective trial counsel under the Sixth Amendment to the United States Constitution), rather than the state bearing the burden of demonstrating that such an error was harmless beyond a reasonable doubt.

The State of Ohio, therefore, only partially complies with the requirements of Recommendation #11.

K. Recommendation #12

¹⁹¹ 386 U.S. 18, 24 (1967).

¹⁹² *Id.*

¹⁹³ *See, e.g., State v. Losey*, 1998 WL 295505, *3 (Ohio Ct. App. 4th Dist. Jun. 3, 1998) (citing *Chapman v. California*, 386 U.S. 18 (1967)).

¹⁹⁴ *Chapman*, 386 U.S. at 24.

¹⁹⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹⁹⁶ *State v. Bradley*, 538 N.E.2d 373, 380 (Ohio 1989).

¹⁹⁷ *State v. Reedy*, 1999 WL 787927, *3 (Ohio Ct. App. 4th Dist. Sept. 27, 1999) (citing *U.S. v. Bagley*, 473 U.S. 667, 682 (1985)).

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 the State of Ohio at this time.

CHAPTER NINE

CLEMENCY

INTRODUCTION TO THE ISSUE

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, and not by political considerations.

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 deficiencies. 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 U.S. Supreme Court temporarily barred the death penalty as unconstitutional, clemency has been granted in substantially fewer death penalty cases. From 1976, when the Court authorized states to reinstate capital punishment, through November 2005, clemency has been granted on humanitarian grounds 229 times in 19 of the 38 death penalty states and the federal government.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.

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

¹ Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

² See Death Penalty Information Center, Clemency, at <http://www.deathpenaltyinfo.org/article.php?did=126&scid=13> (last visited Sept. 13, 2007).

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, 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

A. Clemency Decision-Makers

1. The Governor of Ohio

The Ohio Constitution gives the governor the power to grant reprieves, pardons, and commutations in all criminal cases after conviction, except impeachment and treason.³ The governor may grant reprieves without regard to any regulations.⁴ In order to grant or deny a pardon or commutation request, however, the governor must wait for the Ohio Parole Board to issue an advisory recommendation.⁵

The Governor of Ohio may not refuse to hear any clemency request.⁶ In addition, he/she is required to report to the Ohio General Assembly at every regular session every pardon, commutation, and/or reprieve granted.⁷

2. The Ohio Parole Board

The Adult Parole Authority (Parole Authority) “may recommend to the governor the pardon, commutation, or reprieve of sentence of any convict or prisoner.”⁸ The Parole Authority is required to investigate and make a recommendation to the governor whenever an inmate files a clemency application,⁹ although it also may begin work on its own initiative.¹⁰

The Ohio Parole Board (Board) is a part of the Parole Authority and consists of up to twelve members, one of whom is designated Chairperson by the Director of the Ohio Department of Rehabilitation and Correction (DRC).¹¹ Every member of the Board must be “qualified by education or experience in correctional work, including law enforcement, prosecution of offenses, advocating for the rights of victims of crime,

³ OHIO CONST. art. III, § 11. “Upon conviction for treason, the governor may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve.” *Id.*

⁴ *Id.* at cmt. *But see* OHIO REV. CODE § 2967.08 (West 2007) (purporting to regulate reprieves as well as commutations and pardons); OHIO ADMIN. CODE § 5 120:1-1-15(B) (also purporting to regulate reprieves as well as commutations and pardons). However, the Ohio Constitution, Art. III, Sec. 11, makes no provision for regulation of the governor’s power to grant reprieves and the Ohio Supreme Court has held such regulations unconstitutional. *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 375 n.5, 377 (Ohio 1994).

⁵ *Maurer*, 644 N.E.2d at 378-79. The Ohio Supreme Court held, in *State ex rel. Maurer v. Sheward*, that the governor must wait to act on a pardon application until the legislative requirements under section 2967.07 of the Ohio Revised Code are met. The Court held that the references in section 2967.07 of the Ohio Revised Code to commutations and reprieves were “unconstitutional.” *Id.* at 377. A 1996 amendment to the Ohio Constitution added commutations to the forms of clemency subject to legislative procedural regulation regarding the manner of application. OHIO CONST. art. III, § 11.

⁶ *In re Kline*, 70 N.E. 511 (Ohio 1904).

⁷ OHIO CONST. art. III, § 11.

⁸ OHIO REV. CODE § 2967.03 (West 2007).

⁹ OHIO REV. CODE § 2967.07 (West 2007).

¹⁰ OHIO REV. CODE § 2967.03 (West 2007).

¹¹ OHIO REV. CODE § 5149.10(A) (West 2007).

probation, or parole, in law, in social work, or in a combination of the three categories.”¹² In addition, one member of the Board must be a crime victim, a member of a crime victim’s family, or a representative from a crime victims’ rights organization.¹³

The Director of the DRC, pursuant to his/her rulemaking authority under section 5120.01 of the Ohio Rev. Code, has implemented special clemency procedures applicable only in death penalty cases.¹⁴ A copy of this procedure is required to be delivered to every inmate on death row.¹⁵ Under this procedure, the Board will conduct a clemency investigation and hearing regardless of whether the death-sentenced inmate has requested one.¹⁶ The investigation process will begin once the Board receives notice that the Ohio Supreme Court has set an execution date, although the Board may begin its investigation at an earlier date on its own initiative.¹⁷

The Board is required to conduct any investigation necessary,¹⁸ make findings and a recommendation on each clemency application reviewed, and submit its findings and recommendation to the governor.¹⁹ The Chairperson of the Board must submit all clemency recommendations directly to the governor.²⁰

B. Applying for Clemency to the Ohio Parole Board

1. Applications for Clemency

All clemency applications must be in writing to the Adult Parole Authority.²¹ However, the Board must, under its Death Penalty Clemency Procedure, conduct a clemency review in every capital case regardless of whether an application has been filed, once an execution date has been set by the Ohio Supreme Court.²² A clemency review also must

¹² OHIO REV. CODE § 5149.10(A) (West 2007).

¹³ OHIO REV. CODE § 5149.10(B) (West 2007).

¹⁴ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § I. The prior version of the death penalty clemency procedures was found to meet the Due Process requirements of the United States Constitution in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998).

¹⁵ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(A)(1).

¹⁶ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(B)(1), (2).

¹⁷ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(B)(1).

¹⁸ OHIO ADMIN. CODE § 5120:1-1-15(B).

¹⁹ Ohio Department of Rehabilitation and Correction, Ohio Parole Board, at <http://www.drc.state.oh.us/web/parboard.htm> (last visited Sept. 13, 2007).

²⁰ OHIO REV. CODE § 5149.10(C) (West 2007).

²¹ OHIO REV. CODE § 2967.07 (West 2007); OHIO ADMIN. CODE 5120:1-1-15(A). The Adult Parole Authority is a bureau of the Division of Parole and Community Services of the Department of Rehabilitation and Correction. OHIO REV. CODE § 5149.02 (West 2007). The Adult Parole Authority “consists of its chief, a field services section, and the parole board.” *Id.*

²² Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(B)(1).

be conducted, again without regard to whether an application has been filed, whenever the governor so directs.²³ In addition, the Board may conduct clemency inquiries and make recommendations to the governor on its own initiative.²⁴

There are no restrictions on the information that may be submitted as part of a clemency application.

No later than 45 days from an execution, a hearing will be scheduled.²⁵ The hearing will take place at least three weeks before the scheduled execution date.²⁶ After the hearing is scheduled, notice of the hearing will be sent to the sentencing court, the prosecuting attorney, and the victim's family or representative.²⁷ The death-row inmate will be notified by the Board or prison staff, personally and in writing, that he/she is being considered for clemency and of the date of the hearing.²⁸

The inmate may request that a clemency interview be conducted by one or more members of the Board.²⁹ All requests for interviews will be granted.³⁰ When the inmate requests an interview his/her counsel will be notified. The inmate does not have the right to have his/her lawyer attend the interview,³¹ although the Board has exercised its discretion to allow counsel to attend in recent times.³²

The Board may request that the prisoner submit to a psychological or psychiatric examination,³³ although the prisoner may decline this request.

Before the Parole Authority can recommend any form of clemency to the governor, it must consider any statement made by the victim or the victim's representative³⁴ and must notify the prosecuting attorney and judge of the county in which the indictment was returned of its intention.³⁵

²³ OHIO REV. CODE § 2967.07 (West 2007).

²⁴ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(B)(1).

²⁵ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(B)(2).

²⁶ *Id.*

²⁷ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § (VI)(C)(1), (2).

²⁸ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(C)(3). This provision replaced former Death Penalty Clemency Procedure Section 501, No. 09, § IV(B)(4), which additionally provided for notice to the inmate's lawyer.

²⁹ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(D)(1), (2).

³⁰ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(D)(2).

³¹ *Id.*

³² Email Interview by Deborah Fleischaker with Adele Shank (July 26, 2007) (on file with author).

³³ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(B)(1).

³⁴ OHIO REV. CODE § 2967.03 (West 2007).

³⁵ OHIO REV. CODE § 2967.12(A) (West 2007); OHIO REV. CODE § 2967.121(A) (West 2007).

2. Clemency Hearings and Determinations

The clemency hearing is held during business hours at any location designated by the Parole Board.³⁶ Barring “extenuating circumstances,” the Parole Board member(s) and/or hearing officer(s) who interviewed the inmate are required to attend.³⁷ All attendance, other than that of the Board members or hearing officers who participated in the inmate interview, is at the Board Chairperson’s discretion and there is no right for the death row inmate, the inmate’s family, the public, or the press to attend.³⁸ There is no right to counsel at the hearing, although the Board has in recent times consistently exercised its discretion to allow counsel to appear and present evidence.³⁹

A majority of the Board must be present in order for the clemency hearing to proceed.⁴⁰ The Board will consider all “relevant information” provided.⁴¹ It deliberates and votes in executive session and, if possible, will make a decision on the day of the hearing.⁴²

When there is insufficient time to go through this process, the Death Penalty Clemency Procedure shall not apply, and the Board will gather whatever information it can.⁴³ If a hearing cannot be arranged, the Board will send an informational report to the Governor’s Chief Legal Counsel.⁴⁴

Once the Board’s decision is made, it is sent to the Governor’s Chief Legal Counsel.⁴⁵ Within five business days of the decision, the Governor’s Office will receive the Board’s written report and recommendation.⁴⁶ The prisoner, his/her counsel, the victim’s representative, the prosecutor and the Ohio Attorney General will receive notice of the

³⁶ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(B)(2).

³⁷ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(E)(1).

³⁸ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(E)(2), (3).

³⁹ Email Interview by Deborah Fleischaker with Adele Shank (July 26, 2007) (on file with author).

⁴⁰ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(F)(1).

⁴¹ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(F)(2).

⁴² Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(F)(3).

⁴³ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(H)(1).

⁴⁴ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(H)(2).

⁴⁵ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(F)(4).

⁴⁶ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(G)(1).

Board's recommendation.⁴⁷ A press release must be issued once the Governor has been informed of the Board's recommendation.⁴⁸

Once a clemency recommendation has been made, if new information comes to light, the Board may make an informational update to its original recommendation or hold a new hearing and supplement its original decision and recommendation.⁴⁹ The Board will inform the Governor's Chief Legal Counsel of the informational update or any new decision and recommendation.⁵⁰

The DRC is required to prepare and provide to the governor a report of all grants of clemency for the previous two years, no later than the first Monday of January in odd-numbered years.⁵¹ The report must include the grantee's name, the crime, the sentence, the sentencing date, the date of the clemency action, and the reasons for that action.⁵²

⁴⁷ *Id.*

⁴⁸ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(G)(2).

⁴⁹ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI (I)(1), (2).

⁵⁰ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI (I)(3).

⁵¹ OHIO REV. CODE § 5149.07 (West 2007).

⁵² *Id.*

II. ANALYSIS

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.

One reason for the existence of the clemency process is the recognition that the court system is not perfect. Rules of evidence, procedural default, waiver, and simple human error can result in convictions and/or sentences that are wrong or excessive, yet are not reviewed or corrected by the courts.

There continues to be widespread misunderstanding of the nature of the clemency process, however. For example, in 1981, when Gov. Celeste granted clemency to eight death-row inmates, he was criticized for having “‘set himself above’ the juries, the judges, the General Assembly and the will of many Ohioans who support the death penalty.”⁵³ In fact the Ohio Supreme Court long ago recognized that a grant of clemency, “‘though sometimes called an act of grace or mercy . . . where properly granted, is also an act of justice, supported by a wise public policy.’”⁵⁴ While each governor must set his/her own guidelines in using the clemency power, a too-ready reliance on the courts abdicates the governor’s responsibility to act as a balance and final check in the criminal justice system.

The State of Ohio does not require the governor, who possesses the sole constitutional and statutory power to grant or deny clemency, or the Parole Board (Board), which makes clemency recommendations to the governor, to conduct any specific type of review or consider any specific facts, evidence, or circumstances when making a clemency decision or recommendation.

While the Board is required to conduct an investigation into every capital case prior to issuing its clemency recommendation, there are no requirements as to what issues must be considered during this investigation. As part of the investigation process, the prisoner may request a hearing⁵⁵ and, if requested, an interview will be granted.⁵⁶ In addition, the Board may request that the prisoner submit to a psychological or psychiatric examination as part of its investigation,⁵⁷ although the prisoner may refuse this request.

⁵³ Mary Beth Lane, *Celeste Commutes Eight Death Sentences*, PLAIN DEALER (Cleveland, Ohio), Jan. 11, 1981, at 1-A (quoting Republican State Senator Eugene Watts).

⁵⁴ *Knapp v. Thomas*, 1883 WL 196 (Ohio 1883) (commenting specifically on pardons).

⁵⁵ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(D)(1).

⁵⁶ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(D)(2).

⁵⁷ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(B)(1).

At the clemency hearing, the Board will consider all “relevant information” provided.⁵⁸ Despite this claim, the Board appears to regularly assume that the courts have reached the merits on all issues bearing on the death sentence. For example, in 25% of the Board’s death penalty clemency reports, the Board included a statement that the years of judicial review provide a reason to recommend against clemency, explaining that the clemency applicant’s conviction and sentence have been upheld over many years of judicial review.⁵⁹

Once the Board makes its non-binding recommendation, the governor will make a final clemency determination. Ohio law places no restrictions or requirements on what weight, if any, is given to the information contained in the Board’s report nor does it require consideration of any specific information as part of the governor’s clemency decision-making process. Because of this, the breadth of the review conducted by the governor and the factors considered by him/her are largely unknown, although it appears that governors sometimes do assume that the courts already have reached the merits on the issues bearing upon the death sentence. For example, Ohio’s former Governor, Robert Taft, seemed to place heavy reliance on judicial review as evidence that clemency was not warranted, frequently noting when denying clemency to a death-sentenced prisoner that a number of courts had reviewed the case. For example:

- (1) In denying clemency to Jeffrey D. Lundgren, Gov. Taft stated that “Mr. Lundgren has not offered any reason that would justify the extraordinary grant of clemency. Mr. Lundgren’s case has been exhaustively litigated in both state and federal courts, and these courts have upheld his convictions and sentence. All of the courts that have reviewed this case have concluded that Mr. Lundgren received a fair trial and proper legal representation and that the aggravating circumstances of his crimes outweigh any mitigating factors presented. Moreover, there is overwhelming evidence of guilt in this case.”⁶⁰
- (2) In rejecting clemency for Jay D. Scott, Gov. Taft said that though Scott’s lawyers urged him to consider mitigating evidence not presented by trial

⁵⁸ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(F)(2).

⁵⁹ See, e.g., Ohio Adult Parole Authority, Minutes of Special Meeting, In re: Clarence Carter, OSP #A213-146 (May 2007), available at <http://www.drc.state.oh.us/Public/Clarence%20Carter%20Report.pdf> (last visited Sept. 13, 2007); Ohio Adult Parole Authority, Minutes of Special Meeting, In re: Christopher J. Newton, MANCI #A378-452 (Feb. 2007), available at http://www.drc.state.oh.us/Public/Newton_clemency.pdf (last visited Sept. 13, 2007); Ohio Adult Parole Authority, Minutes of Special Meeting, In Re: James J. Filiaggi, MANCI #A311-180 (Jan. 2007), available at http://www.drc.state.oh.us/Public/Filiaggi_clemency.pdf (last visited Sept. 13, 2007); Ohio Adult Parole Authority, Minutes of Special Meeting, In re: Kenneth Biros, OSP #A249-514 (Jan. 2007), available at <http://www.drc.state.oh.us/Public/Kenneth%20Biros%20Clemency%20Report.pdf> (last visited Sept. 13, 2007); Ohio Adult Parole Authority, Minutes of Special Meeting, In re: Adremy Dennis, MANCI #306-133 (Sept. 2004), available at <http://www.drc.state.oh.us/Public/Adremeny%20Dennis.pdf> (last visited Sept. 13, 2007); Ohio Adult Parole Authority, Clemency Report of Ernest Martin, MANCI #A174-878 (Mar. 2003), available at <http://www.drc.state.oh.us/Public/Martin.pdf> (last visited Sept. 13, 2007).

⁶⁰ News Release by Governor Bob Taft, Taft Statement on Lundgren Clemency Request (Oct. 24, 2006), available at <http://www.dw.ohio.gov/gov/releases/102406Lundgren.htm> (last visited Sept. 13, 2007).

counsel, “the trial court, the court of appeals and the Supreme Court of Ohio all reviewed and rejected the argument of ineffective assistance of counsel, pointing out that a decision to withhold mitigating evidence is a valid defense strategy.”⁶¹

- (3) In denying clemency to John Byrd, Gov. Taft said, “A responsible jury, after hearing all the evidence, determined that Mr. Byrd stabbed Mr. Tewksbury and, to date, 23 stages of appeals have affirmed his conviction and death sentence. I find no reasonable or compelling reason to disagree with these very thorough evaluations of Mr. Byrd’s case.”⁶²
- (4) In denying clemency to Richard Wade Cooley, Gov. Taft said, “For 17 years, Mr. Cooley’s case has been litigated in both state and federal court. No court, including our highest state and federal courts, has found any reason to reverse Cooley’s guilty verdict or his sentence of death. Every reviewing court has concluded that Cooley received a fair trial and had adequate legal representation.”⁶³

Another former Governor, George Voinovich, disagreed with this approach and stated that he considered more than the level of judicial review in making clemency decisions:

I still believe [despite the many judicial reviews conducted in each capital case] that it is my duty as Governor to look at a clemency request thoroughly and very carefully. While questions of guilt and innocence may no longer be viable issues after so many court reviews, I still consider every court’s ruling and want to know about each proceeding. More importantly, I consider other types of information which I believe are relevant in a clemency consideration, including factors which may not have been a part of the trial. I want to know details about the inmate’s family and his upbringing. I want to know how he has adjusted to prison and if he is remorseful about his crime.⁶⁴

The current Governor, Ted Strickland, also appears to consider the extent of judicial review in making his clemency determinations, but also considers a variety of other information. For example:

⁶¹ News Release of Governor Bob Taft, Taft Releases Statement on Scott Clemency Request (Apr. 10, 2001), *available at* <http://www.dw.ohio.gov/gov/releases/Archive2001/41020016141.htm> (last visited Sept. 13, 2007).

⁶² News Release of Governor Bob Taft, Statement of Governor Bob Taft Regarding the Clemency Request of John W. Byrd, Jr. (Sept. 10, 2001), *available at* <http://www.dw.ohio.gov/gov/releases/Archive2001/91020018341.htm> (last visited Sept. 13, 2007).

⁶³ Statement of Governor Bob Taft (July 22, 2003) (denying clemency) (on file with author).

⁶⁴ Letter from Governor George Voinovich to Tim Luckhaupt, Executive Director, Catholic Conference of Ohio, Feb. 12, 1998 (on file with author). A stay was granted as a result of court proceedings and Governor Voinovich did not have to make a clemency decision in Wilford Berry’s case. Mr. Berry was executed in 1999 under Gov. Taft’s tenure. *See* Death Penalty Information Center, Executions in the U.S. in 1999, *available at* <http://www.deathpenaltyinfo.org/article.php?scid=8&did=475> (last visited Sept. 13, 2007).

- (1) In denying clemency to Christopher Newton, Gov. Strickland and his staff “conducted various interviews and reviewed the judicial decisions associated with this matter, Mr. Newton’s mental health records, photographs, the Adult Parole Authority’s report, letters received by the parole board, and the arguments and exhibits presented at the Parole Board hearing.”⁶⁵
- (2) In rejecting clemency for James Filiaggi, Gov. Strickland and his staff “reviewed the trial transcripts, the report of the forensic psychiatrist that was prepared for trial, trial photographs and videos, the Adult Parole Authority’s report, phone call recordings introduced at trial, judicial rulings, Mr. Filiaggi’s institutional mental health records, letters received by the Parole Board, arguments presented at the Parole Board hearing and the exhibits presented at the Parole Board hearing.”⁶⁶
- (3) In denying clemency to Kenneth Biros, Gov. Strickland and his staff “reviewed the record of the proceedings and the evidence presented in Mr. Biros’ case, the judicial decisions regarding Mr. Biros’ conviction, the Application for Executive Clemency filed by Mr. Biros’ attorneys and arguments presented for and against the clemency request and Mr. Biros’ institutional mental health record.” They also reviewed letters received in the Governor’s office regarding the matter and the Parole Board’s unanimous recommendation against clemency.⁶⁷

In a review of the statements released by the governor’s office regarding clemency decisions since 2001, governors routinely failed to note or mention the instances in many of those cases where court review failed to reach the merits of the condemned prisoner’s claims but instead denied review on one or more procedural grounds.

In conclusion, due to the non-existence of laws, rules, procedures, standards, and guidelines requiring the governor to conduct any specific type of review or consider specific facts and the lack of information on what current and past-Governors’ decision-making process entails, we are unable to assess whether the State of Ohio is in compliance with Recommendation #1.

Based on this information, the Ohio Death Penalty Assessment Team recommends that the Governor of Ohio create an innocence commission, with the power to conduct investigations, hold hearings, and test evidence, to review claims of factual innocence in capital cases. This sort of commission, which would supplement the clemency process, is necessary, in large part because current procedural defaults and inadequate lawyering

⁶⁵ Governor Ted Strickland, Statement Regarding Parole Board Recommendation for Christopher Newton (May 21, 2007), *available at* <http://governor.ohio.gov/News/May2007/News52107/tabid/281/Default.aspx> (last visited Sept. 13, 2007).

⁶⁶ Governor Ted Strickland, Statement Regarding Parole Board Recommendation for James Filiaggi (Apr. 19, 2007), *available at* <http://governor.ohio.gov/News/April2007/News419071/tabid/258/Default.aspx> (last visited Sept. 13, 2007).

⁶⁷ Governor Ted Strickland, Statement Regarding Parole Board Recommendation for Kenneth Biros (Mar. 16, 2007), *available at* <http://governor.ohio.gov/News/March2007/News31607/tabid/218/Default.aspx> (last visited Sept. 13, 2007).

have prevented claims of factual innocence from receiving full judicial consideration and the clemency process currently is not equipped to handle them.

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, “all factors” include, but are not limited to, the following, which are not listed in any particular order of priority:

- (1) Constitutional claims that were barred in court proceedings due to procedural default, non-retroactivity, abuse of writ, statutes of limitations or similar doctrines, or whose merits the federal courts did not reach because they gave 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;
- (5) Patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #3);
- (6) Inmates’ mental retardation, mental illness, and/or mental competency (as discussed in Recommendation #4); and
- (7) Inmates’ age at the time of the offense (as discussed in Recommendation #4).⁶⁸

As discussed under Recommendation #1, neither the Board nor the governor is required to consider any specific factors when making clemency decisions, although the Board is required to consider “all available relevant information” in making its recommendation.

As part of its normal process, the Board will issue a report on its clemency recommendation in all death penalty cases.⁶⁹ Each of the reports provide information about some or all of the following: details of the offense, the applicant’s statement, the applicant’s prior record, the applicant’s institutional adjustment, the applicant’s social history, arguments given for and against clemency, summaries of any mental health evaluations, the opinions of the victims’ family, the community attitude, and the Board’s

⁶⁸ AMERICAN BAR ASSOCIATION, *DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES* (2002).

⁶⁹ *See* Death Row Clemency Reports, Ohio Department of Rehabilitation and Correction, *at* <http://www.drc.state.oh.us/Public/clemency.htm> (last visited Sept. 13, 2007).

decision, along with its reasoning for recommending or failing to recommend clemency.⁷⁰ If there is a split vote of the Board, the report identifies the reasons provided by the Board members who support the minority position.⁷¹ These reports indicate that the Board has considered most, but not all of these factors, on various occasions.⁷²

While the Board releases a report detailing the issues it considered important in making its clemency recommendation, there is no such reporting requirement for the governor. Despite this, governors in recent years generally have issued a news release announcing clemency decisions.⁷³ Not surprisingly, different governors appear to consider different factors in making these determinations. For example, Gov. Richard Celeste, in his clemency criteria, “included the inmates’ crimes, the fairness of the sentences, mental health and IQ, and the length of time served.”⁷⁴ In addition, Gov. Celeste referenced a disturbing “racial imbalance of those on Death Row, noting that 54 of the 101 men and all four women are black.”⁷⁵

Where there was substantial doubt about guilt, Gov. Taft granted clemency in several capital cases.⁷⁶

Gov. Strickland appears to consider a variety of issues, including prior judicial decisions, the mental health of the inmate, the Board’s report, the arguments and exhibits presented at Board hearings, trial transcripts, trial photographs and videos, letters received by the Board, the Application for Executive Clemency, and the Board’s recommendation.⁷⁷

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² For example, none of the reports address the issue of racial or geographic disparities. *See id.*

⁷³ See News Releases, Office of the Governor Bob Taft, available at <http://www.dw.ohio.gov/gov/releases/index.htm> (last visited Sept. 13, 2007); News Archive, Governor Ted Strickland, available at <http://governor.ohio.gov/News/tabid/158/Default.aspx> (last visited Sept. 13, 2007).

⁷⁴ Lane, *supra* note 53.

⁷⁵ Mark Williams, *Celeste Did Not Break New Ground in Commuting Several Death Sentences*, DAILY REPORTER (Ohio), Jan. 14, 1991.

⁷⁶ See News Release by Governor Bob Taft, Taft Releases Statement on Campbell Clemency Request (June 26, 2003), available at <http://www.dw.ohio.gov/gov/releases/Archive2003/062603campbellclemency.htm> (last visited Sept. 13, 2007) (announcing the commutation of Jerome Campbell’s death sentence). Governor Taft also granted three reprieves to allow DNA testing in John Spirko’s case. See News Release of Governor Bob Taft, Governor Taft Statement on John Spirko Rehearing (Sept. 8, 2005), available at <http://www.dw.ohio.gov/gov/releases/Archive2005/090805spirko.htm> (last visited Sept. 13, 2007); News Release of Governor Bob Taft, Governor Taft Statement on John Spirko Reprieve (Nov. 8, 2005), available at <http://www.dw.ohio.gov/gov/releases/Archive2005/110805spirko.htm> (last visited Sept. 13, 2007); News Release of Governor Bob Taft, Governor Taft Statement on John Spirko Reprieve (Jan. 9, 2006), available at <http://www.dw.ohio.gov/gov/releases/010906Spirko.htm> (last visited Sept. 13, 2007).

⁷⁷ See Governor Ted Strickland, Statement Regarding Parole Board Recommendation for Christopher Newton (May 21, 2007), available at <http://governor.ohio.gov/News/May2007/News52107/tabid/281/Default.aspx> (last visited Sept. 13, 2007); Governor Ted Strickland, Statement Regarding Parole Board Recommendation for James Filiaggi (Apr. 19, 2007), available at <http://governor.ohio.gov/News/April2007/News419071/tabid/258/Default.aspx> (last visited Sept. 13, 2007); Governor Ted Strickland, Statement Regarding Parole Board Recommendation for

In conclusion, it appears that the Board and the Governor consider at least some of the factors delineated in Recommendation #2. We were unable to ascertain, however, how consistently this happens and whether the review includes all of the factors delineated in Recommendation #2. Consequently, we are unable to ascertain whether the State of Ohio 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.

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.

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 under Recommendation #2, neither the governor nor the Board are required to consider any specific factors when determining whether to recommend or grant a death row inmate clemency.

In spite of not being required to consider specific factors, governors and the Board do appear, at least in some cases, to consider racial and/or geographic disparity, mental retardation, mental illness, mental competency, possible innocence, age, and possible rehabilitation.

For example, Gov. Celeste cited evidence of racial disparity in his grants of clemency to eight death-row inmates in 1981. Noting that over half of Ohio's death row population was African American, Gov. Celeste said, "There may not be a state south of the Mason-Dixon line with a ratio like this. I don't think statistics alone prove racism. But I believe these statistics are compelling and call for further study of Ohio's system in reaching decisions on capital cases."⁷⁸ Furthermore, in granting clemency to these eight death-

Kenneth Biros (Mar. 16, 2007), *available at* <http://governor.ohio.gov/News/March2007/News31607/tabid/218/Default.aspx> (last visited Sept. 13, 2007).

⁷⁸ Lane, *supra* note 53

row inmates, Gov. Celeste included in his assessments the inmates' "mental health and IQ."⁷⁹

Gov. Taft has granted clemency on the basis of his doubts about the guilt of the death-row inmate, or at least his doubts about the quality of the evidence used to establish guilt at trial. In the case of Jerome Campbell, DNA testing proved that blood on Mr. Campbell's shoes was his own, despite the fact that the State had represented to the jury that the blood belonged to the victim. In addition, two informants who testified against Mr. Campbell had failed to reveal that they hoped to receive more lenient treatment from prosecutors as a result of their testimony. In commuting Mr. Campbell's death sentence to life in prison, Governor Taft agreed with the Board's statement that "[t]he jury's reliance on evidence and testimony now called into question strongly suggest that another outcome in the penalty phase of Campbell's trial was at least a possibility."⁸⁰ In addition, Gov. Taft granted John Spirko three reprieves to allow time for DNA testing which was not available at the time of the crime.⁸¹

While governors have relied on these factors as reasons to grant clemency in some cases, they also have failed to consider these same factors in others. For example, Gov. Taft took the position that mental illness which falls short of the legal standard for insanity or incompetence to be executed will not be considered as a factor in clemency decisions. In denying clemency to Jay D. Scott, a diagnosed schizophrenic whose mental illness was not presented to the trial court in mitigation, the Governor said, "Mr. Scott's attorneys also argue that Mr. Scott should be granted clemency because he is suffering from mental illness, yet there is no evidence that his condition even approaches the high standard established under state and federal law."⁸² Wilford Berry, the first inmate executed under Ohio's post-Furman death penalty law, suffered from serious mental illness, yet in denying clemency to Wilford Berry, Governor Taft found "no compelling reason to grant clemency . . . [in light of, among a number of reasons,] the court rulings finding Mr. Berry competent to waive further appeals."⁸³

⁷⁹ *Id.*

⁸⁰ News Release of Governor Bob Taft, Taft Releases Statement on Campbell Clemency Request (June 26, 2003), available at <http://www.dw.ohio.gov/gov/releases/Archive2003/062603campbellclemency.htm> (last visited Sept. 13, 2007).

⁸¹ See News Release of Governor Bob Taft, Governor Taft Statement on John Spirko Rehearing (Sept. 8, 2005), available at <http://www.dw.ohio.gov/gov/releases/Archive2005/090805spirko.htm> (last visited Sept. 13, 2007); News Release of Governor Bob Taft, Governor Taft Statement on John Spirko Reprieve (Nov. 8, 2005), available at <http://www.dw.ohio.gov/gov/releases/Archive2005/110805spirko.htm> (last visited Sept. 13, 2007); News Release of Governor Bob Taft, Governor Taft Statement on John Spirko Reprieve (Jan. 9, 2006), available at <http://www.dw.ohio.gov/gov/releases/010906Spirko.htm> (last visited Sept. 13, 2007). On at least two of the occasions, the Ohio Attorney General had requested a reprieve be granted so that DNA testing could be conducted. *Id.*

⁸² News Release of Governor Bob Taft, Taft Releases Statement on Scott Clemency Request (Apr. 10, 2001), available at <http://www.dw.ohio.gov/gov/releases/Archive2001/41020016141.htm> (last visited Sept. 13, 2007).

⁸³ James C. Benton, *Time Running Out Governor Refuses to Grant Clemency to Wilford Berry; Execution Tonight*, AKRON BEACON JOURNAL (Ohio), Feb. 19, 1999, at 1-A.

Failure to be rehabilitated and absence of remorse also were referenced by Gov. Taft as reasons for denying clemency.⁸⁴ Presumably then, evidence of rehabilitation and remorse would have been viewed as a basis for granting clemency.

Inmates who insist that they are innocent have been characterized as refusing to take responsibility for their crimes.⁸⁵ However, acceptance of responsibility or the admission of guilt has been referenced as a reason for denying clemency.⁸⁶ This apparent “Catch 22” caused Glenn Benner to refuse to participate in the clemency process. He said shortly before his execution, “I know that I have changed, and I am now a new person, but sadly I am unable to change the past, so there does not seem to be point (sic) in participating in such a [clemency] hearing.”⁸⁷

⁸⁴ See News Release of Governor Bob Taft, Taft Releases Statement on Scott Clemency Request (Apr. 10, 2001), *available at* <http://www.dw.ohio.gov/gov/releases/Archive2001/41020016141.htm> (last visited Sept. 13, 2007) (denying commutation to Jay D. Scott, whose record showed “no attempt or desire to rehabilitate himself”); News Release of Governor Bob Taft, Statement of Governor Bob Taft Regarding the Clemency Request of John W. Byrd, Jr., (Sept. 10, 2001), *available at* <http://www.dw.ohio.gov/gov/releases/Archive2001/91020018341.htm> (last visited Sept. 13, 2007) (denying commutation to John Byrd whose prison record showed no “serious effort on his part to rehabilitate himself”); News Release of Governor Bob Taft, Taft Releases Statement Concerning Clemency Request of William Wickline (Mar. 24, 2004), *available at* <http://www.dw.ohio.gov/gov/releases/Archive2004/032404wickline.htm> (last visited Sept. 13, 2007) (denying commutation to William Wickline and noting his failure “to accept responsibility or express remorse”); News Release of Governor Bob Taft, Governor Taft Releases Statement Regarding Clemency Request of William Zuern (June 7, 2004), *available at* <http://www.dw.ohio.gov/gov/releases/060704zuernstatement.htm> (last visited Sept. 13, 2007) (denying commutation to William Zuern who “has never shown remorse for his crimes”); News Release of Governor Bob Taft, Taft Releases Statement Concerning Clemency Request of Scott Mink (July 19, 2004), *available at* <http://www.dw.ohio.gov/gov/releases/071904mink.htm> (last visited Sept. 13, 2007) (denying commutation to Scott Mink, who has “shown no remorse for his crimes”); News Release of Governor Bob Taft, Taft Issues Statement Concerning Clemency Request of Adremy Dennis (Oct. 12, 2004), *available at* <http://www.dw.ohio.gov/gov/releases/Archive2004/101204dennis.htm> (last visited Sept. 13, 2007) (denying commutation to Adremy Dennis who “fails to express remorse for these terrible crimes”); News Release of Governor Bob Taft, Taft Statement on Williams Clemency (Oct. 25, 2005), *available at* <http://www.dw.ohio.gov/gov/releases/Archive2005/102405WilliamsClemency.htm> (last visited Sept. 13, 2007) (denying commutation to Willie J. Williams who “has shown no remorse for his crimes”); News Release of Governor Bob Taft, Taft Statement on Buell Clemency Request (Sept. 23, 2002), *available at* <http://www.dw.ohio.gov/gov/releases/Archive2002/092302buell.htm> (last visited Sept. 13, 2007) (denying commutation to Robert Buell who “is unrepentant”).

⁸⁵ See News Release of Governor Bob Taft, Taft Releases Statement on Martin Clemency Request (June 13, 2003) (denying clemency to Ernest Martin); News Release of Governor Bob Taft, Statement of Governor Bob Taft Regarding the Clemency Request of John W. Byrd, Jr. (Sept. 10, 2001), *available at* <http://www.dw.ohio.gov/gov/releases/Archive2001/91020018341.htm> (last visited Sept. 13, 2007). (denying clemency to John Byrd and noting no effort on the part of Byrd “to atone for the crime he committed”).

⁸⁶ See News Release of Governor Bob Taft, Taft Releases Statement on Hicks Clemency Request (November 28, 2005) (denying commutation to John R. Hicks, who “confessed . . . and fully admits he committed these crimes”); News Release of Governor Bob Taft, Taft Statement on Ashworth Clemency, (September 23, 2005) (denying commutation to Herman Dale Ashworth, who “pled guilty”); News Release of Governor Bob Taft, Taft Releases Statement Concerning Clemency Request of Scott Mink (July 19, 2004) (denying commutation to Scott Mink who “admitted to killing his parents”).

⁸⁷ Andrew Welsh-Huggins, *Death-Row Inmate Says He Will Not Seek Clemency*, CINCINNATI POST (Ohio), Jan. 6, 2006, at A11.

Based on this information, we are unable to ascertain whether the State of Ohio is in compliance with Recommendations #3-#5.

D. Recommendation #6

In clemency proceedings, the death-row inmates should be represented by counsel and such counsel should have qualifications consistent with the *American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*.

The State of Ohio does not have any laws, rules, procedures, or guidelines requiring the appointment of counsel for death-row inmates pursuing clemency. However, counsel is generally permitted to attend inmate clemency interviews and to participate in capital clemency hearings.⁸⁸

Because the State of Ohio makes no provision for the appointment of clemency counsel to death row inmates, the State of Ohio is not in compliance with Recommendation #6.

E. Recommendation #7

Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should 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.

The State of Ohio does not have any laws, rules, procedures, standards, or guidelines entitling a death row inmate to counsel in clemency proceedings, much less to compensation or access to investigative and expert resources. Accordingly, the State of Ohio is not in compliance with Recommendation #7.

F. Recommendation #8

⁸⁸ Interview by Deborah Fleischaker with Adele Shank (July 26, 2007) (on file with author). Governor Taft frequently noted counsel's failure to participate or attend the hearing in his explanation for denying clemency. See News Release of Governor Bob Taft, Taft Statement on Williams Clemency (Oct. 24, 2005), available at <http://www.dw.ohio.gov/releases/Archives2005/102405WilliamsClemency.htm> (Sept. 13, 2007) ("His attorney attended the clemency hearing, but indicated only that Mr. Williams did not wish to participate in the clemency process."); News Release of Governor Bob Taft, Taft Releases Statement Concerning Clemency Request of Scott Mink (Jul. 19, 2004), available at <http://www.dw.ohio.gov/releases/071904mink.htm> (Sept. 13, 2007) ("His attorney attended the clemency hearing, but indicated only that Mink admitted to killing his parents."); News Release of Governor Bob Taft, Taft Releases Statement Concerning Clemency for Stephen Vrabel (Jul. 12, 2004), available at <http://www.dw.ohio.gov/releases/071204vrabel.htm> (Sept. 13, 2007) (stating "neither Mr. Vrabel nor his attorneys chose to present evidence"); News Release of Governor Bob Taft, Governor Taft Releases Statement Regarding Clemency Request of William Zuern (June 7, 2004), available at <http://www.dw.ohio.gov/releases/060704zuernstatement.htm> (Sept. 13, 2007) ("Mr. Zuern declined to participate in the clemency process, and his attorneys did not attend the clemency hearing.").

Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

Clemency proceedings are not required to be formally conducted in public, nor is the hearing presided over by the Governor. In fact, while the Board oversees the clemency hearing, it is only responsible for making a clemency recommendation, which the governor is not required to follow. While the public often is allowed to attend clemency hearings, attendance at these hearings by anyone other than the Board member(s) and/or hearing officer(s) who interviewed the inmate is allowed only at the discretion of the Board Chairperson or his/her designee.⁸⁹ The Board member(s) and/or hearing officer(s) who interviewed the inmate generally are required to attend the clemency hearing.⁹⁰

Board deliberations are not open to the public,⁹¹ nor is the Governor's clemency decision-making process.

While clemency proceedings are not required to be conducted in public, and its final deliberations are in closed executive session, because the Board generally allows the public to attend clemency hearings, the State of Ohio is in partial compliance with Recommendation #8.

G. 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.

The State of Ohio does not have any laws, rules, procedures, standards, or guidelines requiring that the entire Board or the Governor meet with the petitioning inmate. Instead, if the petitioning inmate makes a written request to be interviewed, the Board Chairperson or his/her designee will appoint one or more Board members or hearing officers to interview the inmate.⁹² Barring extenuating circumstances, Board members and/or hearing officers who met with the inmate are required to appear at the clemency hearing.⁹³ It is within the Board Chairperson's discretion to allow the inmate to attend

⁸⁹ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(E)(2), (3).

⁹⁰ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(E)(1).

⁹¹ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(F)(3).

⁹² Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(D)(1), (2).

⁹³ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(E)(1).

his/her clemency hearing,⁹⁴ although the Ohio Death Penalty Assessment Team is not aware of any inmates who have attended.

The Ohio governor, as the clemency decision-maker, is not required to meet with the petitioning inmate, but may do so if he/she so chooses. This does not appear to be done on a regular basis, although we know of at least one instance where Gov. Taft sent his Chief Counsel to meet with a petitioning inmate.⁹⁵

Therefore, the State of Ohio is in partial compliance with Recommendation #9.

H. 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.

The State of Ohio requires that all Board members be qualified “by education or experience in correctional work, including law enforcement, prosecution of offenses, advocating for the rights of victims of crime, probation, or parole, in law, in social work, or in a combination of the three categories.”⁹⁶ In addition, one member of the board must be a crime victim, a member of a crime victim’s family, or a representative of a crime victims’ rights organization.⁹⁷ However, it is unclear whether the Board members have been fully trained in the specific area of the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief.

Furthermore, the State of Ohio does not have any laws, rules, procedures, standards, or guidelines requiring the Board or the governor to encourage the education of the public concerning the nature of clemency powers or the limitations of the judicial system’s ability to grant relief under circumstances that may warrant clemency.

Based on this information, the State of Ohio fails to comply with Recommendation #10.

I. Recommendation #11

To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

In the State of Ohio, the decision to grant or deny clemency rests solely with the governor. The Parole Board makes a recommendation to the Governor, but the Governor does not have to follow the recommendation. Neither the Governor nor the Board is

⁹⁴ Death Penalty Clemency Procedure, Dep’t of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(E)(2).

⁹⁵ This was in the case of Wilford Berry. See News Release of Governor Bob Taft (Feb. 18, 1999) (on file with author).

⁹⁶ OHIO REV. CODE § 5149.10(A) (West 2007).

⁹⁷ OHIO REV. CODE § 5149.10(B) (West 2007).

required to explain the reasons for its clemency recommendation or decision to the clemency petitioner or to the public. Despite this, the Board posts its report and recommendation in every death penalty case on its website⁹⁸ and issues a press release.⁹⁹

Because the information considered by the governor is not always made public, he/she conceivably could take inappropriate political issues into consideration when making a clemency decision and thus base his/her clemency decision on grounds unrelated to the interests of justice. However, it is impossible to determine whether or to what extent inappropriate political considerations may impact the Ohio clemency process. Therefore, we are unable to assess whether Ohio is in compliance with Recommendation #11.

⁹⁸ See Death Row Clemency Reports, Ohio Department of Rehabilitation and Correction, at <http://www.drc.state.oh.us/Public/clemency.htm> (last visited Sept. 13, 2007).

⁹⁹ Death Penalty Clemency Procedure, Dep't of Rehabilitation and Correction Policy No. 105-PBD-01, § VI(G)(2).

CHAPTER TEN

CAPITAL JURY INSTRUCTIONS

INTRODUCTION TO THE ISSUE

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. Jury instructions that are poorly written and conveyed serve only to confuse jurors instead of communicating in an understandable way.

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. It also is important that courts ensure that jurors do not act on the basis of 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. There is a danger that jurors may vote to impose a death sentence because they erroneously believe that the defendant may be released within a few years.

It is similarly vital that jurors understand the true meaning of mitigation and their ability to bring mitigating factors to bear in their consideration of capital punishment.

¹ Caldwell v. Mississippi, 472 U.S. 320, 341 (1985).

I. FACTUAL DISCUSSION

A. *The Promulgation of Pattern Jury Instructions and Revisions to the Instructions as Requested by the Parties*

The Ohio Judicial Conference drafted the *Ohio Criminal Jury Instructions*, and “updates existing instructions as needed and as required by intervening legal opinions or events” or by newly enacted legislation and updates.² The *Ohio Criminal Jury Instructions* “are recommended instructions based primarily upon case law and statutes”³ and are not mandatory.

The state and defense are permitted to help the judge tailor the pattern jury instructions or design new instructions by filing a request at the close of evidence, but prior to closing arguments, that the court instruct the jury on the law as the party sets forth in the request.⁴ Copies of the request must be furnished to all other parties and the court will inform counsel of its proposed action on the jury instruction request prior to the beginning of closing argument.⁵ The court’s final instructions to the jury must be recorded, in written, audio, electronic, or other form, so that the jury may use them during deliberations.⁶

Throughout the trial, the court may give the jury “cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case.”⁷ In charging the jury, the court must state “all matters of law necessary for the information of the jury in giving its verdict,”⁸ although the “court’s instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings.”⁹

Counsel must be afforded an opportunity to object to the court’s failure to give any requested instruction, outside the presence of the jury.¹⁰ If either party wishes to appeal the court’s failure to give a requested instruction, the party must have objected to the failure prior to the jury retiring to consider its verdict, stating specifically the grounds for the objection.¹¹

B. *Capital Felonies in Ohio and the Applicable Standard Jury Instructions*

² Ohio Judicial Conference, Ohio Jury Instructions Committee, available at <http://www.ohiojudges.org/index.cfm?PageID=7F535A81-E1C3-42D4-AA908C43954788A0> (last visited Sept. 13, 2007).

³ State v. Martens, 629 N.E.2d 462, 465 (Ohio Ct. App. 3d Dist. 1993).

⁴ OHIO R. CRIM. P. 30(A).

⁵ *Id.*

⁶ *Id.*

⁷ OHIO R. CRIM. P. 30(B).

⁸ OHIO REV. CODE § 2945.11 (West 2007).

⁹ State v. Guster, 421 N.E.2d 157, 160 (Ohio 1981).

¹⁰ OHIO R. CRIM. P. 30(A).

¹¹ *Id.*

The State of Ohio's aggravated murder statute states that:

- (1) No person shall purposely, and with prior calculation and design, cause the death of another or the unlawful termination of another's pregnancy.
- (2) No person shall purposely cause the death of another or the unlawful termination of another's pregnancy while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit, kidnapping, rape, aggravated arson, arson, aggravated robbery, robbery, aggravated burglary, burglary, terrorism, or escape.
- (3) No person shall purposely cause the death of another who is under thirteen years of age at the time of the commission of the offense.
- (4) No person who is under detention as a result of having been found guilty of or having pleaded guilty to a felony or who breaks that detention shall purposely cause the death of another.
- (5) No person shall purposely cause the death of a law enforcement officer whom the offender knows or has reasonable cause to know is a law enforcement officer when either of the following applies:
 - (a) The victim, at the time of the commission of the offense, is engaged in the victim's duties;
 - (b) It is the offender's specific purpose to kill a law enforcement officer.¹²

A person is eligible for the death penalty in Ohio only if he/she is found guilty of aggravated murder with at least one "specification."¹³ A defendant convicted of aggravated murder is sentenced in accordance with the provisions of section 2929.03 and 2929.04 of the Ohio Rev. Code and Ohio Jury Instruction 503.011, which provides the jury instructions for sentencing a capital defendant.¹⁴

C. The Application of Standard Jury Instructions and Case Law Interpretations of the Instructions in Aggravated Murder Cases

1. Preliminary Instructions

After the jury finds the defendant guilty of aggravated murder, including one or more specifications listed at section 2929.04 of the Ohio Rev. Code, the trial court and jury conduct a separate sentencing proceeding to determine the defendant's sentence.¹⁵ If the jury unanimously finds that the aggravating circumstances the defendant was guilty of committing outweigh the mitigating factors in the case, it must recommend that the trial court impose a sentence of death on the defendant.¹⁶ If the trial court also finds that that

¹² OHIO REV. CODE § 2903.01 (West 2007).

¹³ OHIO REV. CODE § 2929.03 (West 2007). A death penalty specification is any of the ten aggravating circumstances found at section 2929.04 of the Ohio Revised Code, which must be described in the indictment in order for the State to seek the death penalty. OHIO REV. CODE § 2941.14(B) (2007).

¹⁴ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011.

¹⁵ OHIO REV. CODE § 2929.03(C)(2)(b)(i)-(ii) (West 2007).

¹⁶ OHIO REV. CODE § 2929.03(D)(2) (West 2007).

the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, it must impose a sentence of death on the defendant.¹⁷

At the sentencing phase, the trial court initially will remind the jury that it found the defendant guilty of aggravated murder and of one or more death penalty specifications.¹⁸ It will go on to explain that during the sentencing phase, these specifications are aggravating circumstances.¹⁹ The jury is then instructed that it will hear additional evidence, testimony, and arguments of counsel.²⁰ In addition, the jury will be told that during the sentencing phase, the defendant “has a constitutional right not to testify or make a statement” and “[t]he fact that the defendant does not testify or make a statement must not be considered for any purpose.”²¹

The trial court then must set forth the aggravating circumstances (i.e., the death penalty specifications) that the defendant was found guilty of committing during the guilt phase.²² First, the court should state to the jury that “it is not necessary for the State of Ohio to present further evidence to you regarding (this) (these) aggravating circumstance(s);” however, the trial court also must advise that only the aggravating circumstance(s) it found the defendant guilty of committing at the guilt phase as set out in the jury’s verdict form may be considered during the sentencing proceeding.²³

Second, the trial court will remind the jury that it found aggravating circumstances present during the guilt phase, and therefore must consider the four following sentencing options during the sentencing phase:

- (1) Life imprisonment without parole eligibility for twenty-five full years;
- (2) Life imprisonment without parole eligibility for thirty full years;
- (3) Life imprisonment without the possibility of parole; or
- (4) Death.²⁴

The trial court must inform the jury that the aggravating circumstances “will be weighed against the mitigating factors that have been or will be presented.”²⁵ The jury will then be told that mitigating factors are “factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate.”²⁶

¹⁷ OHIO REV. CODE § 2929.03(D)(3) (West 2007).

¹⁸ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(1).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* However, if the offense was committed before July 1, 1996, the jury should be instructed that it may consider only three sentencing options: (1) life imprisonment without parole eligibility for twenty full years; (2) life imprisonment without parole eligibility for thirty full years; or (3) death. OHIO REV. CODE § 2929.03(C)(2) (West 2007) (law effective prior to July 1, 1996).

²⁵ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(1).

²⁶ *Id.*

Finally, the jury should be instructed that if it finds that the State of Ohio did not prove beyond a reasonable doubt that the aggravating circumstance(s) outweigh(s) the mitigating factors, it must impose one of the life sentences it deems appropriate.²⁷

2. Aggravating Circumstances in an Aggravated Murder Case

a. Standard Jury Instructions

Because a jury's verdict during the guilt phase of a capital trial must name the death penalty specifications that the jury found the defendant guilty of committing, the *Ohio Criminal Jury Instructions* instruct that the State need not "present further evidence to [the jury] regarding [the] aggravating circumstance(s)." ²⁸

However, the trial court also must advise the jury that it may consider only those aggravators that it found the defendant guilty of committing during the guilt phase of the trial and that the aggravated murder itself is not an aggravating circumstance.²⁹ In addition, in the event that two or more aggravating circumstances which the defendant was found guilty of committing are duplicative,³⁰ these aggravators must be merged for sentencing.³¹

In connection with each count of aggravated murder which the defendant was found guilty of committing, the *Ohio Criminal Jury Instructions* require the court to list each aggravating circumstance the jury found the defendant guilty of committing in connection with that murder.³² The possible aggravating circumstances, as described to the jury, are as follows:

- (1) The offense was the assassination of (the president of the United States) (a person in line of succession to the presidency of the United States) (the [governor] [lieutenant governor] of Ohio) (the [president-elect] [vice president-elect] of the United States) (the [governor-elect] [lieutenant governor-elect] of Ohio), or (a candidate for office);³³
- (2) The offense was committed for hire;³⁴
- (3) The offense was committed for the purpose of escaping (detection) (apprehension) (trial) (punishment) for another offense committed by the defendant;³⁵

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* "The instruction must inform the jury that the aggravated murder is not itself an aggravating circumstance." *Id.* at cmt.

³⁰ Statutory aggravating circumstances are duplicative when multiple aggravators arise out of "the same act or indivisible course of conduct." *State v. Jenkins*, 473 N.E.2d 264, 296 (Ohio 1984).

³¹ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(9), cmt; *see also Jenkins*, 473 N.E.2d at 296-97.

³² 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7), cmt.

³³ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(A) (drawn from OHIO REV. CODE § 2929.04(A)(1) (West 2007)).

³⁴ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(B) (drawn from OHIO REV. CODE § 2929.04(A)(2) (West 2007)).

- (4) The offense was committed while the defendant was a prisoner in a detention facility;³⁶
- (5) The offense was committed while the defendant was (under detention) (at large after having broken detention);³⁷
- (6) Prior to the commission of this offense the defendant was convicted of (insert name of alleged offense, an essential element of which was the purposeful killing of or attempt to kill another);³⁸
- (7) This offense was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the defendant;³⁹
- (8) The victim of the offense was a law enforcement officer, whom the defendant had reasonable cause to know or knew to be a law enforcement officer, and
 - (a) The victim, at the time of the commission of the offense, was engaged in his/her duties; or
 - (b) It was the defendant's specific purpose to kill a law enforcement officer;⁴⁰
- (9) The offense was committed while the defendant was (committing) (attempting to commit) (fleeing immediately after [committing] [attempting to commit]) the offense of (kidnapping) (rape) (aggravated arson) (aggravated robbery) (aggravated burglary) and the defendant
 - (a) Was the principal offender in the commission of the aggravated murder; or
 - (b) Committed the aggravated murder with prior calculation and design;⁴¹
- (10) The victim of the aggravated murder was a witness to an offense and was purposely killed to prevent his/her testimony in any criminal proceeding and the aggravated murder was not committed during the (commission) (attempted commission) (flight immediately after the [commission] [attempted commission]) of the offense to which the victim was a witness;⁴²

³⁵ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(C) (drawn from OHIO REV. CODE § 2929.04(A)(3) (West 2007)).

³⁶ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(D) (drawn from OHIO REV. CODE § 2929.04(A)(4) (West 1998)). This instruction applies to offenses committed before December 29, 1998. *Id.* at cmt.

³⁷ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(E) (drawn from OHIO REV. CODE § 2929.04(A)(4) (West 2007)). This instruction applies to offenses committed on and after December 12, 1998. *Id.* at cmt.

³⁸ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(F) (drawn from OHIO REV. CODE § 2929.04(A)(5) (West 2007)).

³⁹ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(G) (drawn from OHIO REV. CODE § 2929.04(A)(5) (West 2007)).

⁴⁰ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(H) (drawn from OHIO REV. CODE § 2929.04(A)(6) (West 2007)). Only the alternative found in the trial phase may be charged to the jury during the sentencing phase. *Id.* at cmt.

⁴¹ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(I) (drawn from OHIO REV. CODE § 2929.04(A)(7) (West 2007)). Only the alternative found in the trial phase may be charged to the jury during the sentencing phase. *Id.* at cmt.

⁴² 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(J) (drawn from OHIO REV. CODE § 2929.04(A)(8) (West 2007)).

- (11) The victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his/her testimony in any criminal proceeding;⁴³ and/or
- (12) The defendant, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and the defendant
 - (a) Was the principal offender in the commission of the offense; or
 - (b) Committed the offense with prior calculation and design.⁴⁴

Additionally, section 2929.04(A)(10) of the Ohio Rev. Code includes the following as an aggravating circumstance, which is not described in the *Ohio Criminal Jury Instructions*:

The offense was committed which the offender was committing, attempting to commit, or fleeing from immediately after committing or attempting to commit terrorism.⁴⁵

b. Burden of Proof for Aggravating Circumstances

The Ohio Supreme Court has held that an appropriate penalty phase instruction on the issue of reasonable doubt “should convey to jurors that they must be firmly convinced that the aggravating circumstance(s) outweigh the mitigating factor(s), if any.”⁴⁶ To this end, the *Ohio Criminal Jury Instructions* require the trial court to inform the jury that in order to sentence the defendant to death, the State must prove beyond a reasonable doubt that the aggravating circumstance(s) of which the defendant was found guilty is/are sufficient to outweigh the factors in mitigation.⁴⁷ The court also must inform the jury that the defendant does not have any burden of proof.⁴⁸

The *Ohio Criminal Jury Instructions* explain that reasonable doubt:

is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced that the aggravating circumstance(s) of which the defendant was found guilty outweigh(s) the mitigating factors. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable

⁴³ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(K) (drawn from OHIO REV. CODE § 2929.04(A)(8) (West 2007)).

⁴⁴ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(7)(L) (drawn from OHIO REV. CODE § 2929.04(A)(9) (West 2007)). This instruction applies only to offenses committed on and after August 8, 1997. *Id.* at cmt. Only the alternative found in the trial phase may be charged to the jury during the sentencing phase. *Id.* at cmt.

⁴⁵ OHIO REV. CODE § 2929.04(A)(10) (West 2007).

⁴⁶ *State v. Goff*, 694 N.E.2d 916, 924 (Ohio 1998).

⁴⁷ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(1), (4).

⁴⁸ *Id.*

doubt is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his or her own affairs.⁴⁹

c. Unanimity Requirement for Finding Aggravating Circumstances

The Ohio Rev. Code requires that the jury unanimously find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, thus, “[i]n Ohio, a solitary juror may prevent a death penalty recommendation.”⁵⁰ Relative to this provision of law, the *Ohio Criminal Jury Instructions* recommend that jurors be instructed that:

You are not required to unanimously find that the State failed to prove that the aggravating circumstance(s) outweigh(s) the mitigating factors before considering one of the life sentence alternatives. You should proceed to consider and choose one of the life sentence alternatives if any one or more of you conclude that the state has failed to prove beyond a reasonable doubt that the aggravating circumstance(s) outweigh(s) the mitigating factors. One juror may prevent a death penalty determination by finding that the aggravating circumstance(s) do not outweigh the mitigating factors.

You must be unanimous on one of the life sentence alternatives before you can render that verdict to the court. If you cannot unanimously agree on a specific life sentence, you will then inform the court by written note that you are unable to render a sentencing verdict.⁵¹

d. The Need for Aggravating Circumstances to be Set Forth in Writing

The *Ohio Rules of Criminal Procedure* state that the trial court must reduce its final instructions to the jury “to writing or make an audio, electronic, or other recording of those instructions [and] provide at least one written copy or recording of those instructions to the jury for use during deliberations.”⁵² In accordance with Ohio law, the sentencing jury may consider only the statutory aggravating factors that it found the defendant guilty of committing at the conclusion of the guilt phase of the trial, thus the trial court’s pattern instruction to consider only those aggravators that it described in its instructions.⁵³

3. Mitigating Circumstances in a First-Degree Murder Case

⁴⁹ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(1), (5); *see also* State v. Leonard, 818 N.E.2d 229, 261 (Ohio 2004) (approving *Ohio Criminal Jury Instructions* on definition of reasonable doubt).

⁵⁰ State v. Brooks, 661 N.E.2d 1030, 1042 (Ohio 1996).

⁵¹ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(15).

⁵² OHIO R. CRIM. P. 30(A).

⁵³ *See* OHIO REV. CODE § 2929.03(D)(1), (2) (West 2007); 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(9).

a. Statutory Mitigating Circumstances

The *Ohio Criminal Jury Instructions* advise the jury that it “will be deciding whether the State of Ohio has proved beyond a reasonable doubt that the aggravating circumstance(s) outweigh(s) the mitigating factors.”⁵⁴ The instructions further inform the jury that mitigating factors are “factors about an individual or an offense that weigh in favor of a decision that a life sentence rather than a death sentence is appropriate. Mitigating factors are factors that lessen the moral culpability of the defendant or diminish the appropriateness of a death sentence.”⁵⁵

The Ohio Rev. Code and the *Ohio Criminal Jury Instructions* require that the jurors “consider all of the mitigating factors presented to you. Mitigating factors include, but are not limited to, the nature and circumstances of the offense, the history, character and background of the defendant,” and

- (1) Whether the victim of the offense induced or facilitated the offense;⁵⁶
- (2) Whether it is unlikely that the offense would have been committed, but for the fact that the defendant was under duress, coercion, or strong provocation;⁵⁷
- (3) Whether, at the time of committing the offense, the defendant, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of the law;⁵⁸
- (4) The youth of the defendant;⁵⁹
- (5) The defendant's lack of a significant history of prior criminal convictions and delinquency adjudications;⁶⁰
- (6) Since the defendant was not the principal offender, the degree of the defendant's participation in the offense and the degree of the defendant's participation in the acts that led to the death of the victim;⁶¹
- (7) Any other factors that weigh in favor of a sentence other than death. This means you are not limited to the specific mitigating factors that have been described to you. You should consider any

⁵⁴ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(1).

⁵⁵ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10).

⁵⁶ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10)(A) (drawn from OHIO REV. CODE § 2929.04(B)(1) (West 2007)).

⁵⁷ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10)(B) (drawn from OHIO REV. CODE § 2929.04(B)(2) (West 2007)).

⁵⁸ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10)(C) (drawn from OHIO REV. CODE § 2929.04(B)(3) (West 2007)).

⁵⁹ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10)(D) (drawn from OHIO REV. CODE § 2929.04(B)(4) (West 2007)).

⁶⁰ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10)(E) (drawn from OHIO REV. CODE § 2929.04(B)(5) (West 2007)).

⁶¹ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10)(F) (drawn from OHIO REV. CODE § 2929.04(B)(6) (West 2007)).

other mitigating factors that weigh in favor of a sentence other than death.⁶²

b. Non-Statutory Mitigating Factors

The defendant may request in writing that one or more non-statutory mitigating circumstance(s) be included in the charge to the jury.⁶³ Furthermore, the Ohio Rev. Code states that a capital defendant “shall be given great latitude” in the presentation of all statutory mitigating factors.⁶⁴ Such non-statutory mitigating factors that juries have considered include:

- (1) The defendant’s expressions of remorse or sorrow;⁶⁵
- (2) The defendant’s cooperation with law enforcement in its investigation of the offense and the defendant’s subsequent guilty plea;⁶⁶
- (3) The defendant’s lack of “moral training” that equips most people to obey the law;⁶⁷
- (4) The defendant’s “terrible, depraved, and damaging” childhood;⁶⁸ and
- (5) The love and support of the defendant’s family.⁶⁹

However, the Ohio Supreme Court has determined that several factors do not constitute mitigating circumstances and the trial jury may not be instructed as such. For example, “residual” or “lingering doubt” has been consistently rejected as a non-statutory mitigating circumstance in Ohio, and trial courts may not instruct on it.⁷⁰ Additionally, “mercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors,” and an instruction prohibiting such considerations “serves the useful purpose of confining the jury’s imposition of the death sentence by cautioning it against reliance on extraneous emotional factors.”⁷¹ The *Ohio Criminal Jury Instructions* inform jurors that they must make their findings “with intelligence and impartiality, and without bias, sympathy or prejudice.”⁷²

c. Burden of Proof as to Mitigating Circumstances

⁶² 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10)(G) (drawn from OHIO REV. CODE § 2929.04(B)(7) (West 2007)).

⁶³ OHIO R. CRIM. P 30(A); *see also* 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10), cmt. The Ohio Supreme Court has held that the court should not instruct on mitigating factors that are not specifically raised by the defense. *State v. DePew*, 528 N.E.2d 542, 557-58 (Ohio 1988), *rev’d in part on other grounds*, *DePew v. Anderson*, 311 F.3d 742 (6th Cir. 2002).

⁶⁴ OHIO REV. CODE § 2929.04(C) (West 2007).

⁶⁵ *State v. Barton*, 844 N.E.2d 307, 319 (Ohio 2006).

⁶⁶ *State v. Newton*, 840 N.E.2d 593, 617 (Ohio 2006).

⁶⁷ *State v. Williams*, 679 N.E.2d 646, 662 (Ohio 1997).

⁶⁸ *State v. Tenace*, 847 N.E.2d 386, 403 (Ohio 2006) (Lundberg Stratton, J., concurring).

⁶⁹ *State v. Conway*, 842 N.E.2d 996, 1036 (Ohio 2006).

⁷⁰ *See State v. McGuire*, 686 N.E.2d 1112, 1122 (Ohio 1997) (citing *Franklin v. Lynaugh*, 487 U.S. 164, 174 (1988), and holding that the defendant has no right to present evidence of lingering doubt).

⁷¹ *State v. Lorraine*, 613 N.E.2d 212, 216 (Ohio 1993).

⁷² 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(25).

The *Ohio Criminal Jury Instructions* and the Ohio Rev. Code require that, in order to sentence the defendant to death, the State of Ohio must prove beyond a reasonable doubt that the aggravating circumstances outweigh any mitigating factors.⁷³ In making this determination, the defendant does not have any burden of proof.⁷⁴ The Ohio Rev. Code states that “defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death.”⁷⁵ However, the Ohio Supreme Court has clarified that any instruction to the jury must not place the burden of proving the existence of a mitigating factor by a preponderance of the evidence on the defendant.⁷⁶

d. Unanimity of Findings as to Mitigating Circumstances

The United States Supreme Court has held that a jury instruction should not suggest that the jury must be unanimous in finding that a particular mitigating factor is present before weighing the mitigating factor(s) against the aggravating circumstance(s).⁷⁷ To this end, the *Ohio Criminal Jury Instructions* state that “[i]t is not necessary that the members of the jury unanimously agree on the existence of a mitigating factor before that factor can be weighed by any juror against the aggravating circumstance(s).”⁷⁸

4. Availability and Definitions of the Sentencing Options

The *Ohio Criminal Jury Instructions* explain the circumstances under which the jury may impose a sentence of life imprisonment without parole eligibility for twenty-five full years, life imprisonment without parole eligibility for thirty full years, life imprisonment without the possibility of parole, or death.⁷⁹ The instructions state that:

If all twelve of you find that the State of Ohio proved beyond a reasonable doubt that the aggravating circumstance(s) the defendant was guilty of committing (is) (are) sufficient to outweigh the mitigating factors in this case, then it will be your duty to decide that the sentence of death shall be imposed upon (insert name of defendant).

If you find that the State of Ohio has failed to prove beyond a reasonable doubt that the aggravating circumstance(s) (insert name of defendant) was guilty of committing (is) (are) sufficient to outweigh the mitigating factors

⁷³ OHIO REV. CODE § 2929.03(D)(1), (2) (West 2007); 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(4).

⁷⁴ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(4).

⁷⁵ OHIO REV. CODE § 2929.03(D)(1) (West 2007).

⁷⁶ State v. Lawrence, 541 N.E.2d 451, 455-56 (Ohio 1989).

⁷⁷ Mills v. Maryland, 486 U.S. 367, 383 (1988).

⁷⁸ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10).

⁷⁹ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(1), (3), (10)(G). However, if the offense was committed before July 1, 1996, the jury should be instructed that it may consider only three sentencing options: (1) life imprisonment without parole eligibility for twenty full years; (2) life imprisonment without parole eligibility for thirty full years; or (3) death. See OHIO REV. CODE § 2929.03(C)(2) (West 2007) (law effective prior to July 1, 1996).

present in this case, then it will be your duty to decide which of the following life sentence alternatives should be imposed: the sentence of life imprisonment with no parole eligibility until twenty-five full years of imprisonment have been served; the sentence of life imprisonment with no parole eligibility until thirty full years of imprisonment have been served; or life imprisonment without the possibility of parole.⁸⁰

Because the trial court ultimately imposes the sentence on a defendant, the jury's decision as to whether to impose a death sentence on the defendant is a *recommended* sentence to the trial court.⁸¹ The Ohio Supreme Court has held that it "prefer[s] that no reference be made to the finality of the jury's sentencing decision at all"⁸² and in deference to this finding, the Drafting Committee of the *Ohio Criminal Jury Instructions* has commented that "it is not appropriate for the jury to be advised that their sentencing verdict is a recommendation, that verdict of death is not binding on the court, or that a verdict of death is subject to automatic appeal."⁸³

In addition, the *Ohio Criminal Jury Instructions* do not include an instruction that its recommendation of any of the life sentences is binding upon the trial court, nor do the instructions provide to the jury an explanation of "life imprisonment without the possibility of parole," "life imprisonment," or "parole."

5. Additional Instructions after Jury Deliberations Have Begun

The United States Supreme Court, in *Allen v. United States*,⁸⁴ authorized judges to provide additional instructions to jurors after judges have rendered the main charge to the jury and jury deliberations have begun.⁸⁵ The Court provides the following instruction, which is known as the *Allen* charge:

in substance, that in a large proportion of cases absolute certainty could not be expected; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one

⁸⁰ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(13) (drawn from OHIO REV. CODE § 2929.03(D)(2) (West 2007)). However, if the offense was committed before July 1, 1996, the jury should be instructed that it may consider only three sentencing options: (1) life imprisonment without parole eligibility for twenty full years; (2) life imprisonment without parole eligibility for thirty full years; or (3) death. See OHIO REV. CODE § 2929.03(C)(2) (West 2007) (law effective prior to July 1, 1996).

⁸¹ OHIO REV. CODE § 2929.03(D)(2), (3) (West 2007) (emphasis added).

⁸² *State v. Keith*, 684 N.E.2d 47, 55 (Ohio 1997).

⁸³ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011, cmt.

⁸⁴ *Allen v. United States*, 164 U.S. 492, 501 (1896).

⁸⁵ *Id.*

which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.⁸⁶

In *State v. Howard*, the Ohio Supreme Court expressly rejected an *Allen* instruction to a deadlocked jury during the sentencing phase of a capital trial.⁸⁷ *Howard* requires that any supplemental instruction to a jury must urge jurors in the minority and jurors in the majority to reconsider their position, while “emphatically encourag[ing] the jury to reach a decision.”⁸⁸ To this end, the *Ohio Criminal Jury Instructions* provide the following supplemental instruction for deadlocked juries, reflecting the suggested instruction in *Howard*:

In a large number of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of other jurors, each question submitted to you should be examined with proper regard and deference to the opinion of others.

It is desirable that the case be decided. It is your duty to decide the case if you can conscientiously do so. You should listen to one another’s arguments with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced that it is erroneous. If there is a disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached. Jurors for any of the verdicts should consider whether their doubt is reasonable, considering that it is not shared by others equally honest who have heard the same evidence and with the same desire to arrive at a verdict, and under the same oath.

Likewise, jurors for any of the verdicts should ask themselves whether they might not reasonably doubt the correctness of the judgment not concurred in by all other jurors.

You shall return a verdict of death if you unanimously, and that means all twelve, find beyond a reasonable doubt that the aggravating circumstance(s) outweigh(s) the mitigating factors. If you do not so find, you shall then begin deliberations on the life sentence options, and if possible, unanimously return a verdict of life imprisonment with parole

⁸⁶ *Id.*

⁸⁷ *State v. Howard*, 537 N.E.2d 188, 192-93 (Ohio 1989).

⁸⁸ *Id.* at 194. In coming to this conclusion, the *Howard* court refused to adopt the standard proposed by the American Bar Association, found at 3 ABA CRIMINAL JUSTICE STANDARDS: TRIAL BY JURY, Standard 15-4-4, 154-155 (2d. ed. 1986). *Id.* at 193. However, the court stated that it would not disapprove of a trial court’s use of the ABA standard. *Id.* at 194.

eligibility after twenty-five full years, or life imprisonment with parole eligibility after thirty full years, or life imprisonment without the possibility of parole. However, you should not surrender honest convictions in order to be congenial or to reach a verdict solely because of the opinion of other jurors. If it is impossible for you to reach a decision in this case, please report this fact to the court in writing. You will now be excused to resume your deliberations.⁸⁹

The *Ohio Criminal Jury Instructions* provide a similar instruction for a deadlocked jury during the guilt phase of a criminal trial.⁹⁰

Additionally, when a jury cannot agree unanimously on a death sentence, the Ohio Supreme Court requires that the trial court instruct the jury to “move on in their deliberations to a consideration of which life sentence is appropriate.”⁹¹ Furthermore, when a jury becomes irreconcilably deadlocked during its sentencing deliberations and is unable to reach unanimous verdict to recommend any sentence authorized by Ohio law, the trial court is required to impose an appropriate life sentence.⁹² However, the Ohio

⁸⁹ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(33).

⁹⁰ 4 OHIO CRIMINAL JURY INSTRUCTIONS 415.50(2) states that:

In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of other jurors, each question submitted to you should be examined with proper regard and deference to the opinions of others. It is desirable that the case be decided. You are selected in the same manner, and from the same source, as any future jury would be. There is no reason to believe the case will ever be submitted to a jury more capable, impartial, or intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your duty to decide the case, if you can conscientiously do so. You should listen to one another's opinions with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced it is erroneous. If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached. Jurors for acquittal should consider whether their doubt is reasonable, considering that it is not shared by others, equally honest, who have heard the same evidence, with the same desire to arrive at the truth, and under the same oath. Likewise, jurors for conviction should ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by all other jurors.

Id. The *Ohio Criminal Jury Instructions* also contemplate a scenario in which a unanimous jury verdict is impossible in which the trial court should instruct the jury that:

It is conceivable that after a reasonable length of time honest differences of opinion on the evidence may prevent an agreement upon a verdict. When that condition exists you may consider whether further deliberations will serve a useful purpose. If you decide that you cannot agree and that further deliberations will not serve a useful purpose you may ask to be returned to the courtroom and report that fact to the court. If there is a possibility of reaching a verdict you should continue your deliberations.

4 OHIO CRIMINAL JURY INSTRUCTIONS 415.50(3); *see also Howard*, 537 N.E.2d at 195.

⁹¹ *State v. Brooks*, 661 N.E.2d 1030, 1042 (Ohio 1996).

⁹² *State v. Springer*, 586 N.E.2d 96, 100 (Ohio 1998).

Supreme Court has found that “[n]o exact line can be drawn as to how long a jury must deliberate in the penalty phase before a trial court should instruct the jury to limit itself to the life sentence options or take the case away from the jury” and has stated that “each case must be decided based upon the particular circumstances” of that case.⁹³

6. Form of Instructions

The Ohio Rev. Code provides that the final jury charge must be:

reduced to writing by the court if either party requests it before the argument to the jury is commenced. Such charge, or other charge or instruction provided for in this section, when so written and given, shall not be orally qualified, modified, or explained to the jury by the court. Written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into court and remain on file with the papers of the case.⁹⁴

Furthermore, the Ohio Rules of Criminal Procedure provide that the trial court must reduce its final instructions to the jury “to writing or make an audio, electronic, or other recording of those instructions [and] provide at least one written copy or recording of those instructions to the jury for use during deliberations.”⁹⁵

C. Use of Victim Impact Evidence in All Capital Sentencing Proceedings

1. Substance and Form of Victim Impact Statement

The *Ohio Criminal Jury Instructions* do not address victim impact evidence. However, section 2947.051 of the Ohio Rev. Code requires that the court, prior to sentencing, permit a “victim impact statement” in all criminal cases in which the defendant pleads guilty to or is convicted of a felony and “caused, attempted to cause, threatened to cause, or created a risk of physical harm to the victim of the offense.”⁹⁶ A victim impact statement must:

- (1) Identify the victim of the offense;
- (2) Itemize any economic loss and or physical injury suffered by the victim as a result of the offense;
- (3) Identify the seriousness and permanence of the injury;
- (4) Identify any change in the victim's personal welfare or familial relationships as a result of the offense and any

⁹³ State v. Mason, 694 N.E.2d 923, 955 (Ohio 1998). In *Mason*, the Ohio Supreme Court held that it was not error for the trial court to continue to urge the jury to deliberate after the jury deliberated for four and one-half hours and then informed the trial court that it was unable to unanimously decide upon a sentence. *Id.*

⁹⁴ OHIO REV. CODE § 2945.10(G) (West 2007).

⁹⁵ OHIO R. CRIM. P. 30(A).

⁹⁶ OHIO REV. CODE § 2947.051(A) (West 2007).

- psychological impact experienced by the victim or the victim's family as a result of the offense;
- (5) Contain any other information related to the impact of the offense upon the victim that the court requires;⁹⁷ and
 - (6) If applicable, include any written or oral statement by the victim regarding the impact of the crime that is given to the person whom the court orders to prepare the victim impact statement.⁹⁸

2. Admissibility of Victim Impact Statement

There are constitutional limitations on the information that may be contained within a victim impact statement. For example, the Ohio Supreme Court has held that “[e]xpressions of opinion by a witness as to the appropriateness of a particular sentence in a capital case violate the defendant’s constitutional right to have the sentencing decision made by the jury and judge.”⁹⁹ However, even where the trial court impermissibly permitted testimony as to a victim’s belief regarding the appropriate punishment, the Ohio Supreme Court has held that such admission is not grounds for reversal if there is insufficient evidence to show that the sentencing jury (or three-judge panel) relied on the erroneous admission in arriving at a sentence.¹⁰⁰

⁹⁷ OHIO REV. CODE § 2945.051(B) (West 2007).

⁹⁸ OHIO REV. CODE § 2930.13(A) (West 2007).

⁹⁹ *State v. Huertas*, 553 N.E.2d 1058, 1065 (Ohio 1990).

¹⁰⁰ *See State v. Fautenberry*, 650 N.E.2d 878, 882 (1995); *State v. Allard*, 663 N.E.2d 1277, 1286 (1996).

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.

In July 2002, the Chief Justice of the Ohio Supreme Court, Thomas Moyer, created a twenty-five member Task Force on Jury Service to “study and recommend innovative reforms to Ohio’s jury system.”¹⁰¹ The task force implemented pilot projects in courtrooms throughout Ohio to “aid juror comprehension and satisfaction in serving on a jury in Ohio.”¹⁰² These projects included using “plain English” in jury instructions and providing jurors with written copies of jury instructions.¹⁰³ In its final report, the task force recommended several jury procedures be implemented to “improve juror comprehension and satisfaction” and to “enhance the quality of justice.”¹⁰⁴

For example, one such recommendation was that “plain English” be used at trial and in jury instructions. The Task Force recommended Ohio Jury Instructions (Ohio’s pattern jury instructions) and other “appropriate instructions” be continuously reviewed and revised to institute the use of “plain English.”¹⁰⁵ The task force also recommended that jurors receive written instructions, including preliminary and final instructions.¹⁰⁶ It does not appear that either of these recommendations have been implemented.

Because the State of Ohio does not appear to have acted on the proposed recommendations, the State of Ohio is only in partial compliance with Recommendation #1.

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.

This recommendation is supported by a myriad of studies finding that jurors provided with written court instructions pose fewer questions during deliberations, express less

¹⁰¹ SUPREME COURT OF THE STATE OF OHIO, REPORT AND RECOMMENDATIONS OF THE SUPREME COURT OF OHIO TASK FORCE ON JURY SERVICE [hereinafter REPORT AND RECOMMENDATIONS], *available at* http://www.sconet.state.oh.us/publications/juryTF/jurytf_proposal.pdf (last visited Sept. 13, 2007).

¹⁰² *Id.* at 8.

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* at 1.

¹⁰⁵ *Id.* at 11.

¹⁰⁶ *Id.* at 12.

confusion about the instructions, use less time trying to decipher the meaning of the instructions, and spend less time inappropriately applying the law.¹⁰⁷ Written instructions, therefore, result in more efficient and worthwhile deliberations.¹⁰⁸

The Ohio Rules of Criminal Procedure provide that the trial court must reduce its final instructions to the jury “to writing or make an audio, electronic, or other recording of those instructions [and] provide at least one written copy or recording of those instructions to the jury for use during deliberations.”¹⁰⁹ In addition, the Ohio Rev. Code provides that the final jury charge must be reduced to writing “if either party requests it before the argument to the jury is commenced.”¹¹⁰

If the instructions are put in writing, any jury charge or instruction may not be orally qualified, modified, or explained to the jury by the court and written charges and instructions must be taken by the jury in their retirement, returned with their verdict into court, and remain on file with the papers of the case.¹¹¹ However, one Ohio Court of Appeals has held that the trial court is not prohibited from answering the jury’s questions if the jury is given written instructions.¹¹² It is unclear whether the jury receives written copies of the instructions while being orally charged by the court.

Recognizing that written instructions are not always provided, the Ohio Supreme Court’s Task Force on Jury Service recommended that jurors should be “entitled to be provided a copy of written instructions, including any preliminary instructions and final instructions.”¹¹³

While some sort of audio, electronic, written, or other recording of the jury instructions must be made, the State of Ohio is required to reduce jury instructions to writing only when requested by a party to the case. Because written instructions may not always be provided, and because we were unable to determine if jurors receive written instructions to consult while the court instructs the jury, the State of Ohio is only in partial compliance with Recommendation #2.

C. Recommendation #3

¹⁰⁷ The Honorable B. Michael Dann, ‘Lessons Learned’ 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, 178 (2000) (noting that 69.0% 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).

¹⁰⁸ Dann, *supra* note 107, at 1259; Young, *supra* note 107, at 162-63.

¹⁰⁹ OHIO R. CRIM. P. 30(A).

¹¹⁰ OHIO REV. CODE § 2945.10(G) (West 2007).

¹¹¹ *Id.*

¹¹² See *State v. Kersey*, 706 N.E.2d 818, 822 (Ohio Ct. App. 1st Dist. 1997) (holding that “[a] trial court is not required to reduce its instructions to writing, but even if it does, it is not prohibited from answering a jury’s questions of law during deliberations”).

¹¹³ REPORT AND RECOMMENDATIONS, *supra* note 101, at 1.

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.

Research indicates that capital jurors commonly have difficulty understanding jury instructions.¹¹⁴ Such difficulty can be attributed to a number of factors, including, but not limited to: the length of the instructions, the use of complex legal concepts and unfamiliar words without proper explanation, and insufficient definitions.¹¹⁵ Accordingly, judges should respond meaningfully to jurors' requests for clarification to not only ensure juror comprehension of the applicable law, but, more importantly, to ensure the jury imposes a just and proper sentence.

The Ohio Supreme Court's Task Force on Jury Service recognized the importance of responding to jurors' requests for clarification of instructions and recommended that jurors be "entitled to ask questions about the court's instructions."¹¹⁶

Despite this, the Ohio Supreme Court has held that trial courts have the discretion to determine their response to requests for further instruction or clarification of instructions.¹¹⁷ Therefore, the State of Ohio is not in compliance with Recommendation #3.

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.

Recommendation #4 is composed of two parts. The first part requires judges to provide clear jury instructions on alternative punishments; the second requires judges to provide

¹¹⁴ Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549-51 (1994) (discussing juror comprehension, or lack thereof, of jury instructions); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225 (1996); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12-15 (1993) (focusing on South Carolina capital juries understanding or misunderstanding of jury instructions).

¹¹⁵ James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1169-70 (1995); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (1995) (discussing jurors understanding of the concept of mitigation evidence, including the scope, applicable burden of proof, and the required number of jurors necessary to find the existence of a mitigating factor).

¹¹⁶ REPORT AND RECOMMENDATIONS, *supra* note 101, at 19.

¹¹⁷ *State v. Carter*, 651 N.E.2d 965, 974 (Ohio 1995) (holding that a reversal of a conviction based upon the trial court's response to the jury's request for clarification may occur only if the trial court abused its discretion).

instructions and allow the introduction of evidence on parole practices, including witness testimony, upon the defendant's request.

Alternative Sentences

The *Ohio Criminal Jury Instructions* explain the circumstances under which the jury may impose a sentence of life imprisonment without parole eligibility for twenty-five full years, life imprisonment without parole eligibility for thirty full years, life imprisonment without the possibility of parole, or death.¹¹⁸ For offenses committed prior to July 1, 1996, the instructions explain the circumstances under which the jury may impose a sentence of life imprisonment without parole eligibility for twenty full years, life imprisonment without parole eligibility for thirty full years, or death.¹¹⁹ However, Ohio law does not require, nor do the *Ohio Criminal Jury Instructions* recommend, that the trial court provide to the jury an explanation of "life imprisonment without the possibility of parole," "life imprisonment," or "parole."

Parole Practices

Regarding the second aspect, we were unable to determine if parole officials or other knowledgeable witnesses are permitted to testify about parole practices to clarify jurors' understanding of alternative sentences. We were unable to find information that indicated that judges instruct the jury on actual parole practices.

Because judges in the State of Ohio are required to instruct the jury on the sentencing options, but are not required to define "life imprisonment," or "life imprisonment without the possibility of parole," the State of Ohio is only in partial compliance with Recommendation #4.

E. Recommendation #5

Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.

The State of Ohio does not require an instruction stating that the jury may impose a life sentence if the juror does not believe that the defendant should receive the death penalty, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt. A review of Ohio case law also did reveal any instances in which such an instruction was provided to the jury by the trial court.

The State of Ohio, therefore, is not in compliance with Recommendation #5.

F. Recommendation #6

¹¹⁸ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(1), (3), (10)(G).

¹¹⁹ See OHIO REV. CODE § 2929.03(C)(2) (West 2007) (law effective prior to July 1, 1996).

Trial courts should instruct jurors that residual doubt about the defendant's guilt is a mitigating factor. Further, jurisdictions should implement the provision of Model Penal Code Section 210.6(1)(f),¹²⁰ under which residual doubt concerning the defendant's guilt would, by law, require a sentence less than death.

The Ohio Supreme Court has held that “residual” or “lingering doubt” is not a mitigating circumstance and trial courts may not instruct on it.¹²¹ The State of Ohio, therefore, is not 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.

The State of Ohio requires jurors to weigh whether the aggravating circumstances outweigh the mitigating factor(s) beyond a reasonable doubt in order to sentence the defendant to death.¹²² The *Ohio Criminal Jury Instructions* advise that any mitigating factor, standing alone, is sufficient to support a sentence of life imprisonment if the aggravating factor(s) is/are not sufficient to outweigh the mitigating factor beyond a

¹²⁰ Section 210.6(1) of the Model Penal Code states as follows:

- (1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree [rather than death] if it is satisfied that:
 - (a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or
 - (b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or
 - (c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or
 - (d) the defendant was under 18 years of age at the time of the commission of the crime; or
 - (e) the defendant's physical or mental condition calls for leniency; or
 - (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

See MODEL PENAL CODE § 210.6(1); *see also* James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 311-13 (1994) (discussing the mitigating factors included in the Model Penal Code and the statutory factors under modern death penalty laws).

¹²¹ *See* State v. McGuire, 686 N.E.2d 1112, 1122 (Ohio 1997) (citing Franklin v. Lynaugh, 487 U.S. 164, 173-74 (1988), and holding that the defendant has no right to present evidence of lingering doubt).

¹²² OHIO REV. CODE § 2929.04(B) (West 2007); *see also* 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(12).

reasonable doubt.¹²³ Furthermore, the instructions inform jurors that “[i]t is the quality of the evidence regarding aggravating circumstance(s) and mitigating factors that must be given primary consideration by you. The quality of the evidence may or may not be the same as the quantity of the evidence; that is, the number of witnesses or exhibits presented in this case.”¹²⁴ While this instruction could serve to inform jurors that it is not to weigh the number of aggravators against the number of mitigators to determine if the defendant should be sentenced to death, the instructions do not explicitly state that the jury should not count the aggravators against the mitigators in determining whether the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt.

Therefore, the State of Ohio is not in compliance with Recommendation #7.

¹²³ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(10).

¹²⁴ 4 OHIO CRIMINAL JURY INSTRUCTIONS 503.011(12).

CHAPTER ELEVEN

JUDICIAL INDEPENDENCE

INTRODUCTION TO THE ISSUE

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 political or other bias and notwithstanding official and public pressure. However, in some states, judicial independence is increasingly being undermined by judicial elections, appointments and confirmation proceedings that are affected by nominees' or candidates' purported views on the death penalty or by judges' 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 that, if they are or are to be appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of decisions that are unpopular, even where 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 occurs, the discourse is *not* about the Constitutional doctrine in the case, but rather about the specifics of the crime.

All of this increases the possibility that judges will decide cases not on the basis of their best understanding of the law, but rather on the basis of how their decisions might affect their careers, and makes it less likely that judges will be vigilant against prosecutorial misconduct and incompetent representation by defense counsel. For these reasons, judges must be 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 in the future.

I. FACTUAL DISCUSSION

A. *Selection of Judges*

In the State of Ohio, judges are endorsed by political parties, nominated in partisan primary elections,¹ and elected in nonpartisan general elections.² Judicial vacancies are filled by gubernatorial appointment.³

To be elected or appointed to judicial office, a candidate must be under seventy years of age on the day that he/she will assume the office.⁴

1. Courts of Common Pleas

Every county in the State of Ohio has a court of common pleas, each of which has at least one judge.⁵ Court of common pleas judges must (1) reside in the county in which they serve, (2) have been admitted to practice as an attorney at law in the State of Ohio and (3) for at least six years preceding the judge's appointment or commencement of his/her term, have engaged in the practice of law in the State of Ohio, served as a judge of a court of record in any jurisdiction in the United States, or both.⁶

The voters in each county are responsible for electing its court of common pleas judges,⁷ each of whom are elected for a six-year term at the general election immediately

¹ American Judicature Society, *Judicial Selection in the States, Ohio, Current Methods of Judicial Selection*, available at http://www.ajs.org/js/OH_methods.htm (last visited Sept. 13, 2007).

² OHIO CONST. art. IV, § 6(a). Party affiliations are not listed on the general election ballot. American Judicature Society, *Judicial Selection in the States, Ohio, Current Methods of Judicial Selection*, available at http://www.ajs.org/js/OH_methods.htm (last visited Sept. 13, 2007).

³ OHIO CONST. art. IV, § 13.

⁴ OHIO CONST. art. IV, § 6(c).

⁵ OHIO REV. CODE § 2301.01 (West 2007). Counties have varying numbers of judges, as well as staggered dates of service. The following counties each have one court of common pleas judge: Adams, Ashland, Fayette, Pike, Brown, Crawford, Defiance, Highland, Holmes, Morgan, Ottawa, Union, Auglaize, Coshocton, Darke, Fulton, Gallia, Guernsey, Hardin, Jackson, Knox, Madison, Mercer, Monroe, Paulding, Vinton, Wyandot, Carroll, Champaign, Clinton, Hocking, Meigs, Pickaway, Preble, Shelby, Van Wert, Williams, Harrison, Noble, Putnam, Huron, and Perry. Morrow, Logan, Henry, Sandusky, Athens, Geauga, Hancock, Lawrence, Miami, Ross, Seneca, Washington, Belmont, Jefferson, Columbiana, Delaware, Tuscarawas, and Wayne counties each have two court of common pleas judges. Allen, Ashtabula, Fairfield, Marion, Medina, Muskingum, Portage, Scioto, and Wood counties each have three judges. Erie, Greene, Warren, Clark, Licking, and Richland counties each have four judges. Clermont County has five judges, Lake County has six judges, Mahoning County has seven judges, Stark County has eight judges, Lorain County has ten judges, Butler County has eleven judges, Summit County has thirteen judges, Lucas County has fourteen judges, Montgomery County has fifteen judges, Hamilton County has twenty-one judges, Franklin County has twenty-two judges, and Cuyahoga County has thirty-nine judges. OHIO REV. CODE § 2301.02 (West 2007).

⁶ *Id.*

⁷ *Id.*

preceding the year in which the term begins.⁸ The judge's successor will be elected at the general election immediately before his/her term expires.⁹

When an "unusual number" of cases have accumulated in a court of common pleas, the chief justice of the Ohio Supreme Court may assign judges from other counties to assist in handling those cases.¹⁰ The chief justice must assign judges from other counties to assist in handling those cases when the number of cases pending in the court of common pleas of any county exceeds seventy-five percent of the number of cases filed during the preceding year.¹¹

2. The Ohio Courts of Appeals

The State of Ohio is divided into twelve judicial districts, each of which has a court of appeals.¹² Each court of appeals judge must (1) have been admitted to practice as an attorney at law in the State of Ohio, and (2) have engaged in the practice of law in Ohio, served as a judge of a court of record in any jurisdiction in the United States for at least six years prior to the beginning of judicial service, or both.¹³ At least one judge will be elected in each court of appeals district every two years.¹⁴

3. The Ohio Supreme Court

The Ohio Supreme Court is comprised of a chief justice and six justices.¹⁵ Each justice, including the chief justice, must (1) have been admitted to practice as an attorney at law in Ohio, and (2) have engaged in the practice of law, served as a judge of a court of record in any United States jurisdiction for a total of at least six years preceding his/her appointment or commencement of his/her term, or both.¹⁶

⁸ *Id.*; see also OHIO CONST. art. IV, § 6(a)(3). The Ohio Constitution provides that judicial terms must be not less than six years, which allows the general assembly to lengthen terms. OHIO CONST. art. IV, § 6.

⁹ *Id.*

¹⁰ OHIO REV. CODE § 2503.04 (West 2007).

¹¹ *Id.*

¹² OHIO REV. CODE § 2501.01 (West 2007). The first district consists of Hamilton County. The second district is made up of Darke, Miami, Montgomery, Champaign, Clark, and Greene Counties. The third district consists of Mercer, Van Wert, Paulding, Defiance, Henry, Putnam, Allen, Auglaize, Hancock, Hardin, Logan, Union, Seneca, Shelby, Marion, Wyandot, and Crawford Counties. The fourth district is made up of Adams, Highland, Pickaway, Ross, Pike, Scioto, Lawrence, Gallia, Jackson, Meigs, Vinton, Hocking, Athens, and Washington counties. The fifth district consists of Morrow, Richland, Ashland, Knox, Licking, Fairfield, Perry, Morgan, Muskingum, Guernsey, Coshocton, Holmes, Stark, Tuscarawas, and Delaware counties. The sixth district is made up on Williams, Fulton, Wood, Lucas, Ottawa, Sandusky, Erie, and Huron counties. The seventh district consists of Mahoning, Columbiana, Carroll, Jefferson, Harrison, Belmont, Noble, and Monroe counties. The eighth district is made up of Cuyahoga county. The ninth district consists of Lorain, Medina, Wayne, and Summit counties. The tenth district is made up of Franklin County. The eleventh district consists of Lake, Ashtabula, Geauga, Trumbull, and Portage counties. The twelfth district is made up of Brown, Butler, Clermont, Clinton, Fayette, Madison, Preble, and Warren counties. *Id.*

¹³ OHIO REV. CODE § 2501.02 (West 2007).

¹⁴ *Id.*

¹⁵ OHIO REV. CODE § 2503.01 (West 2007).

¹⁶ *Id.*

The chief justice of the Ohio Supreme Court holds office for six years commencing on the first day of January after being elected.¹⁷ All Ohio Supreme Court terms last six years¹⁸ and two justices are elected in every even-numbered year.¹⁹

4. Judicial Vacancies

If a judicial vacancy occurs before the expiration of a judge's regular term, the governor is responsible for appointing a judge to fill the vacancy.²⁰ To serve the remainder of the term, the newly-appointed judge must run for election at the first general election after his/her appointment, unless the unexpired term ends within one year following the general election.²¹

The specific appointment process for judicial vacancies is determined by the sitting governor.²² Governor Bob Taft required candidates to submit a judicial candidate questionnaire to political party leadership in the county of the vacancy.²³ After reviewing the submissions, and in some cases seeking the advice of the local bar association, the county political party leadership recommended the names of three candidates for appointment to Governor Taft's office.²⁴ At least one of the three recommended appointments was required to be a woman or a minority.²⁵ Once the recommendations were received, the Director of Boards and Commissions and the Governor's Chief Legal Counsel would interview one or more of the recommended candidates and submit their choice to Governor Taft for the final decision.²⁶

Governor Ted Strickland uses a Judicial Appointments Recommendations Panel to assist him in selecting judges.²⁷ Members of the Recommendations Panel evaluate the qualifications of applicants for judicial vacancies and make non-binding recommendations to the governor based on their evaluations.²⁸ The panel is made up of five gubernatorally-appointed at-large members and regional gubernatorally-appointed

¹⁷ OHIO REV. CODE § 2503.02 (West 2007).

¹⁸ OHIO REV. CODE § 2503.03 (West 2007).

¹⁹ *Id.*

²⁰ OHIO CONST. art. IV, § 13.

²¹ *Id.*

²² American Judicature Society, *Judicial Selection in the States, Ohio, Current Methods of Judicial Selection*, available at http://www.ajs.org/js/OH_methods.htm (last visited Sept. 13, 2007).

²³ See *Judicial Appointment Questionnaire*, at http://ohio.gov/forms_1/JudicialCandidatesQuestionnaire.PDF (last visited Sept. 13, 2007).

²⁴ American Judicature Society, *Judicial Selection in the States, Ohio, Current Methods of Judicial Selection*, available at http://www.ajs.org/js/OH_methods.htm (last visited Sept. 13, 2007); Telephone Interview with David Payne, Director of Boards and Commissions, Office of Governor Taft (Mar. 23, 2005).

²⁵ *Id.*

²⁶ Telephone Interview with David Payne, Director of Boards and Commissions, Office of Governor Taft (Mar. 23, 2005).

²⁷ Reginald Fields, *Strickland Creates Screening Panel for Judicial Picks*, PLAIN DEALER (Cleveland, Ohio), Jan. 30, 2007.

²⁸ *Strickland Establishes Judicial Appointments Recommendations Panel*, CLEVELAND B.J., at 34 (Apr. 2007).

six-member groups. Regional groups include one person to represent the local labor and consumer community and another to represent the area's business and industry interests.

B. Training of Judges Who Handle Capital Cases

The Ohio Supreme Court requires any judge who was appointed or elected after January 1, 2007, to take the Ohio Judicial College's Judicial Orientation course, unless the person already has taken the course.²⁹ The Judicial Orientation Program consists of four parts.³⁰ The first two parts consist of a general and specific curriculum applicable to the jurisdictions of the attendees.³¹ Part I is conducted each year after the November election but before the start of the judicial terms at the start of the next year and Part II is conducted within six months after the conclusion of Part I.³² Part III is a capital case seminar.³³ This seminar must be completed by any trial judge in a court that has jurisdiction over capital cases and who has not previously completed the capital case seminar.³⁴ This seminar must be completed by every judge – not just those who are newly appointed or elected – within 24 months of January 1, 2007.³⁵ Part IV is the Ohio Judicial College Mentor Program and pairs a newly elected or appointed judge with an experienced judge-mentor who has the same subject matter jurisdiction.³⁶

The State of Ohio also mandates continuing legal education for all members of the judiciary.³⁷ Full-time judges are required to “complete and report a minimum of forty credit hours of classroom instruction every two years on subjects devoted to the law or judicial administration.”³⁸ The forty credit hours must include “at least ten credit hours of continuing legal education that are offered by the Judicial College of the Supreme Court of Ohio,” in addition to “at least two hours of classroom instruction related to both judicial ethics and professionalism....”³⁹

²⁹ SUPREME COURT RULES FOR THE GOV. OF THE JUDICIARY IV(6)(A). There were no official rules regarding judicial orientation prior to January 1, 2007. *See* OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV (2006).

³⁰ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV(6)(B).

³¹ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV(6)(B)(1), (2).

³² *Id.*

³³ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV(6)(B)(3). Trial judges reelected to the same judicial position must take this portion of the Judicial Orientation Program if the court has jurisdiction over capital cases and he/she has not yet completed the capital case seminar. OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV(6)(A).

³⁴ *Id.*

³⁵ *Id.*; OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV(7).

³⁶ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV(6)(B)(4).

³⁷ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV.

³⁸ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV(2)(A).

³⁹ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV(2)(A)(1)-(2). The Ohio Judicial College serves the following functions: “(1) Foster awareness that judicial training and education are necessary to maintain professional competence; (2) Provide a comprehensive program of continuing education for the judges, and court personnel of this state; (3) Create standards and curricula for education and training programs that will provide quality education and training in procedural and substantive law of Ohio, incorporating national standards and trends; (4) Provide training and education in professional ethics and substance abuse.” OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY V(1)(B).

Part-time and retired judges are required to “complete and report twenty-four credit hours of classroom instruction every two years on subjects devoted to the law or judicial administration,” including “at least ten credit hours of continuing legal education that are offered by the Judicial College of the Supreme Court of Ohio” and “at least two hours of classroom instruction related to both judicial ethics and professionalism.”⁴⁰

C. *Conduct of Judges and Judicial Candidates*

The willful violation of the Ohio Rules of Professional Conduct by a justice, judge, or judicial candidate may be punished by reprimand, suspension, disbarment, or probation.⁴¹ Furthermore, a willful breach of the Code of Judicial Conduct by a judicial officer or candidates for judicial office may be punished by reprimand, suspension, disbarment, probation, retirement, or removal.⁴²

1. Conduct of Judicial Candidates during Campaigns

The Ohio Code of Judicial Conduct governs campaign activities during judicial elections.⁴³ Canon 7 of the Ohio Code of Judicial Conduct specifically prohibits judicial candidates, including incumbent judges, running for reelection, from:

- (1) Making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;⁴⁴
- (2) Making statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court;⁴⁵
- (3) Commenting on any substantive matter relating to a specific pending case on the docket of a judge;⁴⁶
- (4) Knowingly misrepresenting his or her identity, qualifications, present position, or other fact, or the identity, qualifications, present position, or other facts of an opponent;⁴⁷ and
- (5) Knowingly or with reckless disregard posting, publishing, broadcasting, transmitting, circulating, or distributing information concerning a judicial candidate or an opponent, either knowing the information to be false or

⁴⁰ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY IV(3)(A)(1),(2).

⁴¹ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY I(1).

⁴² *Id.*

⁴³ OHIO CODE OF JUD. CONDUCT, Canon 7. In 2000, the Ohio Supreme Court amended the Code of Professional Responsibility to subject a lawyer to disciplinary action if, while campaigning as a judicial candidate, he/she violates Canon 7 of the Code of Judicial Conduct. This amendment was designed to close a loophole that was thought to bar post-election grievance proceedings against an unsuccessful candidate, who arguably would no longer be subject to the Code of Judicial Conduct. See Richard A. Dove, *National Summit on Improving Judicial Selection: Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 LOY. L.A. L. REV. 1447, 1463 (2001).

⁴⁴ OHIO CODE OF JUD. CONDUCT, Canon 7(B)(2)(c).

⁴⁵ OHIO CODE OF JUD. CONDUCT, Canon 7(B)(2)(d).

⁴⁶ OHIO CODE OF JUD. CONDUCT, Canon 7(B)(2)(e).

⁴⁷ OHIO CODE OF JUD. CONDUCT, Canon 7(B)(2)(f).

with a reckless disregard to whether or not it was false or, if true, that would be deceiving or misleading to a reasonable person.⁴⁸

To ensure that all judicial candidates are aware of the Canon 7 provisions, all judicial candidates are required to “complete a two-hour course in campaign practices, finance, and ethics accredited by the Commission on Continuing Legal Education.”⁴⁹

Following the United States Supreme Court decision in *Republican Party of Minnesota v. White*, holding unconstitutional Minnesota’s requirement that judicial candidates refrain from announcing their views on disputed legal or political issues,⁵⁰ the Board of Commissioners on Grievances and Discipline issued an advisory opinion discussing the judicial campaign speech provisions of Canon 7 and outlining eleven guidelines that candidates should follow.⁵¹ Ten of those guidelines are still in force.

The ten guidelines state that:

- (1) The Ohio Code of Judicial Conduct does not prohibit a judicial candidate from announcing views on disputed legal or political issues, but in so doing, the judge must abide by the restraints on judicial campaign speech within Canon 7;⁵²
- (2) The canons do not place absolute limits on comments and debate in judicial campaigns, but the canons ban statements that are false/misrepresent/deceive/mislead for such statements promote public misunderstanding regarding campaign issues, judicial candidates, and the judicial branch of government;

⁴⁸ OHIO CODE OF JUD. CONDUCT, Canon 7(E)(1).

⁴⁹ OHIO CODE OF JUD. CONDUCT, Canon 7(B)(5).

⁵⁰ 536 U.S. 765, 788 (2002).

⁵¹ Advisory Opinion 2002-08, Ohio Bd. Of Commissioners on Grievance & Discipline, at http://www.sconet.state.oh.us/BOC/Advisory_Opinions/2002/op%2002-008.doc (last visited Sept. 13, 2007).

⁵² *Id.* at 6. In particular, the Board noted that when announcing views on disputed legal or political issues, a judicial candidate must be vigilant to avoid making pledges or promises or committing himself/herself with regard to cases and controversies that might come before the court because “[u]nfettered expressions of views may later become disqualification issues when on the bench.” *Id.*

This Guideline appears to have had an effect on Ohio judicial candidates. For example, in a fall 2002 survey, in which *The Cleveland Plain Dealer* asked four candidates for the Ohio Supreme Court about their opinions on a number of controversial legal and political issues, including the death penalty, it received what was described as “gingerly crafted responses.” T.C. Brown, *Judicial Hopefuls Reluctant to Give Stances on Issues*, PLAIN DEALER (Cleveland, Ohio), Sept. 23, 2002, at A1. Then-Democratic candidate Tim Black said, “I still feel restricted by Ohio law. A judge’s personal opinion on an issue is not relevant to what is required in law and evidence.” *Id.* However, at least one candidate for the Ohio Supreme Court did discuss her views on the death penalty. Jon Craig, *Supreme Court Candidates Profess Their Impartiality*, COLUMBUS DISPATCH (Ohio), Sept. 8, 2002, at 1C. Incumbent Justice Evelyn Lundberg Stratton stated that although she was personally opposed to capital punishment and would vote to outlaw the death penalty as a legislator, because it is the law in Ohio, she regularly votes to uphold death penalties: “I don’t like the death penalty, but I have an extremely conservative vote.” *Id.* Her 2002 opponent, Janet Burnside said that it “doesn’t matter” whether she supported the death penalty because “I’m duty bound to uphold it.” *Id.*

- (3) Truthful and specific comments regarding one's self or regarding an opponent or an opponent's record are appropriate judicial campaign speech, as are truthful criticisms of an opponent;
- (4) Promising or pledging conduct in office (other than faithful and impartial performance of judicial duties) is not permitted;⁵³
- (5) Statements regarding substantive matters in specific cases pending before any judge are prohibited, as are statements that commit the judicial candidate with regard to cases or controversies that are likely to come before the court on which the judge serves or will serve;
- (6) Statements that manifest bias or prejudice with regard to an opponent's race, sex, religion, national origin, disability, age, sexual orientation, or social economic status are not permitted by the judicial candidate or his or her campaign committee;
- (7) It is improper for a judicial candidate to speak on behalf of a political organization and it is improper to publicly endorse or oppose candidates for another public office through written or oral public communication;
- (8) Personal solicitation of campaign funds by a judicial candidate is prohibited, as is solicitation or receipt of campaign fund contributions by public employees subject to the judicial candidate's direction or control;
- (9) Judicial candidates are responsible for the contents of their campaign communication and for the compliance of their campaign committee with the restrictions on solicitation and contributions; and
- (10) Judicial speech is not only restrained in the context of judicial campaigns—an incumbent judge has ethical restrictions on judicial speech, regardless of whether he or she is engaged in a judicial campaign.⁵⁴

The Ohio Supreme Court suspended the eleventh guideline on January 28, 2005. The guideline stated that “[a] judicial candidate at any time during the campaign is permitted to identify him/herself in person as a member of a political party and at any time during the campaign is permitted in person or in written communication to truthfully state that he/she is a nominee or endorsed by a party; however, in written advertisements a judicial candidate is permitted to identify him/herself as a member of a political party only in the primary period. A judicial candidate is permitted to appear with other candidates for public office on slate cards, sample ballots, and other publications of a political party that identify all candidates endorsed by the party in an election.”⁵⁵ Now judicial candidates

⁵³ Advisory Opinion 2002-08, Ohio Bd. Of Commissioners on Grievance & Discipline, at http://www.sconet.state.oh.us/BOC/Advisory_Opinions/2002/op%2002-008.doc (last visited Sept. 13, 2007) (“There is a distinction between announcing a view and making a pledge or promise. An example of a pledge or promise is the affirmative declaration ‘I will imprison all convicted felons.’ An example of expressing a philosophical view is the statement ‘I believe incarceration is an appropriate sentencing tool in some cases.’ An example of a pledge or promise is ‘In my court, I will impose the death penalty on criminals at every opportunity.’ An example of expressing a view is the statement ‘The death penalty should be reconsidered by the legislature.’”).

⁵⁴ *Id.*

⁵⁵ *Id.*

may identify themselves as members of a political party throughout the entire election period.⁵⁶

2. Conduct of Sitting Judges

While the Ohio Code of Judicial Conduct and the Ohio Rules of Professional Conduct include many important standards of conduct, this discussion will focus on those standards pertaining to three issues related to the death penalty: (1) judicial impartiality; (2) public comment on cases; and (3) the conduct of prosecutors and defense attorneys.

a. Judicial Impartiality

Canon 1 of the Ohio Judicial Code of Conduct requires judges in Ohio to “uphold the integrity and independence of the judiciary”⁵⁷ and to “participate in establishing, maintaining, and enforcing high standards of conduct.”⁵⁸ They also are required to “observe those standards so that the integrity and independence of the judiciary will be preserved.”⁵⁹ The commentary to this Canon explains that public confidence in the judiciary depends on its integrity and independence:

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of the government under law.⁶⁰

The Canons also require judges to “respect and comply with the law” and to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”⁶¹ In addition, the Canon states that “[a] judge shall not be swayed by partisan interests, public clamor, or fear of criticism.”⁶²

Furthermore, the Canons state that a judge must not “allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment” or “lend the prestige of judicial office to advance the private interests of the judge or others and shall

⁵⁶ Miscellaneous Orders, *at* http://www.sconet.state.oh.us/Judicial_Candidates/fed_lit_canon7/canon7_order_020205.pdf (last visited Sept. 13, 2007).

⁵⁷ OHIO CODE OF JUD. CONDUCT, Canon 1.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ OHIO CODE OF JUD. CONDUCT, Canon 1 cmt.

⁶¹ OHIO CODE OF JUD. CONDUCT, Canon 2.

⁶² OHIO CODE OF JUD. CONDUCT, Canon 3(B)(2).

not convey or permit others to convey the impression that they are in a special position to influence the judge.”⁶³

Lastly, a judge may not “commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.”⁶⁴ The commentary to this Canon explains that “[c]ommending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.”⁶⁵

b. Public Comment on Cases

The Code of Judicial Conduct states that “[w]hile a proceeding is pending or impending in any court, a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control.”⁶⁶

c. Conduct of Prosecutors and Defense Attorneys

The Code of Judicial Conduct requires that “[a] judge who has knowledge that a lawyer has committed a violation of the Ohio Rules of Professional Conduct shall report the violation to a tribunal or other authority empowered to investigate or act upon the violation.”⁶⁷ If asked, the judge having knowledge of the violation must reveal it to “a tribunal or other authority empowered to investigate or act upon the violation.”⁶⁸

3. Complaints and Disciplinary Action against Judicial Candidates and Judges

a. Removal or Suspension of Judges

According to the Ohio Rev. Code, a judge may be removed or suspended from office without pay when he/she has:

- (1) Engaged in any misconduct involving moral turpitude, or a violation of such of the canons of judicial ethics adopted by the supreme court as would result in a substantial loss of public respect for the office;
- (2) Been convicted of a crime involving moral turpitude; or

⁶³ OHIO CODE OF JUD. CONDUCT, Canon 4(A).

⁶⁴ OHIO CODE OF JUD. CONDUCT, Canon 3(B)(10).

⁶⁵ OHIO CODE OF JUD. CONDUCT, Canon 3 cmt.

⁶⁶ OHIO CODE OF JUD. CONDUCT, Canon 3(B)(9). “Division (B)(9) of this canon does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. Division (B)(9) of this canon does not apply to proceedings in which the judge is a litigant in a personal capacity.” *Id.*

⁶⁷ OHIO CODE OF JUD. CONDUCT, Canon 3(D)(2).

⁶⁸ OHIO CODE OF JUD. CONDUCT, Canon 3(D)(3).

- (3) Been disbarred or suspended for an indefinite period from the practice of law for misconduct occurring before election or appointment.⁶⁹

A judge may be retired from office when he/she has a permanent physical or mental disability which prevents him/her from properly discharging his/her duties.⁷⁰ A judge may be suspended without pay when he/she has a physical or mental disability which will prevent the proper discharge of the judge's duties of office for an indefinite time.⁷¹

The Supreme Court Rules for the Government of the Judiciary provide additional reasons that a justice or judge may be removed from office:

- (1) The willful and persistent failure to perform judicial duties;
- (2) Habitual intemperance;
- (3) Engaging in conduct prejudicial to the administration of justice or that would bring the judicial office into disrepute;
- (4) Suspension from the practice of law for a period of six months to two years, probation, indefinite suspension from the practice of law, permanent disbarment, or resignation from the practice of law in Ohio.⁷²

b. Certified Grievance Committees and the Office of Disciplinary Counsel

Complaints about judges may be filed with the Office of Disciplinary Counsel,⁷³ an approved local bar association, or the Ohio State Bar Association.⁷⁴ Certified Grievance Committees and the Disciplinary Counsel are responsible for investigating grievances involving alleged misconduct by justices and judges and grievances with regard to mental illness.⁷⁵ If a Certified Grievance Committee determines that the alleged misconduct under investigation is "sufficiently serious and complex," the chair of the Grievance Committee may request assistance from the Disciplinary Counsel.⁷⁶ The Disciplinary

⁶⁹ OHIO REV. CODE § 2701.12(A) (West 2007).

⁷⁰ OHIO REV. CODE § 2701.12(B) (West 2007).

⁷¹ OHIO REV. CODE § 2701.12(C) (West 2007).

⁷² OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY III(1)(B).

⁷³ With the approval of the Ohio Supreme Court, and by majority vote, the Board of Commissioners on Grievances and Discipline will appoint a Disciplinary Counsel. OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(3)(B). The Disciplinary Counsel is responsible for investigating allegations of misconduct by judges and allegations of mental illness affecting judges, initiating complaints as a result of investigations, and certifying bar counsel designated by Certified Grievance Committees. *Id.*

⁷⁴ See Supreme Court of Ohio, Board of Commissioners on Grievances & Discipline FAQ, at <http://www.sconet.state.oh.us/BOC/faq/default.asp> (last visited Sept. 13, 2007). A Certified Grievance Committee must be an organized committee of the Ohio State Bar Association or of one or more local bar associations in Ohio that permits the membership of any attorney practicing within the geographic area served by that association without reference to the attorney's area of practice, special interest, or other criteria. With the exception of Cuyahoga County, a county may only have one Certified Grievance Committee. A Certified Grievance Committee, once certified by the Board of Commissioners on Grievances and Discipline, may investigate allegations of misconduct by judges and mental illness affecting judges and initiate complaints as a result of its investigations. *Id.*

⁷⁵ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(4)(C).

⁷⁶ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(4)(B).

Counsel must investigate all matters contained in the request and report the results of the investigation to the committee that requested it.⁷⁷

Certified Grievance Committees and the Disciplinary Counsel may file a complaint with the Board of Commissioners on Grievances and Discipline in cases where it finds probable cause to believe that misconduct has occurred or that a condition of mental illness exists.⁷⁸

c. Board of Commissioners on Grievances and Discipline

The Ohio Constitution has charged the Ohio Supreme Court with establishing rules for conducting state judicial disqualification hearings.⁷⁹ Rule V of the Supreme Court Rules for the Government of the Bar of Ohio creates the Board of Commissioners on Grievances and Discipline (Board) which has jurisdiction to hear grievances involving alleged judicial misconduct, including alleged misconduct by judicial candidates.⁸⁰ The Board has exclusive jurisdiction to hear grievances:

- (1) Concerning complaints of misconduct that are alleged to have been committed by a Justice, judge, or candidate for judicial office;
- (2) Concerning allegations that a Justice or judge is unable to discharge the duties of judicial office by virtue of a mental or physical disability;
- (3) Upon reference by the Supreme Court of conduct by a Justice, judge, or candidate for judicial office affecting any proceeding under the Supreme Court Rules for the Government of the Judiciary or the Supreme Court Rules for the Government of the Bar of Ohio, where the acts allegedly constitute a contempt of the Supreme Court or a breach of the rules but did not take place in the presence of the Supreme Court or a member of the Supreme Court, whether by willful disobedience of any order or judgment of the Supreme Court or an order or subpoena issued by the Board of Commissioners, by interference with any officer of the Supreme Court in the prosecution of any duty, or otherwise.⁸¹

The Board has 28 members, including seventeen attorneys admitted to practice in Ohio, seven active or voluntarily retired judges, and four non-attorney members.⁸² The members of the Board are appointed for three-year terms by the justices of the Supreme Court.⁸³

⁷⁷ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(4)(B).

⁷⁸ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(4)(C).

⁷⁹ OHIO CONST. art. IV, § 5(c).

⁸⁰ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(2)(A).

⁸¹ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY II(1).

⁸² OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(1)(A).

⁸³ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(1)(D).

The Board does not conduct the initial investigation and may refer any matter filed with it to a Certified Grievance Committee or the Disciplinary Counsel.⁸⁴ Upon receiving a complaint from a Certified Grievance Committee or the Disciplinary Counsel, the complaint and investigatory materials will be sent to a probable cause panel for review.⁸⁵ The panel must make an independent determination, based solely on the complaint and investigation materials, of whether probable cause exists for the filing of a complaint.⁸⁶ The panel must issue an order certifying the complaint to the Board or dismissing the complaint and investigation.⁸⁷

If the probable cause panel finds that probable cause exists, a hearing panel will be appointed⁸⁸ and a formal hearing will be held on the complaint.⁸⁹ If the hearing panel unanimously finds that the evidence is insufficient to support a charge or count of misconduct, the panel may order that the complaint be dismissed.⁹⁰ Alternatively, the hearing panel may submit its findings of fact and dismissal recommendations for review and action by the full Board.⁹¹

If the hearing panel determines, by clear and convincing evidence, that the respondent is guilty of misconduct and that public reprimand, suspension for a period of six months to two years, probation, suspension for an indefinite period, or disbarment is merited, the hearing panel must file its certified report of the proceedings and its findings of facts and recommendations.⁹²

After the Board conducts its review, it “may refer the matter to the hearing panel for further hearing, order a further hearing before the Board, or proceed on the certified report before the hearing panel.”⁹³ “After the final review, the Board may dismiss the complaint or find that the respondent is guilty of misconduct.”⁹⁴ “If the Board determines that a public reprimand, suspension for a period of six months to two years, probation, suspension for an indefinite period, or disbarment is merited, the Board must file a final certified report of its proceedings with the Clerk of the Supreme Court.”⁹⁵

⁸⁴ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(4)(A). All complaints and grievances alleging misconduct by a Justice of the Ohio Supreme Court must be filed with the Disciplinary Counsel. OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY II(2)(B)(1).

⁸⁵ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(6)(D)(1).

⁸⁶ *Id.*

⁸⁷ *Id.* The decision of the probable cause panel may be appealed to the full Board by the Disciplinary Counsel or Certified Grievance Committee. In this situation, the Board must review the investigation and make an independent determination as to whether probable cause exists for the filing of a complaint. The board will issue an order certifying the complaint or dismissing it. There is no appeal from the decision of the Board. OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(6)(D)(2).

⁸⁸ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(6)(D)(3).

⁸⁹ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(6)(G).

⁹⁰ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(6)(H).

⁹¹ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(6)(I).

⁹² OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(6)(J).

⁹³ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(6)(K).

⁹⁴ *Id.*

⁹⁵ OHIO SUP. CT. RULES FOR THE GOV'T OF THE BAR OF OHIO V(6)(L).

Once the Board files its final report with the Supreme Court, the Supreme Court must issue an order to the respondent to show cause why the report of the Board should not be confirmed and a disciplinary order entered.⁹⁶ After a hearing on objections, or if no objections are filed, the Supreme Court will enter an order.⁹⁷ If the Court rejects a sanction recommended in the certified report, the Court will remand the matter to the Board for another hearing.⁹⁸

Complaints against judicial candidates for violations of Canon 7 of the Code of Judicial Conduct are handled somewhat differently. Under the Supreme Court Rules on the Government of the Judiciary of Ohio, “[a] grievance that alleges a violation by a judicial candidate of Canon 7 of the Code of Judicial Conduct during the course of a campaign for judicial office” must be filed with the secretary of the Board.⁹⁹ The secretary will conduct a preliminary review of the complaint, and if he/she determines that (1) the grievance is facially valid, (2) the Board has jurisdiction over the grievance, and (3) the grievance should be considered on an expedited basis,¹⁰⁰ the secretary will appoint a panel of three Board members to determine whether there is probable cause that a violation of Canon 7 has occurred.¹⁰¹ If the panel determines that probable cause exists, the secretary of the Board will prepare a formal complaint and the chairman of the board will appoint three different Board members to conduct a formal hearing on the complaint.¹⁰²

If the formal hearing panel “determines by clear and convincing evidence that a violation of Canon 7 has occurred,” the panel’s report and a record of the proceeding are certified to the Supreme Court.¹⁰³ The Supreme Court will then appoint a five-judge commission to consider the report.¹⁰⁴ If this commission determines by clear and convincing evidence that a violation has occurred, the commission may enter an order and sanctions against the respondent. Potential sanctions include, but are not limited to, disciplinary sanctions, cease and desist orders, and damages for the cost of proceedings or attorneys fees.¹⁰⁵

⁹⁶ OHIO SUP. CT. RULES FOR THE GOV’T OF THE BAR OF OHIO V(8)(A).

⁹⁷ OHIO SUP. CT. RULES FOR THE GOV’T OF THE BAR OF OHIO V(8)(D).

⁹⁸ *Id.*

⁹⁹ OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY II(5)(C)(1)(a).

¹⁰⁰ Under Rule II of the Rules for the Government of the Judiciary of Ohio, the Ohio Supreme Court has created an expedited procedure for reviewing and resolving campaign complaints, which allows a maximum of 20 days to pass from the filing of the complaint to the determination by the complaint hearing panel. Dove, *supra* note 43, at 1463. The hearing panel’s decision is not final, as the panel must refer the case to the Supreme Court for a final determination. Nonetheless, “the panel’s findings and recommendations carry great weight and will, in most cases, bring a halt to the improper conduct.” *Id.*

¹⁰¹ OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY II(5)(C)(1)(a).

¹⁰² OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY II(5)(C)(1)(a), (b).

¹⁰³ OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY II(5)(D).

¹⁰⁴ OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY II(5)(E).

¹⁰⁵ OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY II(5)(E)(1). A respondent then may appeal a sanction issued by the commission to the Supreme Court. OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY II(5)(E)(3). Commissions have, in the past, been “creative” in determining an appropriate sanction; in one instance, a respondent was required to apologize publicly to his opponent and to the citizens of his judicial district. Finding his proposed apology to be inadequate, the commission rewrote the apology and ordered the respondent to publish the revised version. Dove, *supra* note 43, at 1465.

d. Impeachment

In addition to being subject to discipline, judges in the State of Ohio may be impeached for “any misdemeanor in office.”¹⁰⁶ The House of Representatives has the sole power to impeach public officers, and the Senate has the power to try the impeachment proceedings.¹⁰⁷ A judge may only be convicted with the concurrence of two-thirds of the Ohio Senate.¹⁰⁸

¹⁰⁶ OHIO CONST. art. II, § 24.

¹⁰⁷ OHIO CONST. art. II, § 23.

¹⁰⁸ *Id.*

II. ANALYSIS

A. Recommendation # 1

States should examine the fairness of their processes for the appointment/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.

It does not appear that the State of Ohio has been examining the fairness of its judicial selection process in any systemic way, nor is it undertaking a public education effort 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.

The fairness of the judicial selection process in Ohio has been called into question. With the exception of judicial vacancies, which are filled by the governor,¹⁰⁹ Ohio elects its judges in a hybrid election system in which judges are endorsed by political parties, nominated in partisan primary elections,¹¹⁰ and elected in nonpartisan general elections.¹¹¹ While the general election is officially nonpartisan, however, judicial candidates are allowed to identify themselves throughout their campaigns as members of a political party,¹¹² thereby minimizing the effectiveness of the general election's nonpartisan format and rendering Ohio's election process more partisan than not.

Judicial elections, partisan or not, create problematic financial pressures. Ohio judicial campaigns unquestionably are expensive and getting more so. A campaign for a seat on the Ohio Supreme Court cost approximately \$100,000 in the 1980s, compared with the \$2 million a candidate currently may raise and spend.¹¹³ To finance these elections, judicial candidates must solicit contributions from individuals and organizations, some of whom may have an interest in the cases the candidates will decide as judges.¹¹⁴ An examination of the Ohio Supreme Court by *The New York Times* found that "its justices routinely sat on cases after receiving campaign contributions from the parties involved or from groups that filed supporting briefs. On average, they voted in favor of contributors 70 percent of the time."¹¹⁵

¹⁰⁹ OHIO CONST. art. IV, § 13.

¹¹⁰ American Judicature Society, *Judicial Selection in the States, Ohio, Current Methods of Judicial Selection*, available at http://www.ajs.org/js/OH_methods.htm (last visited Sept. 13, 2007).

¹¹¹ OHIO CONST. art. IV, § 6(a). Party affiliations are not listed on the general election ballot. American Judicature Society, *Judicial Selection in the States, Ohio, Current Methods of Judicial Selection*, available at http://www.ajs.org/js/OH_methods.htm (last visited Sept. 13, 2007).

¹¹² Miscellaneous Orders at http://www.sconet.state.oh.us/Judicial_Candidates/fed_lit_canon7/canon7_order_020205.pdf (Sept. 13, 2007).

¹¹³ Adam Liptak & Janet Roberts, *Tilting the Scales: The Ohio Experience: Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES, Oct. 1, 2006.

¹¹⁴ A.B.A. COMM'N ON THE 21ST CENTURY JUDICIARY, JUSTICE IN JEOPARDY 70 (2003) [hereinafter JUSTICE IN JEOPARDY], available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf> (last visited Sept. 13, 2007).

¹¹⁵ Liptak & Roberts, *supra* note 113, N.Y. TIMES, Oct. 1, 2006.

Second, the cost of running judicial campaigns limits the pool of viable candidates to those with financial means and/or access to contributors.¹¹⁶ This has a potentially troubling impact on the diversity of the judiciary.¹¹⁷ The American Bar Association Standing Committee on Judicial Independence reports that of the 450 general jurisdiction appellate and trial court judgeships in Ohio, only 15 of them, or 3.3 percent, are filled by people of color.¹¹⁸ Furthermore, none of these judges are Asian or Native-American, and only two are Latina/o.¹¹⁹

Partisan judicial elections have additional problems, creating special risks and operating in tension with core principles of an independent judiciary: that a judge ought to “participate in establishing, maintaining, and enforcing high standards of conduct,”¹²⁰ without “cast[ing] doubt on the judge's capacity to act impartially as a judge, demean[ing] the judicial office, or interfere[ing] with the proper performance of judicial duties.”¹²¹ Furthermore, while judges are responsible for upholding the law, regardless of political party, partisan elections “further blur, if not obliterate, the distinction between judges and other elected officials in the public’s mind by conveying the impression that the decision making of judges, like that of legislators and governors, is driven by allegiance to party, rather than to law.”¹²²

In addition to requiring that judges be elected, the governor has the sole authority to fill judicial vacancies.¹²³ While judicial appointments generally are preferred to judicial elections, the process of filling judicial vacancies by appointment in a system that requires retention elections results in the judge having the advantage of running for reelection as an incumbent.

Regardless of whether a candidate is running for election or reelection, however, judicial campaigns in the State of Ohio sometimes are politicized and, in some cases, this politicization involved the death penalty. For example:

- In his 1996 election, Judge Lee Hildebrandt ran a 30-second television ad saying that his opponent “voted to end the death penalty” while in Congress.¹²⁴ One day before the election, the Board of Commissioners on Grievances and Discipline concluded that Judge Hildebrandt violated the Ohio Canons of Judicial Ethics,¹²⁵ stating that “[t]he average person hearing the statement, ‘According to the district

¹¹⁶ JUSTICE IN JEOPARDY, *supra* note 114, at 70 (2003), available at <http://www.abanet.org/judind/jeopardy/pdf/report.pdf>.

¹¹⁷ *Id.*

¹¹⁸ ABA Standing Committee on Judicial Independence, National Database on Judicial Diversity in State Courts, at <http://www.abanet.org/judind/diversity/ohio.html> (last visited Sept. 13, 2007).

¹¹⁹ *Id.*

¹²⁰ OHIO CODE OF JUD. CONDUCT, Canon 1.

¹²¹ OHIO CODE OF JUD. CONDUCT, Canon 2(A).

¹²² JUSTICE IN JEOPARDY, *supra* note 114, at 76-77.

¹²³ OHIO CONST. art. IV, § 13.

¹²⁴ *In re* Judicial Campaign Complaint Against Lee Hildebrandt, 675 N.E.2d 889 (Ohio 1997).

¹²⁵ *Id.* at 893, 894.

attorneys he voted to end the death penalty’ would be led to believe that the candidate voted to end the death penalty and that the district attorneys (sic) said so. Such is not the case.”¹²⁶

- In a 1998 race for Darke County Common Pleas Judge, the challenger Jonathan Hein labeled his opponent, Judge Lee Bixler, as “liberal” and “soft on crime” in campaign communications and public statements.¹²⁷ A commission of judges appointed by the Ohio Supreme Court said that the “use of general, inflammatory terms or ‘buzzwords,’ such as those employed by the respondent in his printed and oral campaign communications, are inappropriate in judicial campaigns. Moreover, the terms do not allow for a fair and accurate portrayal of the record of the respondent’s opponent.”¹²⁸
- In a 2000 campaign for the Ohio Supreme Court between Justice Deborah L. Cook and Tim Black, a television advertisement by the Institute for Legal Reform touted Justice Cook’s experience with death penalty cases and her opponent’s lack thereof.¹²⁹ The ad, which was not officially sanctioned by Justice Cook, pointed to Cook’s experience on the Supreme Court and an appeals court, noting that she has decided many important cases, including death penalty appeals.¹³⁰ The announcer then says, “Tim Black has never ruled on any death-penalty cases—but he’s ruled on many traffic cases. Big difference.”¹³¹
- In the 2004 Ohio Supreme Court campaign between Justice Terrence O’Donnell and William O’Neill, Justice O’Donnell was quoted criticizing his opponent’s lack of experience in handling death penalty cases,¹³² stating that, “My opponent has never charged a jury. He’s never been a trial judge. He’s never sentenced a convicted felon or presided over a death penalty case. These are important considerations.”¹³³

¹²⁶ *Id.* at 893. As a result, a panel of five judges appointed by the Ohio Supreme Court fined Judge Hildebrandt \$15,000, placed him on six-month’s probation, and required that he pay the complainant’s attorney fees and expenses of \$7,963.50. The panel also made Judge Hildebrandt issue a public apology to the complainant and the citizens of Hamilton County. *Id.* at 892. Despite Judge Hildebrandt’s violations of Canon 7, he won re-election in the campaign. See Hamilton County, General Election Results 1996, at <http://www.hamilton-co.org/BOE/inputdata/Electionsresults/Archived/G96OFFCANVASS.xls> (last visited Sept. 13, 2006). His opponent, former Congressman David Mann, said the official finding that Judge Hildebrandt violated ethics rules did not help him, because it came just one day before the election. See Spencer Hunt, *Judicial Races Stretch Ethics*, CINCINNATI ENQUIRER (Ohio), Sept. 24, 2000, at 1A.

¹²⁶ Hunt, *supra* note 126.

¹²⁷ *In re* Judicial Campaign Complaint against Hein, 706 N.E.2d 34, 36 (Ohio 1999).

¹²⁸ *Id.* at 37. The commission ordered a public reprimand of Hein and that he pay a \$2,500 fine, plus the complainant’s reasonable and necessary attorney fees and the costs of the proceedings. *Id.* at 37-38. Still, Jonathan Hein won election to the Darke County Court of Common Pleas in a narrowly contested race, ousting Judge Bixler who had served for 20 years. See *Former Darke County Judge Lee Bixler Dies at 56*, DAYTON DAILY NEWS, Nov. 7, 2000, at 3B.

¹²⁹ Darrel Rowland and James Bradshaw, *State Elections Panel Reaffirms Legality of Anti-Resnick TV Ad*, THE COLUMBUS DISPATCH (Ohio), Oct. 27, 2000, at 1D.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Jim Siegel, *Supreme Court Opponents Disagree on Revealing Views*, CINCINNATI ENQUIRER (Ohio), Oct. 25, 2004, at 2B.

¹³³ *Id.*

Conclusion

It does not appear that the State of Ohio is currently examining the fairness of the judicial appointment/election process in any systemic way. Nor does it appear that the State is undertaking any type of concerted public education effort to ensure that the public is aware of the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary. Therefore, the State of Ohio fails to comply with Recommendation #1.

B. Recommendation # 2

A judge who has made any promise—public or private—regarding his 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.

Canon 7 of the Ohio Code of Judicial Conduct states that a candidate for judicial office may not “make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office”¹³⁴ and may not “make statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court.”¹³⁵ In addition, Canon 3 of the Ohio Code of Judicial Conduct states that a judge may not “commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding,”¹³⁶ explaining that “[c]ommending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.”¹³⁷

The Ohio Board of Commissioners on Grievances and Discipline has issued an advisory opinion discussing the judicial campaign speech provisions of Canon 7 and stated that: (1) promising or pledging conduct in office (other than faithful and impartial performance of judicial duties) is not permitted; and (2) statements regarding substantive matters in specific cases pending before any judge are prohibited, as are statements that commit the judicial candidate with regard to cases or controversies that are likely to come before the court on which the judge serves or will serve.¹³⁸

In explaining its opinion, the Board of Commissioners on Grievances and Discipline stated that:

There is a distinction between announcing a view and making a pledge or promise. An example of a pledge or promise is the affirmative declaration

¹³⁴ OHIO CODE OF JUD. CONDUCT, Canon 7(B)(2)(c).

¹³⁵ OHIO CODE OF JUD. CONDUCT, Canon 7(B)(2)(d).

¹³⁶ OHIO CODE OF JUD. CONDUCT, Canon 3(B)(10).

¹³⁷ OHIO CODE OF JUD. CONDUCT, Canon 3 cmt.

¹³⁸ Advisory Opinion 2002-08, Ohio Bd. Of Commissioners on Grievance & Discipline, *at* http://www.sconet.state.oh.us/BOC/Advisory_Opinions/2002/op%2002-008.doc (last visited Sept. 13, 2007).

“I will imprison all convicted felons.” An example of expressing a philosophical view is the statement “I believe incarceration is an appropriate sentencing tool in some cases.” An example of a pledge or promise is “In my court, I will impose the death penalty on criminals at every opportunity.” An example of expressing a view is the statement “The death penalty should be reconsidered by the legislature.”¹³⁹

There is at least one example of a judicial candidate running afoul of Canon 7 in discussing the death penalty. Elizabeth Burick, a November 1998 candidate for judge in the Stark County Court of Common Pleas, made promises concerning future decisions affecting capital cases.¹⁴⁰ In print and television advertisements, she stated that “Elizabeth Burick will be a tough Judge that supports the death penalty and isn’t afraid to use it,” and that “Burick favors the death penalty for convicted murderers.”¹⁴¹ A commission of five judges appointed by the Supreme Court of Ohio found that the statements violated Canon 7 of the Ohio Codes of Judicial Conduct. The commission noted that while such statements “may be appropriate in nonjudicial elections, judicial candidates must guard against making statements in the course of their campaigns that adversely reflect on their impartiality.”¹⁴² It added that “[a]t the very least, the respondent’s statements imply to a reasonable person that she will use the death penalty in a capital case, regardless of the evidence produced during the mitigation phase of trial and notwithstanding the statutory standards a judge or jury must consider in determining the appropriateness of the death penalty.”¹⁴³ For that violation and two other non-death penalty related infractions, the commission issued a public reprimand against Burick, imposed a \$7,500 fine, and assessed her \$5,000 for the complainant’s attorney’s fees and expenses.¹⁴⁴

The United States Court of Appeals for the Sixth Circuit has acknowledged the difficult situation faced by elected judges. In *DePew v. Anderson*, the court stated its concern about Ohio’s reliance “on elected judges to hear, decide and review death penalty cases.”¹⁴⁵ During the defendant’s trial in *DePew*, the presiding judge, Judge Moser, received criticism for his role in an earlier case in which he, along with two other judges, sentenced the defendant to life imprisonment with the possibility of parole.¹⁴⁶ Judge Moser responded to the criticism by writing a letter to the local newspaper, blaming the Ohio Legislature for the sentence and “saying it had put too many impediments in the way of prosecuting death penalty cases.”¹⁴⁷ Judge Moser’s letter formed the basis of a judicial bias complaint, but the court found that his statements merely reflected an elected judge’s “political realities” and did not indicate bias.¹⁴⁸ The court explained that:

¹³⁹ *Id.*

¹⁴⁰ *In re* Judicial Campaign Complaint against Elizabeth Burick, 705 N.E.2d 422 (Ohio 1999).

¹⁴¹ *Id.* at 425.

¹⁴² *Id.* at 426.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 428.

¹⁴⁵ *DePew v. Anderson*, 311 F.3d 742, 753 (6th Cir. 2002).

¹⁴⁶ *Id.* at 752.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Such shifting of blame for unpopular decisions is common during contested elections. The statement was merely a political response by a judge facing an election, and we do not believe it indicates that Judge Moser could not or would not render decision based on the law and the evidence before him in a specific case...Judge Moser was caught in a system that requires elected judges, subject to the prevailing political winds, to preside over capital cases. This episode serves as one more example of the problems faced by elected state court judges who must make unpopular decisions in order to uphold the rights of defendants before them and then be branded as ‘soft on crime’ by opponents and reviled by the public when they come up for reelection. In a system that relies on elected judges to hear, decide and review death penalty cases, the federal courts must be conscious of the intense political pressures our state colleagues are facing and remain especially vigilant in enforcing procedural rights accorded the accused by the Bill of Rights.¹⁴⁹

Based on this information, the State of Ohio has made an effort to determine the appropriateness of comments made by judges and judicial candidates on prospective issues that may come before the court. However, it is unclear whether the State of Ohio is taking sufficient steps to preclude judges who make prejudgments about prospective decisions in capital cases from presiding over capital cases or from reviewing death penalty decisions in the jurisdiction. We therefore are unable to determine if the State of Ohio is in compliance 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 out themselves.

- a. 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 for all defendants.**
- b. Bar associations and community leaders publicly should oppose any questioning of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they have upheld the death penalty.**
- c. Purported views on the death penalty or on *habeas corpus* should not be litmus tests or important factors in the selection of judges.**

¹⁴⁹ *Id.* at 752-53.

Political assaults on judges may influence the way judges decide death penalty cases, in addition to affecting the public's perception of the judiciary's proper role. The negative image created by these sorts of attacks is exacerbated by the inability of the judiciary to speak in its own defense. Therefore, it is imperative that bar associations and community leaders publicly defend judges from assaults that undermine the independence of the judiciary. As stated in the Supreme Court Rules for the Government of the Judiciary, "[j]ustices and judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of lawyers against unjust criticism and clamor."¹⁵⁰

State and local bar associations have attempted to support judicial independence. In 2002, the Ohio State Bar Association established the Judicial Election Campaign Advertising Monitoring Committee. This committee requested candidates for the Ohio Supreme Court to sign a voluntary pledge that they would conduct their campaigns according to Canon 7, the committee's guidelines, and The Constitution Project's guidelines, "The Higher Ground: Standards of Conduct for Judicial Candidates."¹⁵¹ The committee also asked candidates to allow the committee to eliminate false or misleading campaign materials issued on the candidates' behalves, and to submit their campaign materials to the committee for review 48 hours in advance of their intended distribution.¹⁵²

In addition, the Cuyahoga and Franklin county bar associations have established voluntary judicial election monitoring committees. The Franklin County committee, for example, permits candidates to enter into voluntary agreements concerning their campaign conduct. The committee will hear complaints filed by candidates, and will also prescreen campaign advertisements to ensure that candidates do not present materials that appear to violate the Code of Judicial Conduct or the voluntary agreement. If candidates persist in presenting materials that violate the Code or agreement, the local committee may publicize the noncompliance to local media and may refer the matter to the elections commission or the disciplinary committee.¹⁵³

It is commendable that the Ohio State Bar Association, the Cuyahoga County Bar Association, and the Franklin County Bar Association have taken steps to monitor judicial elections for compliance with the Code of Judicial Conduct. It is unclear, however, whether bar association and community leaders have spoken out in defense of sitting judges who are criticized for decisions in capital cases. Consequently, it is unclear whether the State of Ohio is in compliance with Recommendation #3.

¹⁵⁰ OHIO SUP. CT. RULES FOR THE GOV'T OF THE JUDICIARY I(2).

¹⁵¹ CONSTITUTION PROJECT, THE HIGHER GROUND: STANDARDS OF CONDUCT FOR JUDICIAL CANDIDATES, *available at* http://www.constitutionproject.org/pdf/The_Higher_Ground_Standards_of_Conduct_for_Judicial_Candidates.pdf (last visited Sept. 13, 2007).

¹⁵² American Judicature Society, Judicial Selection in the States, Ohio, Judicial Campaigns and Elections, *available at* http://www.ajs.org/js/OH_elections.htm (last visited Sept. 13, 2007). "None of the four Ohio Supreme Court candidates in 2002 signed the voluntary pledge, although each candidate did promise to conduct a clean campaign." *Id.*

¹⁵³ Dove, *supra* note 43, at 461.

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.

The Ohio Code of Judicial Conduct does not explicitly mention the appropriate course of action that a judge should take when confronted with ineffective lawyering by defense counsel or prosecutorial misconduct. It does state, however, that “a judge who has knowledge that a lawyer has committed a violation of the Ohio Rules of Professional Conduct shall report the violation to a tribunal or other authority empowered to investigate or act upon the violation.”¹⁵⁴ In addition, “a judge having knowledge of a violation by ... a lawyer shall, upon request, fully reveal the violation to a tribunal or other authority empowered to investigate or act upon the violation.”¹⁵⁵

In *State v. DePew*, a majority of the Ohio Supreme Court recommended the appropriate course of action for judges when confronted with prior ineffective defense lawyering and prosecutorial misconduct:¹⁵⁶

There is one other alternative [to reversal of a death-penalty conviction] left to the courts in expressing our condemnation of intentional or unjustifiable misconduct by either prosecutors or defense counsel. Attorneys, trial courts, courts of appeals, and this court should remain ever vigilant regarding the duties of counsel

In order to preserve the fairness of trial proceedings and to deter further misconduct, it is henceforth the intention of this court to refer matters of misconduct to the Disciplinary Counsel in those cases where we find it necessary and proper to do so. We encourage all trial courts and appellate courts to take similar steps where appropriate.¹⁵⁷

Despite these words, however, it is unclear how often, if ever, ineffective lawyering by defense counsel or prosecutorial misconduct is referred to the Disciplinary Counsel for action. Because we were unable to ascertain the scope of the measures taken by judges to remedy the harm caused by ineffective defense attorneys or prosecutorial misconduct or

¹⁵⁴ OHIO CODE OF JUD. CONDUCT, Canon 3(D)(2).

¹⁵⁵ OHIO CODE OF JUD. CONDUCT, Canon 3(D)(3).

¹⁵⁶ *State v. DePew*, 528 N.E.2d 542 (Ohio 1988).

¹⁵⁷ *Id.* at 557.

to prevent harm from occurring in the future, we are unable to assess the State of Ohio's compliance with Recommendations #4 and 5.

F. Recommendation # 6

Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases.

Neither the Ohio Rev. Code, the Ohio Rules of Criminal Procedure, nor the Ohio Code of Judicial Conduct explicitly require judges to ensure that defendants are provided with full discovery in criminal cases, including capital cases.

Under Rule 16 of the Ohio Rules of Criminal Procedure (Rule 16), judges are responsible for regulating discovery.¹⁵⁸ If one party fails to comply with required discovery, the court may, at any time, order the party to permit the discovery or inspection, grant a continuance, prohibit the party from introducing the material not disclosed into evidence, or make any other order it deems just under the circumstances.¹⁵⁹ In addition, upon a sufficient showing, the court may order that the discovery or inspection be denied, restricted, or deferred, or make any other appropriate order.¹⁶⁰

The Ohio Supreme Court has addressed the issue of full discovery and held that Rule 16 "does not provide for what is often called 'full,' 'complete,' or 'open file' discovery."¹⁶¹ Despite the fact that open file discovery is not required, however, a number of counties appear to practice it, either as a matter of course or in individual cases. For example, prosecutors in Summit County are required to practice open file discovery.¹⁶² Other counties appear to provide open file discovery in individual cases, but do not require it.¹⁶³

¹⁵⁸ OHIO R. CRIM P. 16(E).

¹⁵⁹ OHIO R. CRIM P. 16(E)(3).

¹⁶⁰ OHIO R. CRIM P. 16(E)(1). This showing may be made in the form of a written statement to be reviewed by the judge alone. If the court grants relief following such a showing, the party's statement will be sealed and preserved in the court records to be made available to the appellate court in the event of an appeal. *Id.*

¹⁶¹ *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83, 89 (1994).

¹⁶² RULES OF PRAC. & P. OF THE SUMMIT CO. CT. OF COMMON PLEAS GEN. DIV. R. 21.06. "It shall be the responsibility of the Asst. Prosecutor assigned and the defense counsel, to carry out the policy of 'open-file discovery', as is the custom of this Court and the Prosecutor's office. Defense counsel must, between the time of arraignment and pretrial, review the Prosecutor's file for pertinent evidence and factual determinations as to the truth of the charge to an end that meaningful discussion shall be had at the pretrial conference regarding plea or trial.

It shall be the responsibility of the Asst. Prosecutor assigned, to have available early and open discovery of pertinent evidence and availability of lab tests that they intend to introduce into evidence. It shall be the responsibility of the Court to supervise and monitor the handling of the discovery, and determine whether or not motion dates, if requested, are set for evidentiary hearing or ruling, as the case may be." *Id.*

¹⁶³ *See, e.g., State v. Gondor*, 860 N.E.2d 77, 82 (2006) ("Prosecutors notified Levine '[e]arly on' that discovery would be conducted through an open-file procedure. Nevertheless, Levine testified that he expected a formal response to his discovery requests pursuant to Crim.R. 16. Levine also testified that he personally viewed the prosecutor's file at the Portage County Prosecutor's Office and was never refused an appointment to do so."); *State v. Winfield*, 2000 WL 1573079 (Ohio Ct. App. 4th Dist. Spt. 18, 2000)

The State of Ohio does not require that defendants be provided with full-or open-discovery in capital cases. And while some counties require or allow open file discovery, we were unable to assess whether, on a statewide basis, judges are doing all within their power to enforce the requirements that ensure full discovery in capital cases. Therefore, we were unable to determine whether the State of Ohio is in compliance with Recommendation #6.

(“Appellee informed the trial court that the normal practice of the Ross County Prosecutor’s Office is not to answer specific discovery requests, but rather to open its case file for independent examination by defense counsel.”); *State v. Dye*, 1995 WL 787464 (Ohio Ct. App. 11th Dist. Oct. 6, 1995) (“On April 15, 1994, the state filed a response which stated that it had given Dye ‘open file discovery’”); *State v. Woodhouse*, 2004 WL 2634628 (Ohio Ct. App. 6th Dist. Nov. 19, 2004) (“To the contrary, the transcript of the guilty plea hearing reveals that the trial court asked appellant’s lead counsel whether he was satisfied with the discovery provided by the prosecution. Counsel replied that ‘[W]e received complete, open file discovery.’”).

CHAPTER TWELVE

RACIAL AND ETHNIC MINORITIES

INTRODUCTION TO THE ISSUE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is all too often a major explanatory factor. Most of the studies have found that, holding other factors constant, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is African-American. Studies also have found that in some jurisdictions, the death penalty has been sought and imposed more frequently in cases involving African-American defendants than in cases involving white defendants. The death penalty appears to be most likely in cases in which the victim is white and the perpetrator is black.

In 1987, the United States Supreme Court held in *McCleskey v. Kemp*¹ that even if statistical evidence revealed systemic racial disparity in capital cases, this 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 were systematic racial disparities in death penalty implementation.

The pattern of racial discrimination reflected in *McCleskey* persists today in many jurisdictions, in part, because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can 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 all-white juries.

There is little dispute about the need to eliminate race as a factor in the administration of the death penalty. To accomplish that, however, requires that states identify the various ways in which race infects the administration of the death penalty and that they devise solutions to eliminate discriminatory practices.

¹ 481 U.S. 279 (1987).

I. FACTUAL DISCUSSION

The issue of racial and ethnic discrimination in the administration of the death penalty was brought to the forefront of the death penalty debate by the United States 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 because blacks convicted of killing whites were found to have the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.³ The Court rejected McCleskey's claims, finding that the figures evidencing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in McCleskey's case.⁴

In 1993, six years after the *McCleskey* decision, the Ohio Supreme Court and the Ohio State Bar Association established the Ohio Commission on Racial Fairness to "assess racial impact on the entire justice system," ultimately resulting in *The Report of the Ohio Commission on Racial Fairness*.⁵ Two years later, in 2000, the Ohio Supreme Court commissioned the Racial Fairness Implementation Task Force to create a plan of action to implement the recommendations presented in *The Report of the Ohio Commission on Racial Fairness*.⁶

A. Ohio Commission on Racial Fairness

Through a joint effort in 1993, the Ohio Supreme Court and the Ohio Bar Association established the Ohio Commission on Racial Fairness (Commission).⁷ The Commission was composed of judges, attorneys, and laypersons and was charged with (1) studying "every aspect of the state court system and the legal profession to ascertain the manner in which African-Americans, Hispanics, Native Americans, and Asian-Americans are perceived and treated as parties, victims, lawyers, judges, and employees;" (2) determining "public perception of fairness or lack of fairness in the judicial system and legal profession;" and (3) making "recommendations on needed reforms and remedial programs."⁸

² 481 U.S. 279 (1987).

³ *Id.* at 291-92.

⁴ *Id.* at 297.

⁵ OHIO COMMISSION ON RACIAL FAIRNESS, THE REPORT OF THE OHIO COMMISSION ON RACIAL FAIRNESS (1999) [hereinafter RACIAL FAIRNESS REPORT], available at <http://www.sconet.state.oh.us/publications/fairness/fairness.pdf> (last visited Sept. 13, 2007).

⁶ RACIAL FAIRNESS IMPLEMENTATION TASK FORCE, ACTION PLAN (2002) [hereinafter RACIAL FAIRNESS ACTION PLAN], available at <http://www.sconet.state.oh.us/publications/fairness/Action-Plan-dev.pdf> (last visited Sept. 13, 2007).

⁷ RACIAL FAIRNESS REPORT, *supra* note 5, at 1.

⁸ RACIAL FAIRNESS ACTION PLAN, *supra* note 6.

Members of the Commission conducted a series of twelve public hearings to gauge Ohioans' perceptions of fairness in the justice system.⁹ The hearings made clear that "many of Ohio's citizens, particularly its minority citizens, harbor serious reservations about the ability of Ohio's current legal system to be fair and even-handed in its treatment of all of the state's residents regardless of race."¹⁰ The hearings also convinced the Commission that regardless of the findings contained in any empirical data it collected, recommendations were needed to address the perceptions of Ohio's citizens.¹¹

The Commission addressed the issue of racial bias in capital sentencing in its "Criminal Justice and Sentencing" chapter, stating in part that:

[t]he issue here is not whether one is a proponent or opponent of capital punishment or whether those on death row deserve to be there. The issue is the integrity of the criminal justice system, whether black males are looked upon as expendable and treated differently than white males resulting in disparate sentencing.

One hundred seventy-five (175) people were the victims of those currently residing on Ohio's death row. Of those 175 victims, 124 were Caucasian and 42 were African-American. The numbers speak for themselves. A perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black. The implication of race in this gross disparity is not simply explained away and demands thorough examination, analysis and study until a satisfactory explanation emerges which eliminates race as the cause for these widely divergent numbers.¹²

The Commission addressed the issue again later in the same chapter, noting that:

numerous studies have revealed race as a predominate factor in determining the application of the death penalty in this country, according to a report issued by the National Association of Criminal Defense Lawyers. No less an authority than Congress' General Accounting Office found in 1990, research then available revealed "a pattern of evidence indicating racial disparities in the charging, sentencing, and the imposition of the death penalty" at the state level. . . .

None of these statistics supports a broad statement that individual judges, courts, or, for that matter, other parts of the criminal justice system are purposely going out of their ways to "get" minority citizens. However, given the strength of some public hearing testimony presented before this

⁹ RACIAL FAIRNESS REPORT, *supra* note 5, at 2.

¹⁰ *Id.* at 3.

¹¹ *Id.*

¹² *Id.* at 37-38 (footnotes omitted).

Commission, it is impossible to escape the conclusion that such individuals exist.

Intended or not, disparate end results suggest that, when laws are drafted in such a way that they target certain minority communities for enforcement, and combine with arrest policies focusing on those same communities, and are then joined with sentencing guidelines, practices and policies that have devastating impacts on those exact same minority groups, a legitimate grievance is identified which demands redress, if fundamental fairness is to be obtained.¹³

The Commission made a series of recommendations covering the entire justice system, including, but not limited to, the following:

- (1) The Supreme Court should establish an implementation task force on racial bias in the legal profession to consider and implement recommendations suggested in the report, along with other methods to eradicate racial bias problems in the legal profession and courts;
- (2) The implementation task force should develop an anti-racism workshop curriculum to be implemented by the Ohio Judicial College, the Ohio State Bar Association, and the Ohio Continuing Legal Education Institute as an annual workshop offered to attorneys, judges, and courthouse personnel;
- (3) Research should be conducted to determine accurately the pattern of minority under-representation in juries in Ohio state courts;
- (4) The Ohio Supreme Court should require racial diversity education for jurors and for lawyers;
- (5) All groups and organizations involved in the criminal justice system should engage in a continuing process of study and discussion with the objective of identifying and eradicating race based attitudes and practices;
- (6) Statistical data as to race should be maintained in connection with sentences in all criminal cases;
- (7) Law enforcement agencies should maintain statistical data as to race in connection with all arrests;
- (8) The Supreme Court should engage a person or entity with the necessary skill and experience to design meaningful methodologies for the collection and compilation of relevant data as to race at all relevant stages of the criminal justice system, and to monitor the collection and compilation of the data;
- (9) The public defenders' offices should be expanded and upgraded to ensure equity between the prosecutorial function and defense function; and
- (10) A Sentencing Commission should be established, as recommended by the Governor's Committee on Prison and Jail Crowding, to research and review sentencing patterns in Ohio courts.¹⁴

¹³ *Id.* at 43-44 (footnotes omitted).

¹⁴ *Id.*

B. Racial Fairness Implementation Task Force

In 2000, the Ohio Supreme Court created the Racial Fairness Implementation Task Force (Task Force) to develop a plan to implement the recommendations of the Ohio Commission on Racial Fairness.¹⁵ The Task Force consisted of 14 judges, attorneys, and laypersons and spent eighteen months studying the Commission's recommendations and creating an implementation plan.¹⁶

In its 2002 final report, the Task Force noted the importance of addressing the fundamental and perceived fairness in the criminal justice system, recognizing that “[i]n order to maximize the effectiveness of the criminal justice system, it is vitally important that all participants continue to work on continuous quality improvement – to make improvements in both the fairness and the perception of fairness of the system.”¹⁷ The Task Force's plan to implement the Commission's recommendations included, but was not limited to, the following:

- (1) Two hours of anti-racism/diversity training should be added to the continuing legal education requirement for judges and attorneys for each reporting cycle;
- (2) The Supreme Court should facilitate research to determine whether and to what extent there is minority under-representation in Ohio state courts;
- (3) The Supreme Court of Ohio should offer continuing legal education courses for lawyers and judges with the aim of eradicating race-based attitudes and practices through the justice system;
- (4) The Supreme Court of Ohio should ensure that statistical data regarding race is maintained in connection with sentences in all criminal cases;
- (5) Law enforcement agencies should be encouraged to continue or begin to implement the collection of statistical data about race in connection with all arrests and stops; and
- (6) The Supreme Court of Ohio should engage a person/entity with the necessary skill and experience to design methodologies for collecting data on race at all relevant stages of the criminal justice system, and to monitor its compilation.¹⁸

To date, it does not appear that these recommendations have been implemented.¹⁹

C. Private Studies Which Discuss the Impact of Race in Capital Sentencing

1. Associated Press Study on Race and Geography in Capital Sentencing

¹⁵ RACIAL FAIRNESS ACTION PLAN, *supra* note 6.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The Asian Pacific American Bar Association currently is conducting a follow-up on the Action Plan to see what, if any, steps have been taken to implement the recommendations made in the Action Plan. See Letter from Sheena L. Little to Michaeline Carrig (July 16, 2007) (on file with author).

In a 2005 report, the Associated Press analyzed 1,936 capital indictments reported to the Ohio Supreme Court from October 1981 through 2002 and concluded that “Ohio’s death penalty has been inconsistently applied since it was enacted in 1981. Race, the extensive use of plea bargains and even where a crime has been committed all play a role in who is sentenced to death.”²⁰

The Associated Press concluded that:

- (1) Offenders facing a capital charge for killing a white person were two times more likely to be sentenced to death than if they had killed a black person. In fact, death sentences were handed down in 18% of cases in which the victims were white, but only 8.5% of cases in which the victims were black;
- (2) Nearly half of the capital cases ended with a plea bargain, including 131 cases in which the crime involved two or more victims and 25 cases with at least three victims; and
- (3) Eight percent of people charged with a capital crime were sentenced to death in Cuyahoga County, but 43% of those sentenced in Hamilton County received a death sentence.²¹

2. Ohio Public Defender Commission Study on Death Sentence Proportionality in Ohio

The Ohio Public Defender Commission commissioned a study in 1995 to determine whether the death penalty is applied proportionally throughout Ohio.²² As part of this study, the Ohio Public Defender Commission attempted to analyze the impact of race on the number of death row inmates, as compared to the number of aggravated murder indictments at both the state and county level. The study ultimately was unable to account for race because 92% of the indictments did not include the necessary data about the defendant’s race,²³ although it did measure the association of race and the probability of a death sentence. The study found that the death row per capita rates for black residents were 9.5 times that of white residents.²⁴ Due to the lack of racial information in the majority of abstracted indictments, the study was unable to draw any further conclusions as to why such a disparity existed.

3. American Bar Association Study of Racial and Geographic Bias in Capital Sentencing²⁵

²⁰ Andrew Welsh-Huggins, *Race, Geography Can Mean Difference Between Life, Death*, ASSOCIATED PRESS (May 7, 2005).

²¹ *Id.*

²² SUSAN E. WHITE, OHIO PUBLIC DEFENDER’S COMMISSION, DEATH SENTENCE PROPORTIONALITY IN OHIO: AN ANALYSIS OF INDICTMENTS FROM 1982-1994 (Dec. 27, 1995).

²³ *Id.* at 4.

²⁴ *Id.* at 10.

²⁵ *Racial and Geographic Disparities in Death Sentencing in Ohio, 1981-2000*, may be found in the Appendix to this Report, *infra*, at p. A.

A study looking at potential racial and geographic bias in Ohio's capital sentencing system was conducted as part of the ABA's Ohio Death Penalty Assessment Report. This study examined homicides in Ohio between 1981 and 2000 in order to identify potential racial and/or geographic factors that correlate with the decision to sentence defendants to death.

The study concluded that racial and geographic bias does exist in Ohio's capital system, finding that (1) those who kill Whites are 3.8 times more likely to receive a death sentence than those who kill Blacks and (2) the chances of a death sentence in Hamilton County are 2.7 times higher than in the rest of the state, 3.7 times higher than in Cuyahoga County, and 6.2 times higher than in Franklin County.

D. Collection of Data on Race and Ethnicity in Capital Cases

The State of Ohio requires the Ohio Attorney General to prepare annually a "capital case status report" which relates information about "all individuals who were sentenced to death pursuant to sections 2929.02 – 2929.04 or section 2929.06 of the Revised Code for an aggravated murder committed on or after October 19, 1981."²⁶ These reports include a summary of the facts, the state and federal procedural history, and the current state and federal court status of each case.²⁷ The annual capital case reports do not contain the race of individual death row inmates and victims, but do contain demographic information about the overall racial composition of the current death row inmates and their victims.²⁸

The Ohio Public Defender website also provides information about current and former death row inmates, including proportionality statistics, date of sentence, age, sex, and race of the defendant, race of the victim, number of death row residents by county, and the names of those executed under the 1981 death penalty law.²⁹ The website also provides capital indictment and disposition statistics from 2000 to 2005, including the total number of capital indictments for the year, number of capital indictments per county, and the number of trial and plea dispositions by county.³⁰

²⁶ OHIO REV. CODE § 109.97 (West 2007).

²⁷ *Id.*; see also, e.g., MARC DANN, OHIO ATTORNEY GENERAL, 2006 CAPITAL CRIMES ANNUAL REPORT: STATE AND FEDERAL CASES (Apr. 1, 2007), available at http://www.ag.state.oh.us/le/prosecuting/pubs/ann_rpt_capital_crimes2006.pdf (last visited Sept. 13, 2007).

²⁸ See *id.*

²⁹ See Office of the Ohio Public Defender, More Information on Ohio Death Row, available at http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (last visited Sept. 13, 2007).

³⁰ *Id.*

A. 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.

The State of Ohio has undertaken two initiatives designed to investigate and evaluate the impact of racial discrimination in its criminal justice system and/or develop strategies that strive to eliminate it: (1) the Ohio Commission on Racial Fairness; and (2) the Racial Fairness Implementation Task Force. Three private studies also have been conducted in the state of Ohio which researched whether the death penalty is proportionally applied throughout the state.³¹ These studies do not present explanations or recommendations, but they support the state studies' findings that there is racial disparity in the Ohio criminal justice system.

In 1993, the Ohio Supreme Court and the Ohio State Bar Association established the Commission on Racial Fairness (Commission) to "identify racial bias where it exists and propose methods for eliminating it from the legal profession and the justice system."³² In 1999, after an extensive review of the judicial system, the Commission issued its final report, making forty-five recommendations to help ensure that "all those who seek to use the [justice] system, or who are required to resort to it, will come away believing that they were afforded the guarantees that our constitutions and our fundamental law promise."³³ The recommendations focused on seven aspects of the judicial system: (1) public perceptions of fairness;³⁴ (2) judges' and attorneys' perceptions of racial bias;³⁵ (3) employment and appointment practices in the courts;³⁶ (4) jury issues;³⁷ (5) criminal justice and sentencing;³⁸ (6) law schools;³⁹ and (7) interpreter services.⁴⁰

The Commission gathered data by holding public hearings at 10 sites; surveying judges, attorneys, jurors, and law school deans; moderating focus groups of judges, attorneys, and law students; reviewing previous research; and conducting investigations into aspects of county level judicial systems. The Commission's findings included, but were not limited to:

- (1) [T]he [criminal justice] system does not always operate in a race-neutral fashion;⁴¹

³¹ See Welsh-Huggins, *supra* note 20; see also WHITE, *supra* note 22.

³² RACIAL FAIRNESS REPORT, *supra* note 5, at 1.

³³ *Id.* at 73.

³⁴ *Id.* at 6-9.

³⁵ *Id.* at 10-18.

³⁶ *Id.* at 19-29.

³⁷ *Id.* at 30-35.

³⁸ *Id.* at 36-55.

³⁹ *Id.* at 56-67.

⁴⁰ *Id.* at 68-72.

⁴¹ *Id.* at 52.

- (2) Minorities are being incarcerated at a much higher rate than their white counterparts;⁴²
- (3) A perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black;⁴³ and
- (4) Black males compose approximately five percent of the Ohio population, yet they compose 50 percent of death row inmates.⁴⁴

In the spring of 2000, the Ohio Supreme Court created the Racial Fairness Implementation Task Force (Task Force) to “devise a plan to implement the recommendations of the Ohio Commission on Racial Fairness.”⁴⁵ In 2002, the Task Force released its report to the Ohio Supreme Court, outlining specific proposals for each of the Commission’s recommendations.⁴⁶ The Task Force’s proposals included, but were not limited to:

- (1) Two hours of anti-racism/diversity training be added to the continuing legal education requirement for judges and attorneys for each reporting cycle;
- (2) The Supreme Court facilitate research to determine whether and to what extent there is minority under-representation in Ohio state courts;
- (3) The Supreme Court of Ohio offer continuing legal education courses for lawyers and judges with the aim of eradicating race-based attitudes and practices through the justice system;
- (4) The Supreme Court of Ohio will ensure that statistical data regarding race is maintained in connection with all criminal cases;
- (5) Law enforcement agencies should be encouraged to continue or implement the collection of statistical data about race in connection with all arrests and stops; and
- (6) The Supreme Court of Ohio should engage a person/entity with the necessary skill and experience to design methodologies for collecting data on race at all relevant stages of the criminal justice system, and to monitor its compilation.⁴⁷

It does not appear that the recommendations relevant to the death penalty included in the Racial Fairness Implementation Task Force *Action Plan* have been implemented.

While the State of Ohio has investigated and evaluated the impact of racial discrimination in its criminal justice system and developed strategies that strive to eliminate it, the State of Ohio has not implemented the vast majority of these strategies. The State of Ohio, therefore, is only in partial compliance with Recommendation #1.

⁴² *Id.*

⁴³ *Id.* at 38.

⁴⁴ *Id.* at 37.

⁴⁵ RACIAL FAIRNESS ACTION PLAN, *supra* note 6 (preface).

⁴⁶ *Id.*

⁴⁷ RACIAL FAIRNESS ACTION PLAN, *supra* note 6.

Based on this information, the Ohio Death Penalty Assessment Team recommends that the State of Ohio conduct and release a comprehensive study to determine the existence or non-existence of unacceptable disparities racial, socio-economic, geographic, or otherwise in its death penalty system and provide a mechanism for ongoing study of these factors.

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.

Between the offices of the Ohio Attorney General and the Ohio Public Defender, Ohio collects and maintains data on the race of the defendants and victims and the circumstances of the crime for all death row inmates.⁴⁸ The State of Ohio does not collect data about the nature and strength of the evidence for all potential capital cases, however, or about the aggravating and mitigating circumstances for either death row inmates or potential capital cases.

Notably, the state post-conviction statute raises the possibility of maintaining data about the defendant's race, gender, ethnic background, or religion:

If the supreme court adopts a rule requiring a court of common pleas to maintain information with regard to an offender's race, gender, ethnic background, or religion, the supporting evidence for the petition shall include, but shall not be limited to, a copy of that type of information relative to the petitioner's sentence and copies of that type of information relative to sentences that the same judge imposed upon other persons.⁴⁹

The Ohio Supreme Court has not adopted such a rule.

Based on this information, the State of Ohio is only in partial compliance with Recommendation #2.

C. Recommendation #3

⁴⁸ See OFFICE OF THE OHIO PUBLIC DEFENDER, DEATH ROW CURRENT RESIDENTS (May 2, 2007) [hereinafter DEATH ROW CURRENT RESIDENTS], available at http://opd.ohio.gov/dp/dp_residents.pdf (last visited Sept. 13, 2007); See also OFFICE OF THE OHIO ATTORNEY GENERAL, 2006 CAPITAL CRIMES ANNUAL REPORT: STATE AND FEDERAL CASES [hereinafter 2006 CAPITAL CRIMES ANNUAL REPORT], available at http://www.ag.state.oh.us/le/prosecuting/pubs/ann_rpt_capital_crimes2006.pdf (last visited Sept. 13, 2007).

⁴⁹ OHIO REV. CODE § 2953.21 (West 2007).

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.

To the best of our knowledge, the State of Ohio is not currently collecting or reviewing all studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty nor is it identifying and carrying out any additional studies that would help determine discriminatory impacts on capital cases.⁵⁰

The Commission on Racial Fairness did acknowledge, however, that “numerous studies have revealed race as a predominate factor in determining the application of the death penalty in this country, according to a report issued by the National Association of Criminal Defense Lawyers” and that:

One hundred seventy-five (175) people were the victims of those currently residing on Ohio’s death row. Of those 175 victims, 124 were Caucasian and 42 were African-American. The numbers speak for themselves. A perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black. The implication of race in this gross disparity is not simply explained away and demands thorough examination, analysis and study until a satisfactory explanation emerges which eliminates race as the cause for these widely divergent numbers.⁵¹

The State of Ohio, therefore, is not in compliance with Recommendation #3.

D. Recommendation #4

Where patterns of racial discrimination are found in any phase of the death penalty administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.

In 1999, the Ohio Commission on Racial Fairness concluded that “evidence does exist that...race plays a role in too many of the decisions made in Ohio’s criminal justice

⁵⁰ The Ohio Commission on Racial Fairness noted the “gross [racial] disparity” in the application of the death penalty in the state, but it did not analyze the causes of the disparity. RACIAL FAIRNESS REPORT, *supra* note 5, at 38. The Commission further stated that “this gross disparity . . . demands thorough examination, analysis and study until a satisfactory explanation emerges which eliminates race as the cause for these widely divergent numbers.” *Id.* A subsequent report on racial bias in the administration of the death penalty in Ohio conducted by the *Associated Press* has not encouraged further action by the State of Ohio to conduct its own report into the causes of the racial disparity. See Andrew Welsh-Huggins, *Death Penalty Unequal Study: Race, Geography can Make a Difference*, CINCINNATI ENQUIRER (Ohio), May 7, 2005.

⁵¹ RACIAL FAIRNESS REPORT, *supra* note 5, at 37-8 (footnotes omitted).

system.”⁵² Recognizing institutionalized bias or the appearance of bias in many areas of the Ohio justice system, the Commission specified forty-five recommendations to “mak[e] every reasonable effort to eradicate every factual basis for perceptions of unfairness.”⁵³

None of the State’s efforts, including those of the Commission and the Racial Fairness Implementation Task Force (Task Force), specifically studied the administration of the death penalty or recommended any remedial or preventative changes to alleviate perceived or actual racial and ethnic bias in death penalty proceedings. It did recommend myriad reforms, however, that are relevant to the criminal justice system as a whole.

A 2005 study conducted by the Associated Press that reviewed 1,936 indictments reported to the Ohio Supreme Court by counties with capital cases from October 1981 to 2000 has provided evidence that there is a serious racial disparity in the administration of the death penalty in Ohio.⁵⁴ The study found that individuals who killed Caucasians were twice as likely to receive the death penalty than those who killed African-Americans; the death penalty was given in 18 percent of cases with white victims compared to a rate of 8.5 percent of cases with African-American victims.⁵⁵ The study concluded that “[r]ace [among other factors]...play[s] a role in who is sentenced to death.”⁵⁶ The State of Ohio has not developed any remedial or prevention strategies in response to this investigation.

Because the State has failed to address racial bias or patterns of racial discrimination in the administration of the death penalty, the State of Ohio is not in compliance with Recommendation #4.

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 patterns. If such a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.

The State of Ohio has not adopted 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. It has, however, explicitly provided that a petitioner for post-conviction relief who was convicted of or plead guilty to a felony may include a claim that he/she did not receive equal protection under either the Ohio or the United

⁵² RACIAL FAIRNESS REPORT, *supra* note 5, at 52.

⁵³ *Id.* at 53.

⁵⁴ Welsh-Huggins, *supra* note 20.

⁵⁵ *Id.*

⁵⁶ *Id.*

States Constitution because the imposed sentence “was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence with regard to the petitioner’s race...[or] ethnic background....”⁵⁷

In addition, the State of Ohio does not permit defendants to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. For example, in *State v. Zuern*, the Ohio Supreme Court held that “[t]here can be no finding that the death penalty is imposed in a discriminatory fashion absent a demonstration of specific discriminatory intent.”⁵⁸

Therefore, the State of Ohio is not in compliance with Recommendation #5.

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 death penalty administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any State actor found to have acted on the basis of race in a capital case.

In 2002, the Racial Fairness Implementation Task Force’s Action Plan made a number of recommendations to incorporate training on racial and ethnic diversity into the criminal justice system. Those recommendations included that: (1) two hours of anti-racism/diversity training be added to the continuing legal education requirement for judges and attorneys for each reporting cycle; and (2) the Supreme Court of Ohio should offer continuing legal education courses for lawyers and judges with the aim of eradicating race-based attitudes and practices through the justice system.⁵⁹

Today, the Ohio Peace Officer Training Commission (Commission) regulates the basic training curriculum for prospective officers, each of whom must complete 558 hours of basic training, including 24 hours of training in Cultural Differences.⁶⁰

Lawyers in Ohio must receive 24 hours of approved continuing legal education (CLE) every two years,⁶¹ including sixty minutes of instruction related to the Code of Professional Responsibility and sixty minutes related to professionalism.⁶² Defense attorneys in capital cases also must have twelve hours of “specialized training, as approved by the [Committee on the Appointment of Counsel for Indigent Capital Cases], on subjects that will assist counsel in the defense of persons accused of capital crimes.”⁶³

⁵⁷ OHIO REV. CODE § 2953.21(A)(5) (West 2007).

⁵⁸ *State v. Zuern*, 512 N.E.2d 585 (Ohio 2002).

⁵⁹ RACIAL FAIRNESS ACTION PLAN, *supra* note 6.

⁶⁰ OHIO PEACE OFFICER TRAINING COMMISSION, BASIC TRAINING CURRICULUM (2003), *available at* http://www.ag.state.oh.us/le/training/pubs/requirements_options.pdf (last visited Sept. 13, 2007).

⁶¹ OHIO SUP. CT. RULES FOR THE GOV’T OF THE BAR OF OHIO X(3).

⁶² *Id.*

⁶³ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(A)(2)(c).

Racial and ethnic diversity training is not required as part of these obligations, but various approved training programs for capital counsel, annually sponsored by the Ohio Association of Criminal Defense Lawyers, the Ohio State Bar Association, and the Cuyahoga County Bar Association, have included presentations on such topics as “Race and Cultural Issues in Capital Cases” and “Race and Victim-Related Issues,” “Litigating the Effect of Racism: An Overview/Uncovering Racial Biases and Preconceptions During Voir Dire,” and “Litigating Issues of Racial Discrimination in Capital Cases After *McClesky v. Kemp*.”⁶⁴

Prosecutors are not required to attend any educational programming on race, although the Ohio Prosecuting Attorneys Association (OPAA) has sponsored training programs for its members on capital prosecutions in previous years that could include information on race, including a review of case law on death penalty issues, a review of the law and practical considerations in jury selection and at sentencing, and dealing with motions for new trial, appeal, post-conviction and habeas corpus.⁶⁵

Full-time, state court judges in the State of Ohio are required to complete and report 40 hours of Continuing Legal Education every two years, including: (1) at least 10 hours of CLE offered by the Judicial College of the Supreme Court of Ohio, and (2) at least two hours of instruction on judicial ethics and professionalism.⁶⁶ In addition, The Ohio Supreme Court requires any judge who was appointed or elected after January 1, 2007, to take the Ohio Judicial College’s Judicial Orientation course, unless the person already has taken the course.⁶⁷ The Judicial Orientation Program consists of four parts,⁶⁸ including a general and specific curriculum applicable to the jurisdictions of the attendees,⁶⁹ and a capital case seminar.⁷⁰

Furthermore, the Ohio Code of judicial conduct prohibits judges from performing judicial duties with bias or prejudice.⁷¹ Judges also must ensure that staff, court officials, and attorneys in their courtroom do not manifest bias or prejudice.⁷² Judges may not participate in extra-judicial activities that may impair the judge’s impartiality, including being a member in an organization that practices invidious discrimination on the basis of

⁶⁴ See Margery Koosed, Death Penalty Seminar Presentations Discussing Racial Issues 1995-present, (on file with author).

⁶⁵ See also Email Correspondence by Sarah Turberville with John Murphy, Executive Director, Ohio Prosecuting Attorneys Association (June 20, 2007).

⁶⁶ OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY IV(2).

⁶⁷ OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY IV(6)(A). There were no official rules regarding judicial orientation prior to January 1, 2007. See OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY IV.

⁶⁸ OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY IV(6)(B).

⁶⁹ OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY IV(6)(B)(1)-(2).

⁷⁰ OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY IV(6)(B)(3). This seminar must be completed by any trial judge in a court that has jurisdiction over capital cases and who has not previously completed the capital case seminar. *Id.* Trial judges reelected to the same judicial position must take this portion of the Judicial Orientation Program if the court has jurisdiction over capital cases and he/she has not yet completed the capital case seminar. OHIO SUP. CT. RULES FOR THE GOV’T OF THE JUDICIARY IV(6)(A).

⁷¹ OHIO CODE JUD. CONDUCT, Canon 3(B)(5).

⁷² OHIO CODE JUD. CONDUCT, Canon 3(B)(5)-(6).

race or national origin.⁷³ This includes refraining from making “any public comment that might reasonably be expected to affect [a case’s] outcome or impair its fairness.”⁷⁴

Although peace officers in Ohio receive some training on “cultural differences” and Continuing Legal Education programs may provide some training on racial and ethnic diversity, educational programs stressing that race should not be a factor in any aspect of death penalty administration are not required for judges, prosecutors, or defense attorneys.⁷⁵

Based on this information, the State of Ohio is only in partial compliance with Recommendation #6.

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*.

The State of Ohio does not require defense counsel to participate in training to identify and develop racial discrimination claims in capital cases or identify biased jurors during *voir dire*.

As mentioned previously, however, the State of Ohio requires specialized training for any attorney who represents an indigent defendant in a capital case. The Ohio Supreme Court Rule 20 of the Rules of Superintendence for the Courts of Ohio requires that all indigent defense counsel in capital cases have at least 12 hours of specialized training in capital defense, and complete a minimum of 12 hours of training in capital defense every two years thereafter.⁷⁶ To assist attorneys in completing this requirement, various approved training programs for capital counsel are sponsored annually by the Ohio Association of Criminal Defense Lawyers, the Ohio State Bar Association, and the Cuyahoga County Bar Association, and have included presentations on such topics as “Litigating the Effect of Racism: An Overview/Uncovering Racial Biases and Preconceptions During *Voir Dire*.”⁷⁷

The State of Ohio, therefore, is not in compliance with Recommendation #7.

H. Recommendation #8

Jurisdictions should require jury instructions that it is improper to consider any racial factors in their decision making and that they should report any evidence of racial discrimination in jury deliberations.

⁷³ OHIO CODE JUD. CONDUCT, Canon 4(B).

⁷⁴ OHIO CODE JUD. CONDUCT, Canon 3(B)(9).

⁷⁵ OHIO SUP. CT. RULES FOR THE GOV’T OF THE BAR OF OHIO R. X(3).

⁷⁶ OHIO SUP. CT. RULES FOR THE GOV’T OF THE BAR OF OHIO R. XX(7)(A)(1).

⁷⁷ See Margery Koosed, “Death Penalty Seminar Presentations Discussing Racial Issues 1995-Present,” (on file with author).

The Ohio Criminal Jury Instructions direct the jury only to consider the evidence and apply the law to render a verdict.⁷⁸ Although consideration of racial factors in the jury's deliberations should be prohibited by this jury instruction, there is no pattern jury instruction in Ohio specifically requiring judges to inform jurors that they may not consider racial factors in their decision-making and that jurors should report any evidence of racial discrimination in jury deliberations.

The State of Ohio, therefore, is not in compliance with Recommendation #8.

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 Ohio Code of Judicial Conduct requires that a judge recuse him/herself in any proceeding in which he/she "has a personal bias or prejudice concerning a party or a party's lawyers..."⁷⁹ However, the number of judges who have actually disqualified themselves due to racial bias or prejudice in Ohio is unknown. Consequently, we cannot assess whether the State of Ohio is in 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.

Although the post-conviction statute expressly provides that a petitioner for post-conviction relief who was convicted of or plead guilty to a felony may include a claim that he/she did not receive equal protection under either the Ohio or the United States Constitution because the imposed sentence "was part of a consistent pattern of disparity in sentencing by the judge who imposed the sentence with regard to the petitioner's race...[or] ethnic background..."⁸⁰ the State of Ohio does not make any exceptions to the general procedural rules for claims of racial discrimination in the imposition of the death penalty. Further, a movant who fails to raise such a claim in his/her initial motion for post-conviction relief is procedurally barred from raising it anytime after, except in a very limited set of circumstances.⁸¹ Similarly, claims challenging the racial composition of a grand jury, venire, and/or the convicting or sentencing jury, or racial statements by a prosecutor, are deemed procedurally barred unless properly preserved at trial and raised

⁷⁸ 4 OHIO CRIMINAL JURY INSTRUCTIONS 403.03.1.

⁷⁹ OHIO CODE OF JUD. CONDUCT, Canon 3(E)(1)(a).

⁸⁰ OHIO REV. CODE § 2953.21(A)(5) (West 2007).

⁸¹ OHIO REV. CODE § 2953.21(A) (West 2007).

on direct appeal.⁸² In order to overcome these procedural bars, the movant must assert a claim of ineffective assistance of counsel for failure to object to a trial court error that, if raised at trial, would have changed the outcome of the proceeding;⁸³ or allege that the error constituted “plain error.”⁸⁴

Accordingly, the State of Ohio fails to comply with Recommendation #10.

⁸² State v. Campbell, 2003 WL 22783857, *3 (Ohio Ct. App. 10th Dist. Nov. 25, 2003) (holding that a defendant who was represented by counsel is barred from raising an issue in a petition for post-conviction relief if defendant raised or could have raised the issue at trial or on direct appeal).

⁸³ State v. Hester, 341 N.E.2d 304 (1976).

⁸⁴ OHIO R. CRIM. P. 52(B).

CHAPTER THIRTEEN

MENTAL RETARDATION AND MENTAL ILLNESS

INTRODUCTION TO THE ISSUE

Mental Retardation

The ABA unconditionally opposes imposition of the death penalty on offenders with mental retardation. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held it unconstitutional to execute offenders with mental retardation.

This holding does not, however, guarantee that no one with mental retardation will be executed. The American Association on Intellectual and Developmental Disabilities (formerly the American Association on Mental Retardation) defines a person as mentally retarded if the person's IQ (general intellectual functioning) is in the lowest 2.5 percent of the population; if the individual is significantly limited in his/her conceptual, social, and practical adaptive skills; and if these limitations were present before the person reached the age of eighteen. Unfortunately, some states do not define mental retardation in accordance with this commonly accepted definition. Moreover, some states impose upper limits on IQ that are lower than the range (approximately 70-75 or below) that is commonly accepted in the field. In addition, lack of sufficient knowledge and resources often preclude 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 holding of *Atkins*, i.e., that people with mental retardation should not be executed, a reality.

Mental Illness

Although mental illness should be a mitigating factor in capital cases, juries often mistakenly treat it as an aggravating factor. States, in turn, often have failed to monitor or correct such unintended and unfair results.

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[/her] conduct or to conform his[/her] 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[/her] conduct."

Often, however, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness. Without proper instructions, most jurors are likely to view mental illness incorrectly as an aggravating factor; indeed, research indicates that jurors routinely consider the three statutory factors listed above as *aggravating*, rather than *mitigating*, factors in cases involving mental illness. One study found specifically that jurors' consideration of the factor, "extreme mental or emotional disturbance," in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a criminal defendant when it is considered in the context of determining "future dangerousness," often a criterion for imposing the death penalty. 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. In fact, only a small percentage of mentally ill individuals are dangerous, and most of them respond successfully to treatment. But the contrary perception unquestionably affects decisions in capital cases.

In addition, the medication of some mentally ill defendants in connection with their trials often leads them to appear to be lacking in emotion, including remorse. This, too, can lead them to receive capital punishment.

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. When the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability, tragic consequences often follow for the defendant.

I. FACTUAL DISCUSSION

A. *Mental Retardation*

The State of Ohio does not have a statute banning the execution of mentally retarded offenders, but, the State is bound by the United States Supreme Court decision in *Atkins v. Virginia*¹ which held that the execution of mentally retarded offenders is a violation of the United States Constitution's Eighth Amendment prohibition on cruel and unusual punishment.² In the year *Atkins* was decided, the Ohio Supreme Court confirmed, in *State v. Lott*, that prisoners sentenced to death prior to *Atkins* could file a petition for post-conviction relief to determine if the defendant was mentally retarded at the time of the offense and consequently could not be executed.³ *Lott* also set out the substantive standards and procedural guidelines to be followed by Ohio courts in determining whether a defendant charged with aggravated murder is mentally retarded and thus ineligible to receive a death sentence.⁴

1. Definition of Mental Retardation

In *Lott*, the Ohio Supreme Court declared that in the absence of a statutory framework to determine whether a capital defendant is mentally retarded, Ohio courts should use the clinical definitions of mental retardation cited with approval in *Atkins* to assess whether a capital defendant was mentally retarded at the time of the offense.⁵ Under *Lott*, these definitions, used by both the American Association on Intellectual and Developmental Disabilities (AAIDD, formerly the American Association of Mental Retardation) and the American Psychiatric Association, are “(1) significantly subaverage intellectual functioning[;] (2) significant limitations in two or more adaptive skills, such as communication, self-care and self direction[;] and (3) onset before the age of 18.”⁶

Lott notes that “while IQ tests are one of the many factors that need to be considered, they alone are not sufficient to make a final determination on this issue.”⁷ However, “there is a rebuttable presumption that the defendant is not mentally retarded if his or her IQ is above 70.”⁸ This presumption has been rebutted successfully in at least one case, despite the fact that the defendant previously tested between 70 and 79 on IQ tests administered while the defendant was under the age of eighteen.⁹

¹ *Atkins v. Virginia*, 536 U.S. 304 (2002).

² *Id.* at 306-307.

³ *State v. Lott*, 779 N.E.2d 1011, 1013-14 (Ohio 2002).

⁴ *Id.* at 1014-17.

⁵ *Id.* at 1014.

⁶ *Id.*; see also *Atkins*, 536 U.S. at 308, n.3. Additionally, the Ohio Department of Mental Retardation and Developmental Disabilities defines a “mentally retarded person” as “a person having significantly subaverage general intellectual functioning existing concurrently with deficiencies in adaptive behavior, manifested during the developmental period.” OHIO REV. CODE § 5123.01(O) (West 2007).

⁷ *Lott*, 779 N.E.2d at 1014.

⁸ *Id.*

⁹ See *State v. Gumm*, 864 N.E.2d 133, 139-40 (Ohio Ct. App. 1st Dist. 2006) (The defendant scored 73, 70, and 71 on IQ tests administered between 1974 and 1979, 79 on an IQ test administered in 1981, and 70, 67, and 61 on IQ tests administered in 1992 and 1994. The Court of Common Pleas “determined that [the

In 2002, AAIDD amended its definition of mental retardation to require a finding of significant adaptive behavior deficiencies. These include deficiencies in one of three categories of adaptive skills: (1) “conceptual,” which includes language, money concepts, self-direction, and the functional academic skills of reading and writing; (2) “social,” which includes interpersonal relationships, self-esteem, gullibility, naiveté, and avoiding victimization; and (3) “practical,” which includes work, self-care, health, and safety skills.¹⁰ At least one appellate court in Ohio has recognized that AAIDD’s definition of limitation in adaptive skills has expanded since *Atkins*, and affirmed a trial court’s finding that a capital defendant was mentally retarded based, in part, on a court-appointed psychologist’s testimony that the defendant exhibited significant deficiencies in adaptive behavior as defined under AAIDD’s amended definition.¹¹

Ohio courts also require that a capital defendant’s mental retardation have manifested itself before age eighteen, and in at least one instance found that a defendant could not be exempt from the death penalty because the defendant’s alleged mental impairments did not manifest before the age of eighteen and instead stemmed from an injury he sustained in his mid-twenties.¹²

2. Procedures for Raising and Considering Mental Retardation Claims

A determination of mental retardation may be made pre-trial,¹³ at trial,¹⁴ directly after the guilt phase of a capital trial,¹⁵ or in post-conviction proceedings.¹⁶ The decision as to whether a defendant was mentally retarded at the time of the offense rests with the trial court.¹⁷

a. Pretrial and Trial Determinations of Mental Retardation

While the Ohio Revised Code does not explicitly provide the mechanism by which a criminal defendant may raise the issue of mental retardation as a bar to execution, the

defendant’s] IQ scores raised the presumption that he was not mentally retarded. But the court found that [the defendant] had rebutted the presumption with evidence demonstrating significantly subaverage intellectual functioning and significant limitations in his social, self-direction, and functional-academics adaptive skills manifested before the age of 18.”). However, some capital defendants in Ohio with an I.Q. above 70 have been found not mentally retarded and therefore could be sentenced to death. *See, e.g., State v. Lynch*, 787 N.E.2d 1185, 1216-17 (Ohio 2003).

¹⁰ *Gumm*, 864 N.E.2d at 136-38; *see also* American Association of Intellectual and Developmental Disabilities, Definition of Mental Retardation and Frequently Asked Questions, *available at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Sept. 13, 2007).

¹¹ *Gumm*, 864 N.E.2d at 136-38.

¹² *State v. Thomas*, 779 N.E.2d 1017, 1038 (Ohio 2002).

¹³ *Lott*, 779 N.E.2d at 1016.

¹⁴ *Id.* at 1014.

¹⁵ *State v. Were*, 2005 WL 267671, *9 (Ohio Ct. App. 1st Dist. Feb. 4, 2005) (“After the jury found Were guilty of kidnapping and aggravated murder, the court held a hearing to determine whether Were was mentally retarded.”).

¹⁶ *Lott*, 779 N.E.2d at 1014-16.

¹⁷ *Id.* at 1015.

Lott decision provides the substantive standards and procedural guidelines courts should follow in determining whether a capital defendant is mentally retarded in the absence of a statutory framework.¹⁸ The *Lott* court specified that the standards and procedures for handling *Atkins* claims discussed in its decision apply to both post-conviction proceedings and cases currently pending trial.¹⁹ A defendant's mental retardation also must be examined if the defendant challenges his/her competency to stand trial.²⁰

i. Determination of Mental Retardation under *Lott*

It is not clear how a defendant may present a claim of mental retardation before or during the capital trial, although it appears that the defendant may present a pre-trial motion detailing the factual basis for the defendant's claim of mental retardation and the importance of holding a hearing where the defendant may prove his/her mental retardation.²¹ The trial court also may hold a hearing on the defendant's mental retardation following the guilt phase of the trial, but prior to sentencing.²²

The *Lott* decision requires that the trial court rely on professional evaluations of the defendant's mental status and appoint experts, if necessary, to determine whether a defendant is mentally retarded and ineligible for the death penalty.²³ Similarly, the Ohio Rev. Code requires that if "the court determines that the defendant is indigent and that investigative services, experts, or other services are reasonably necessary" for representation at trial of a defendant charged with a capital offense, the court must authorize the defendant's counsel to obtain the necessary services and order payment of the fees and expenses for these services.²⁴ The Ohio Court of Appeals also has held that a capital defendant "must be allowed access to the resources that might permit him to rebut [the presumption that the defendant does not have mental retardation because his I.Q. was over seventy]"²⁵ and the defendant must be afforded a "full and fair opportunity to litigate his[/her] claim of mental retardation as a complete bar" to a death sentence.²⁶

A capital defendant may present testimony of witnesses, including caregivers and clinical and forensic psychologists who have tested the defendant's I.Q., to testify as to whether the defendant was mentally retarded.²⁷

¹⁸ *Id.* at 1014-15.

¹⁹ *Id.* at 1016.

²⁰ See OHIO REV. CODE § 2945.371 (West 2007).

²¹ See Office of the Ohio Public Defender, Mental Retardation Motions, Defendant's Motion to Eliminate the Death Penalty as a Sentencing Option Due to His Status as a Person with Mental Retardation 1-2, available at http://www.opd.ohio.gov/Mental/MR_trialMtn.pdf (last visited Sept. 13, 2007).

²² See, e.g., *State v. Were*, 2005 WL 267671, *9 (Ohio Ct. App. 1st Dist. Feb. 4, 2005).

²³ *Lott*, 779 N.E.2d at 1015.

²⁴ OHIO REV. CODE § 2929.024 (West 2007); see also Telephone Interview by Halli Brownfield with Dennis Sipe, Counsel for Gary Hughbanks (August 31, 2005) (stating that counsel may make a pretrial request for expert evaluation of the defendant)

²⁵ *State v. Bays*, 824 N.E.2d 167, 170 (Ohio Ct. App. 2d Dist. 2005).

²⁶ *State v. Hughbanks*, 823 N.E.2d 544, 547 (Ohio Ct. App. 1st Dist. 2004).

²⁷ See, e.g., *State v. Gumm*, 864 N.E.2d 133, 137-38 (Ohio Ct. App. 1st Dist. 2006) (stating that defendant presented testimony of defendant's family members, special education teachers, and court-

There is a rebuttable presumption that the defendant is not mentally retarded if his I.Q. is above seventy²⁸ and the defendant bears the burden of establishing that he/she is mentally retarded by a preponderance of the evidence.²⁹ After hearing the testimony of the defendant's and State's witnesses, the trial court must set forth, in writing, its rationale for finding that the defendant is or is not mentally retarded.³⁰

ii. Determination of Mental Retardation via Competency Determination

A defendant also may raise the issue of mental retardation as a bar to execution via a challenge to his/her competency to stand trial or a plea of not guilty by reason of insanity.³¹ If the defendant raises the issue of his/her competency to stand trial, the court may order one or more evaluations of the defendant's present mental condition.³² If the examiner believes the defendant to be mentally retarded and subject to institutionalization, the court must order a second evaluation by a psychologist from the Department of Mental Retardation and Developmental Disabilities (Department of MR/DD).³³ After receiving the report from the Department of MR/DD's examiner, the court must hold a hearing on the issue of the defendant's competency to stand trial.³⁴

If (1) the defendant has been charged with a felony offense, (2) the court finds the defendant incompetent to stand trial, and (3) the court determines that the person is mentally retarded and subject to institutionalization, but that there is not a substantial probability that the defendant will become competent to stand trial within one year after treatment, the court must order the discharge of the defendant.³⁵ Alternatively, the prosecution, or the court *sua sponte*, may move to have the mentally retarded defendant civilly committed pursuant to Ohio law permitting judicial hospitalization³⁶ or involuntary institutionalization.³⁷

The court or prosecutor may file an affidavit in probate court for civil commitment of the defendant when the above conditions apply.³⁸ Alternatively, the court may retain jurisdiction over the defendant if it conducts a hearing and finds by clear and convincing evidence that (1) the defendant committed the offense with which the defendant is

appointed psychologist to prove defendant met *Lott* standard of mental retardation); *Were*, 2005 WL 267671, at *10-11.

²⁸ *Lott*, 779 N.E.2d at 1014.

²⁹ *Id.* at 1015-16.

³⁰ *Id.* at 1015.

³¹ OHIO REV. CODE § 2945.371(A), (G)(3)(b), (H) (West 2007).

³² OHIO REV. CODE § 2945.371(A) (West 2007).

³³ *See* OHIO REV. CODE § 2945.371(H) (West 2007).

³⁴ OHIO REV. CODE § 2945.37(C) (West 2007).

³⁵ OHIO REV. CODE § 2945.38(B)(2) (West 2007).

³⁶ *See* OHIO REV. CODE §§ 2945.39, 5122.11 (West 2007).

³⁷ OHIO REV. CODE § 2945.39(A); OHIO REV. CODE § 5123.71 (West 2007) (procedures for involuntary institutionalization).

³⁸ OHIO REV. CODE § 2945.39(A)(1) (West 2007).

charged; and (2) the defendant is a mentally retarded person subject to institutionalization by court order.³⁹

If a court commits a defendant pursuant to a hearing, the defendant will be committed until “final termination,” which means that:

- (1) The defendant no longer is a mentally retarded person subject to institutionalization by court order, as determined by the trial court;
- (2) The maximum prison term or term of imprisonment that the defendant or person could have received or, if the defendant had been convicted of the most serious offense with which the defendant is charged, has expired; or
- (3) The trial court has entered an order terminating the commitment because the person or defendant has regained competency to stand trial.⁴⁰

b. Post-Conviction Determinations of Mental Retardation

In *Lott*, the Ohio Supreme Court held that death-row inmates who had already filed a petition for post-conviction relief may raise their mental retardation claims in a successive petition for post-conviction relief.⁴¹ If the petition was submitted within 180 days of the *Lott* decision, the death-row inmate would bear a lower burden of proof than that required of successive or untimely post-conviction petitions under Ohio law.⁴² Death-row inmates who did not meet *Lott*'s 180-day deadline and capital defendants sentenced to death after *Lott* may raise the issue of their mental retardation as a bar to execution in an initial or successive post-conviction petition.⁴³

Whether a death-row inmate is mentally retarded is a disputed factual issue that must be resolved by the trial court.⁴⁴ *Lott* set out the legal standard of mental retardation that the defendant must meet and the procedural requirements to which criminal trial courts *and* post-conviction courts must adhere in determining whether a defendant was mentally retarded at the time of the offense.⁴⁵ In order to demonstrate mental retardation at the time of the offense, a death-row inmate must demonstrate that he/she exhibited “(1) significantly subaverage intellectual functioning[;] (2) significant limitations in two or more adaptive skills, such as communication, self-care and self direction[;] and (3) onset before the age of 18.”⁴⁶

i. Initial Post-Conviction Petitions

³⁹ OHIO REV. CODE § 2945.39(A)(2)(a), (b) (West 2007).

⁴⁰ OHIO REV. CODE § 2945.401 (J)(a)-(c) (West 2007).

⁴¹ *State v. Lott*, 779 N.E.2d 1011, 1014-15 (Ohio 2002).

⁴² *Id.* at 1016.

⁴³ *Id.* at 1016; OHIO REV. CODE §§ 2953.21, .23 (West 2007).

⁴⁴ *Lott*, 779 N.E.2d at 1014, 1015.

⁴⁵ *Id.* at 1014.

⁴⁶ *Id.*; *see also* *Atkins v. Virginia*, 536 U.S. 304, 308, n. 3 (2002); *see also supra* note 6 and accompanying text.

A death-row inmate sentenced after the *Lott* decision may raise a claim of mental retardation in an initial petition for post-conviction relief.⁴⁷ This petition generally must be filed within 180 days after the date on which the trial transcript is filed in the Ohio Supreme Court in the direct appeal of the defendant's capital conviction and death sentence.⁴⁸ To obtain relief, the death-row inmate must demonstrate that there was "such a denial or infringement of the person's rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States" with respect to the death sentence.⁴⁹

ii. Post-Conviction Petitions within 180 Days of the *Lott* Decision

Prior to *Atkins*, Ohio courts viewed evidence of mental retardation as a mitigating circumstance and not as a bar to execution.⁵⁰ In light of *Atkins*, the Ohio Supreme Court held that due process requires consideration of a petitioner's mental retardation claim before he/she is executed, regardless of whether the court previously considered evidence of mental retardation during mitigation.⁵¹ For defendants already under a sentence of death at the time of the *Lott* decision, the Ohio Supreme Court required that these individuals specifically raising an *Atkins* claim file their petition for post-conviction relief within 180 days of the *Lott* decision.⁵² The death-row inmate must file the petition with the court that imposed the death sentence.⁵³

Under *Lott*, an *Atkins* claim is considered "more akin to a first petition than a successive petition for post-conviction relief" and therefore requires a trial court to decide whether a petitioner is mentally retarded based only upon a preponderance of evidence.⁵⁴ In order for a court to proceed to a prompt hearing on the issue, the death-row inmate must demonstrate "substantive grounds for relief" in his/her post-conviction petition through the use of supporting affidavits and the files and records from the case.⁵⁵ While the appointment of experts in post-conviction cases generally is not required, *Lott* held that a trial court should "consider expert testimony, appointing experts if necessary."⁵⁶ The

⁴⁷ OHIO REV. CODE § 2953.21(A)(1)(a), (A)(3) (West 2007).

⁴⁸ OHIO REV. CODE § 2953.21(A)(2) (West 2007).

⁴⁹ OHIO REV. CODE § 2953.21(A)(1)(a), (A)(3) (West 2007).

⁵⁰ *State v. Evans*, 586 N.E.2d 1042, 1052 (Ohio 1992) (holding that while low intelligence is a proper subject for mitigation, there is no rule, statute, or case that holds that a person with an IQ of 64 cannot be executed).

⁵¹ *State v. Lott*, 779 N.E.2d 1011, 1015-16 (Ohio 2002).

⁵² *Id.* at 1015.

⁵³ OHIO REV. CODE § 2953.21(A)(1)(b) (West 2007).

⁵⁴ *Lott*, 779 N.E.2d at 1016. Ohio law permits a court to entertain a second or successive petition for post-conviction relief when the U.S. Supreme Court "recognized a new federal or state right that applies retroactively to persons in [a post-conviction petitioner's] situation, and the petition asserts a claim based on that right." OHIO REV. CODE § 2953.23(A)(1)(b) (West 2002).

⁵⁵ *State v. Carter*, 813 N.E.2d 78, 81-82 (Ohio Ct. App. 1st Dist. 2004) (citing OHIO REV. CODE ANN. § 2953.21(C) (2004)); *see, e.g.*, *State v. Lorraine*, 2005 WL 1208119, *2 (Ohio Ct. App. 11th Dist. May 5, 2005) (unpublished opinion) (holding that it was error for the post-conviction court to deny the petitioner an *Atkins* hearing when the petitioner included a record of the trial mitigation hearing and evidence relative to his education history, cognitive development, and IQ).

⁵⁶ *See State v. Waddy*, 2006 WL 1530117 (Ohio Ct. App. 10th Dist. June 6, 2006) (unpublished opinion) (citing *Lott*, 779 N.E.2d at 1015).

Ohio Court of Appeals also has held that a death-row inmate is entitled to discovery to develop his/her mental retardation claim, including the use of experts, if the post-conviction petition and its supporting evidentiary material demonstrate substantive grounds for relief.”⁵⁷

iii. Post-Conviction Petitions from Death-Row Inmates after the Expiration of 180 days from *Lott*; Untimely or Successive Post-Conviction Petitions

If a death-row inmate failed to file his/her petition for post-conviction relief within the 180-day time frame established under *Lott*, or if a capital defendant sentenced after *Lott* failed to raise his/her mental retardation in an initial petition for post-conviction relief or filed the initial petition in an untimely manner, he/she must satisfy the jurisdictional requirements for untimely and successive petitions for post-conviction relief.⁵⁸ This requires, in relevant part, that the defendant demonstrate:

- (1) That he/she was unavoidably prevented from discovery of the facts upon which he/she must rely to present the claim for relief, or, after the expiration of the time for filing the petition, the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner’s situation, and the petition asserts a claim based on that right;⁵⁹ and
- (2) By clear and convincing evidence that, but for constitutional error at trial, no reasonable fact-finder would have found the petitioner guilty of the offense of which the petitioner was convicted or found the petitioner eligible for the death sentence.⁶⁰

Once a death-row inmate has met the jurisdictional requirements permitting a court to entertain a successive or untimely post-conviction petition, the inmate must demonstrate that he/she meets the court’s definition of mental retardation as described in *Lott*.⁶¹

B. Mental Conditions Other Than Mental Retardation

A capital defendant may introduce evidence regarding his/her mental condition for an insanity defense.⁶² Ohio courts do not permit expert testimony about whether the defendant suffered from the partial defense of “diminished capacity” at the time of the offense.⁶³

1. Definition of Insanity

⁵⁷ *Carter*, 813 N.E.2d at 82.

⁵⁸ *Lott*, 779 N.E.2d at 1016.

⁵⁹ OHIO REV. CODE § 2953.23(A)(1)(a) (West 2007).

⁶⁰ OHIO REV. CODE § 2953.23(A)(1)(b) (West 2007).

⁶¹ *Lott*, 779 N.E.2d at 1015.

⁶² OHIO REV. CODE § 2901.01(A)(14) (West 2007).

⁶³ *State v. Wilcox*, 436 N.E.2d 523 (Ohio 1982).

The Ohio Code Revised Annotated states that a person is “not guilty by reason of insanity” if, at the time of the offense, “the person did not know, as a result of a severe mental disease or defect, the wrongfulness of the person’s acts.”⁶⁴ A defect or disease of the mind caused by the use of intoxicants, such as drugs, and resulting in insanity, is a defense to an offense, but, “voluntary intoxication, no matter how extreme, is not an insane condition.”⁶⁵ The Ohio Supreme Court also has clarified that “a behavior or personality disorder does not qualify as a mental disease or defect.”⁶⁶ And although previously permitted to constitute an insanity defense, proof that a person’s reason at the time of the commission of the offense was so impaired that the person did not have the ability to refrain from doing the person’s act(s) no longer constitutes a defense under Ohio law.⁶⁷

Additionally, under the “*Wilcox* Rule,” a capital defendant may present expert psychiatric evidence only to support an insanity defense, and is prohibited from introducing expert testimony or relying on a “diminished capacity” defense that he/she had impaired ability to form the specific mental state required of a crime.⁶⁸

2. Pre-Trial Proceedings

If the defendant enters a plea of not guilty by reason of insanity, the court may order one or more evaluations of the defendant’s mental condition at the time of the offense.⁶⁹ If the court orders more than one evaluation, the prosecution and defendant each may recommend to the court an examiner to perform one of the evaluations.⁷⁰ If the court does not appoint the examiner recommended by an indigent defendant, the defendant will be afforded funds to retain an expert at the State’s expense.⁷¹ Persons appointed as examiners must be paid “a reasonable amount for their services and expenses, as certified by the court.”⁷²

A defendant’s statements during an evaluation cannot be used against the defendant on the issue of guilt in any criminal proceeding⁷³ and the testimony of an examiner

⁶⁴ OHIO REV. CODE § 2901.01(A)(14) (West 2007).

⁶⁵ 4 OHIO CRIMINAL JURY INSTRUCTIONS 411.53.

⁶⁶ *State v. Richey*, 595 N.E.2d 915, 930-31 (Ohio 1992), *abrogated on other grounds*, *State v. McGuire*, 686 N.E.2d 1112 (Ohio 1997).

⁶⁷ OHIO REV. CODE § 2945.391 (West 2007); *see also* S.B. 24, 118th Gen. Assem., Reg. Sess. (Ohio 1990) (prohibiting defendant from relying on an insanity defense if he/she was so impaired that he/she did not have the ability to refrain from doing hihe/her acts).

⁶⁸ *State v. Wong*, 641 N.E.2d 1137, 1150 (Ohio Ct. App. 4th Dist. 1994) (citing *State v. Wilcox*, 436 N.E.2d 523 (Ohio 1982)); *see also* *State v. Cooley*, 544 N.E.2d 895 (Ohio 1989) (“Except in the mitigation phase of the trial, a defendant may not offer expert psychiatric testimony, unrelated to the insanity defense, to show that he lacked the mental capacity to form the specific mental state required for a particular crime or degree of crime.”) With Ohio’s now-narrowed insanity test, defendants are even more limited in their ability to present expert evidence at trial relating to their mental state at the time of the crime.

⁶⁹ OHIO REV. CODE § 2945.371(A) (West 2007).

⁷⁰ OHIO REV. CODE § 2945.371(B) (West 2007).

⁷¹ *Id.*

⁷² OHIO REV. CODE § 2945.371(K) (West 2007).

⁷³ However, the Ohio Supreme Court has held that a court-appointed psychologist’s testimony that the defendant admitted to him that he caused the death of the victim by tying up and strangling the victim was

appointed to evaluate the defendant does not preclude the prosecutor or defense counsel from calling other witnesses or presenting other evidence on insanity.⁷⁴

The examiner must provide the court with a written report following his/her examination of the defendant, which must include:

- (1) The examiner's findings;
- (2) The facts in reasonable detail on which the findings are based;
- (3) The examiner's findings as to whether the defendant, at the time of the offense charged, did know, as a result of severe mental disease or defect, the wrongfulness of the defendant's acts as charged.⁷⁵

The examiner must file his/her written report within thirty days after entry of the court order providing for the evaluation and must provide copies of the report to the prosecution and defense counsel.⁷⁶

3. Trial Proceedings

During the trial, the defendant must show by a preponderance of the evidence that he/she was insane at the time of the offense.⁷⁷ The Ohio Jury Instructions similarly instruct that the defendant must prove insanity "by the greater weight of the evidence."⁷⁸ To establish his/her insanity, the defendant may present his/her own mental health expert(s) to testify that he/she met the legal definition of insanity at the time of the offense.⁷⁹ Evidence also may consist of testimony by a court-appointed psychologist who may serve as a rebuttal expert witness for the prosecution.⁸⁰ The jury or three-judge panel must determine the weight to be given to the evidence presented to support and/or rebut an insanity defense.⁸¹

4. Post-Trial Actions Regarding an Individual Found Not Guilty by Reason of Insanity

If the defendant is found not guilty by reason of insanity, the trial court must conduct a hearing within ten days of the not guilty verdict to determine whether the person is a mentally ill person subject to hospitalization or a mentally retarded person subject to

admissible because it was "relevant to [the defendant's] capacity to know the wrongfulness of killing [the victim]" and that any possible prejudice of admission of the defendant's statement was alleviated by a jury instruction. *See State v. Hancock*, 840 N.E.2d 1032, 1045 (Ohio 2006).

⁷⁴ OHIO REV. CODE § 2945.371(J) (West 2007).

⁷⁵ OHIO REV. CODE § 2945.371(G)(1)-(4) (West 2007).

⁷⁶ OHIO REV. CODE § 2945.371(G) (West 2007).

⁷⁷ OHIO REV. CODE § 2901.05(A) (West 2007).

⁷⁸ 4 OHIO CRIMINAL JURY INSTRUCTIONS 411.51 (2006).

⁷⁹ *State v. Hancock*, 840 N.E.2d 1032, 1041 (Ohio 2006); *see also State v. Filiaggi*, 714 N.E.2d 867, 878 (Ohio 1999) (noting that the defense offered the testimony of one clinical psychologist and three psychiatrists, none of whom were qualified in the field of forensics).

⁸⁰ *Hancock*, 840 N.E.2d at 1041; *Filiaggi*, 714 N.E.2d at 878.

⁸¹ *State v. Thomas*, 434 N.E.2d 1356, 1357 (Ohio 1982).

institutionalization.⁸² A “mentally ill person subject to hospitalization” is a person who, because of his/her mental illness:

- (1) Represents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;
- (2) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness;
- (3) Represents a substantial and immediate risk of serious physical impairment or injury to self as manifested by evidence that the person is unable to provide for and is not providing for the person’s basic physical needs because of the person’s mental illness and the appropriate provision for those needs cannot be made immediately available in the community; or
- (4) Would benefit from treatment in a hospital for the person’s mental illness and is in need of such treatment as manifested by evidence of the behavior that creates grave and imminent risk to substantial rights of others or the person.⁸³

At this hearing, the person has the right to be represented by counsel, have an independent expert evaluation (provided at public expense if needed), subpoena witnesses and documents, present evidence, cross-examine witnesses, testify on their own behalf or not be compelled to testify, and obtain any medical or mental health records in the custody of the state.⁸⁴ The civil rules of procedure apply during the hearing and the court may consider “all relevant evidence, including...psychiatric, psychological, or medical testimony and reports, the acts constituting the offense in relation to which the person was found not guilty by reason of insanity, and any history of the person that is relevant to the person’s ability to conform to the law.”⁸⁵

If the court does not find by clear and convincing evidence that the defendant is a mentally ill person subject to hospitalization, it must discharge him/her.⁸⁶ If the court finds that the person is mentally ill and subject to hospitalization, the court must commit the person involuntarily to a hospital operated by the State or “another medical or psychiatric facility as appropriate.”⁸⁷ The court must order the least restrictive

⁸² OHIO REV. CODE § 2945.40(A), (B) (West 2007). Because a capital defendant’s mental retardation would likely have been litigated prior to or during trial pursuant to *Atkins* and *Lott*, or through a competency to stand trial determination, this Section will deal exclusively with persons subject to hospitalization due to mental illness. *See supra* notes 18 and 31 and accompanying text.

⁸³ *See* OHIO REV. CODE § 5122.01(B) (West 2007).

⁸⁴ OHIO REV. CODE § 2945.40(C) (West 2007).

⁸⁵ OHIO REV. CODE § 2945.40(D) (West 2007).

⁸⁶ OHIO REV. CODE § 2945.40(E) (West 2007).

⁸⁷ OHIO REV. CODE § 2945.40(F) (West 2007).

commitment alternative available, giving preference to protecting public safety in making this determination.⁸⁸

The hospital, program, or facility to which the person is admitted must report to the trial court in six months and, after the initial report is submitted, submit a written report every two years, as to whether the person remains mentally ill and subject to hospitalization.⁸⁹ Upon receipt of a report, the court must hold a hearing on the continued commitment of the person or any changes in the commitment of the person.⁹⁰ A person must be committed until “final termination,” which means that (a) the person is no longer a mentally ill person subject to hospitalization by court order; or (b) the maximum prison term or term of imprisonment that the person could have received in relation to the offense for which the defendant was found not guilty by reason of insanity has expired.⁹¹

C. Presentation of Mental Condition at Sentencing

The Ohio Revised Code requires that mental illness be considered as a mitigating circumstance during the penalty phase of a capital trial.⁹² The court, the trial jury, or the three-judge panel must, in weighing the aggravating circumstances, consider “whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender’s conduct or to conform the offender’s conduct to the requirements of the law.”⁹³ The defendant also must be given great latitude in the presentation of evidence of statutory mitigating factors as well as any other factors in mitigation of the death penalty.⁹⁴ If a capital defendant’s mental mitigation does not rise to the level to meet a statutory mitigating factor, the defendant may present evidence of psychological and mental problems under section 2929.04(B)(7) of the Ohio Rev. Code, which permits the defendant to introduce “any other factors that are relevant to the issue of whether the offender should be sentenced to death.”⁹⁵

Ohio law requires the court to appoint expert and/or investigative services whenever such services are “reasonably necessary for proper representation of a defendant” charged with a capital crime,” including at the sentencing hearing.⁹⁶ The Ohio Supreme Court Rules

⁸⁸ OHIO REV. CODE § 2945.40(F) (West 2007).

⁸⁹ OHIO REV. CODE § 2945.401(C) (West 2007).

⁹⁰ *Id.*

⁹¹ OHIO REV. CODE § 2945.401(J)(a)-(c) (West 2007).

⁹² OHIO REV. CODE § 2929.04(B)(3) (West 2007).

⁹³ *Id.*

⁹⁴ OHIO REV. CODE § 2929.03(D)(1); § 2929.04(C) (West 2007).

⁹⁵ OHIO REV. CODE § 2929.03(B)(7) (West 2007); *see also* State v. Bays, 716 N.E.2d 1126, 1142-43 (Ohio 1999) (holding that it was error for the jury to consider whether the defendant’s mental retardation would constitute a mental disease or defect under section 2929.04(B)(3) of the Ohio Revised Code and not consider it a mitigating factor under the catch-all of section 2929.04(B)(7) of the Ohio Revised Code).

⁹⁶ OHIO REV. CODE § 2929.024 (West 2007). “Reasonable necessity” exists “when the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his/[her] defense, and (2) that denial of the requested expert assistance would result in an unfair trial.” State v. Mason, 694 N.E.2d 932, 944 (Ohio 1998) (citing State v. Jenkins, 473 N.E.2d 264, 292 (Ohio 1984)). The Ohio Supreme Court has also

of Superintendence also require that the court provide a capital defendant with resources, such as an investigator, mitigation specialists, mental health professionals, and other forensic experts and support services who are “reasonably necessary or appropriate” for counsel to prepare for and present an adequate defense at every stage of the proceedings.⁹⁷

Additionally, if a defendant is convicted of a capital offense, the court, upon request of the defendant, may order a pre-sentence investigation and mental examination of the defendant.⁹⁸ A pre-sentence investigation report must include the circumstances of the offense, criminal record, social history, and present condition of the defendant, and a physical and mental examination of the defendant if the investigating officer considers it advisable.⁹⁹ Copies of a pre-sentence report initiated by the defendant must be furnished to the court, the trial jury, and the prosecution.¹⁰⁰

The prosecution must prove beyond a reasonable doubt that the aggravating circumstances of which the defendant was found guilty are sufficient to outweigh the mitigating factors in opposition to the death penalty.¹⁰¹ The trier of fact must then decide whether to sentence the defendant to death, after considering any pre-sentence investigation report, the aggravating circumstances proven beyond a reasonable doubt, and any mitigating factors.¹⁰²

D. “Insane” to Be Executed

The Ohio Supreme Court may order the suspension of an inmate’s execution if a hearing judge finds a death-row inmate to be “insane.”¹⁰³ An inmate is “insane” when the “convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict.”¹⁰⁴

1. Determination of Death-Row Inmate’s “Insanity”

Whenever a death-row inmate appears to be insane and, as a result, cannot be executed, the warden or the sheriff having custody of the death-row inmate, the inmate’s counsel, or a psychiatrist or psychologist who has examined the inmate must give notice to the judge who imposed the death sentence that the inmate appears to be “insane.”¹⁰⁵

required that a defendant show that he/she had no alternative means of fulfilling the same functions that the requested expert would provide. *State v. Tibbetts*, 749 N.E.2d 226, 241 (Ohio 2001).

⁹⁷ See OHIO REV. CODE § 2929.024 (West 2007); RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(D).

⁹⁸ OHIO REV. CODE § 2929.03(D)(1) (West 2007).

⁹⁹ OHIO REV. CODE § 2951.03(A)(1) (West 2007).

¹⁰⁰ OHIO REV. CODE § 2929.03(D)(1) (West 2007).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ OHIO REV. CODE §§ 2949.28(B)(4), .29(B) (West 2007).

¹⁰⁴ OHIO REV. CODE § 2949.28(A) (West 2007); see also *State v. Scott*, 748 N.E.2d 11, 12 (Ohio 2001).

¹⁰⁵ OHIO REV. CODE § 2949.28(B)(1) (West 2007). If a three-judge panel imposed a death-sentence on the inmate, then one of three judges must be notified that the inmate appears insane to be executed. *Id.*

Upon receiving notice of the inmate's apparent insanity, including any supporting information, information submitted by the prosecuting attorney, and the record in the case (including previous hearings and orders), the judge must determine "whether probable cause exists to believe that the convict is insane."¹⁰⁶ If the trial court is able to make this determination without a hearing, no hearing is required.¹⁰⁷ If the trial court finds that probable cause exists to believe the death-row inmate is "insane," the trial court must hold a hearing on the issue.¹⁰⁸

If probable cause exists as to the death-row inmate's insanity to be executed, the trial court must give notice to the prosecuting attorney in the case, as well as to the inmate's counsel, that an inquiry into the inmate's sanity will take place.¹⁰⁹ If the death-row inmate does not have counsel, counsel must be appointed to represent the inmate in the inquiry and the court also may appoint one or more psychiatrists or psychologists who are *not* employed by the Department of Rehabilitation and Correction, to examine the inmate.¹¹⁰ A psychiatrist or psychologist must conduct a thorough examination of the inmate and submit a report to the trial court within thirty days of the examiner's appointment in the inquiry.¹¹¹ The examiner also must be given access to any psychiatric or psychological reports previously submitted to the court, including any reports on the inmate's competence to stand trial or plea of not guilty by reason on insanity.¹¹²

At the inquiry, the Ohio Rules of Evidence apply and the prosecuting attorney, the inmate, and the inmate's counsel may produce, examine, and cross-examine witnesses.¹¹³ The death-row inmate must demonstrate that he/she is insane to be executed by a preponderance of the evidence.¹¹⁴

2. Restoration of Competency

If the convict is not found insane, the execution will take place at the time previously appointed.¹¹⁵ If the inmate is found to be insane and if it is authorized by the Ohio Supreme Court, the trial judge will continue any stay of execution previously issued order treatment of the defendant.¹¹⁶ At any time thereafter, the court may conduct, or on motion of the prosecuting attorney, the court *must* conduct, a hearing on the death-row

¹⁰⁶ OHIO REV. CODE § 2949.28(B)(2) (West 2007).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ OHIO REV. CODE § 2949.28(B)(3) (West 2007). The inquiry may take place at the inmate's place of confinement. *Id.*

¹¹⁰ OHIO REV. CODE § 2949.28(B)(3) (West 2007).

¹¹¹ OHIO REV. CODE § 2949.28(C) (West 2007).

¹¹² *Id.*

¹¹³ OHIO REV. CODE § 2949.29(A), (D) (West 2007).

¹¹⁴ OHIO REV. CODE § 2949.29(C) (West 2007).

¹¹⁵ OHIO REV. CODE § 2949.29(A) (West 2007). If the time set for execution has elapsed, then the judge conducting the inquiry, if authorized by the Ohio Supreme Court, must appoint a time for execution to be effective fifteen days from the date of the entry of the judge's finding in the inquiry. *Id.*

¹¹⁶ OHIO REV. CODE § 2949.29(B) (West 2007).

inmate's insanity to be executed pursuant to the provisions above.¹¹⁷ One or more psychiatrists or psychologists may be appointed to re-examine the inmate and submit a report to the trial court.¹¹⁸ If the court finds that the inmate is no longer insane to be executed and the time previously appointed for execution has not passed, the death-row inmate will be executed at the previously appointed time.¹¹⁹ If the inmate is no longer insane to be executed and the time previously set for execution has elapsed, the judge who conducted the hearing, if authorized by Supreme Court, will appoint a new time for the inmate's execution fifteen days from the date of the judge's final findings at the hearing.¹²⁰

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *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).¹²¹ 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 American Association on Intellectual and Developmental Disabilities (AAIDD)¹²² defines mental retardation as “a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.”¹²³

The State of Ohio does not have a statute banning the execution of mentally retarded offenders, but following the United States Supreme Court decision in *Atkins v. Virginia*,¹²⁴ the Ohio Supreme Court confirmed, in *State v. Lott*, that Ohio courts should use the clinical definitions of mental retardation cited with approval in *Atkins* to assess whether a capital defendant was mentally retarded at the time of the offense.¹²⁵ The *Lott* definition comports with that of the AAIDD and the American Psychiatric Association, stating that mental retardation consists of “(1) significantly subaverage intellectual functioning[;] (2) significant limitations in two or more adaptive skills, such as communication, self-care and self-direction[;] and (3) onset before the age of 18.”¹²⁶

Under the AAIDD definition of mental retardation, an individual must have an impairment in general intellectual functioning that places him/her in the lowest category of the general population. IQ scores alone are not precise enough to identify the upper boundary of mental retardation and while experts generally agree that mental retardation includes everyone with an IQ score of 70 or below, the definition also includes some

¹²¹ The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD) on Jan. 1, 2007. See American Association on Intellectual and Developmental Disabilities, Results of the Vote on the Name Change, available at http://www.aamr.org/About_AAMR/name.shtml (last visited Sept. 13, 2007).

¹²² The American Association on Intellectual and Developmental Disabilities promotes sound research, effective practices, and universal human rights for people with intellectual and developmental disabilities. See American Association on Intellectual and Developmental Disabilities, AAIDD’s Principles, available at http://www.aamr.org/About_AAMR/mission_statement.shtml (last visited Sept. 13, 2007).

¹²³ American Association on Intellectual and Developmental Disabilities, Definition of Mental Retardation, available at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Sept. 13, 2007).

¹²⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹²⁵ *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002).

¹²⁶ *Lott*, 779 N.E.2d at 1014; see also *Atkins*, 536 U.S. at 308, n. 3.

individuals with IQ scores in the low to mid-70s.¹²⁷ The AAIDD states that “since the standard error of measurement on most IQ tests is approximately 5, the ceiling may go up to 75.”¹²⁸ Consequently, no state should impose an IQ maximum lower than 75.¹²⁹

Under *Lott*, “IQ tests are one of the many factors that need to be considered” to determine if a capital defendant is mentally retarded, but “[IQ scores] alone are not sufficient to make a final determination on this issue.”¹³⁰ While Ohio does not institute an IQ maximum in order for a capital defendant to be found mentally retarded, *Lott* holds that there is a rebuttable presumption that a defendant is not mentally retarded if his/her IQ is above 70.¹³¹ However, Ohio courts have come to varying conclusions with regard to a capital defendant’s subaverage intellectual functioning in determining whether or not a capital defendant is mentally retarded. In one case, the Ohio Court of Appeals found that a death-row inmate was mentally retarded at the time of the offense although the inmate achieved varying IQ scores as high as 79 on IQ tests administered to the inmate in his youth.¹³² However, the same Ohio Court of Appeals found that a defendant who

¹²⁷ See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, at 7 (2002) (unpublished manuscript), available at <http://www.deathpenaltyinfo.org/MREllisLeg.pdf> (last visited Sept. 13, 2007). Ellis notes that “relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation.” *Id.* at 7 n.18; see also American Association on Intellectual and Developmental Disabilities, *Definition of Mental Retardation*, available at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Sept. 13, 2007) (noting that “[a]n obtained IQ score must always be considered in light of its standard error of measurement,” thus potentially making the IQ ceiling for mental retardation rise to 75. However, “an IQ score is only one aspect in determining if a person has mental retardation.”); AMERICAN ASSOCIATION OF MENTAL RETARDATION, *MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT* 5 (Ruth Luckasson ed., 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.”); AMERICAN ASSOCIATION 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 an IQ of 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.”); AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 41 (4th ed. 2000) (“Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.”).

¹²⁸ American Association on Intellectual and Developmental Disabilities, *Definition of Mental Retardation*, available at http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Sept. 13, 2007).

¹²⁹ This fact is reflected in *Atkins v. Virginia*, where the Court noted that “an IQ between 70 and 75” is “typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.” *Atkins*, 536 U.S. at 309 n.5.

¹³⁰ *Lott*, 779 N.E.2d at 1014.

¹³¹ *Id.*

¹³² See *State v. Gumm*, 864 N.E.2d 133, 136 (Ohio Ct. App. 1st Dist. 2006). However, some capital defendants in Ohio with an I.Q. slightly above 70 have been found not mentally retarded and therefore could be sentenced to death. See, e.g., *State v. Lynch*, 2006 WL 2788504 (Ohio Ct. App. 1st Dist. Sept. 29, 2006). In *Lynch*, a death-row inmate’s IQ was 72, creating a rebuttable presumption that the defendant was not mentally retarded. *Id.* at *1. After hearing testimony from the defense expert witness to support a finding that the defendant was mentally retarded and testimony from the State’s expert that the defendant

demonstrated an IQ of 69 on IQ tests administered before the age of eighteen was not mentally retarded and thus could be sentenced to death.¹³³ Another Ohio Court of Appeals has found that a capital defendant who exhibited an IQ score between 52 and 57 was not mentally retarded.¹³⁴

The AAIDD also requires that mental retardation be manifested during the developmental period, which generally is defined as up until the age of eighteen.¹³⁵ This does not mean that an individual must have been IQ tested with scores in the mentally retarded range during the developmental period, but that there must have been manifestations of mental disability, which at an early age generally materialize as problems in the area of adaptive functioning.¹³⁶ The age of onset requirement is used to distinguish mental retardation from other forms of mental disability that can occur later in life, such as traumatic brain injury or dementia.¹³⁷

Ohio courts have determined whether a capital defendant's mental retardation manifested during the developmental period by examining the defendant's IQ score achieved prior to age eighteen and not by examining whether the capital defendant exhibited deficits in adaptive behavior during the developmental period. For example, in *State v. Stallings*, an Ohio Court of Appeals denied a petition for post-conviction relief and found that a death-row inmate was not mentally retarded because the death-row inmate's IQ ranged from 70 to 82 before the age of eighteen; the court did not examine whether the petitioner exhibited deficits in adaptive behavior prior to the age of eighteen.¹³⁸ However, the court did note that "[n]either party contests that the trial court accurately determined that [the petitioner] established that he *currently* has significantly subaverage intellectual functioning and significant limitations in two or more adaptive skills."¹³⁹

While *Lott* appears to require trial courts to rely on expert opinions in order decide whether a capital defendant is mentally retarded, ("the trial court should rely on professional evaluations of [a petitioner's] mental status, and consider expert testimony, appointing experts if necessary in deciding this matter"), at least one Ohio Court of Appeals has disregarded expert testimony as to the defendant's mental retardation in

was not mentally retarded, the court held that the defendant had not shown, by a preponderance of the evidence, that he was mentally retarded. *Id.* at *3.

¹³³ *State v. Were*, 2005 WL 267671, at *9-11 (Ohio Ct. App. 1st Dist. Feb. 4, 2005). In *Were*, the Court of Appeals affirmed the trial court finding that the defendant did not meet the definition of mental retardation, despite the defendant's IQ of 69, which the trial court held was depressed due to cultural bias in IQ tests. *Id.*

¹³⁴ See *State v. White*, 2005 WL 3556634, *2, *7 (Ohio Ct. App. 9th Dist. Dec. 30, 2005), *accepted for review*, *State v. White*, 848 N.E.2d 857 (Ohio 2006); see also *infra* note 140 and accompanying text.

¹³⁵ American Association on Intellectual and Developmental Disabilities, Definition of Mental Retardation, *available at* http://www.aamr.org/Policies/faq_mental_retardation.shtml (last visited Sept. 13, 2007).

¹³⁶ Ellis, *supra* note 127, at 9 n.27.

¹³⁷ *Id.* at 9.

¹³⁸ *State v. Stallings*, 2004 WL 1932869, at *2-4 (Ohio Ct. App. 9th Dist. Sept. 1, 2004). The court also found that the expert witnesses who testified at the post-conviction hearing did not conclusively confirm that the defendant was mentally retarded. *Id.*

¹³⁹ *Stallings*, 2004 WL 1932869, at *2 (emphasis added).

favor of a lay witness's observation that a defendant did not suffer from deficits in adaptive behavior.¹⁴⁰ In *State v. White*, both the State and defense experts testified that the defendant exhibited deficits in adaptive behavior based on numerous interviews with the defendant's relatives and with the defendant himself; the defendant also exhibited an uncontested IQ score between 52 and 57.¹⁴¹ However, the post-conviction court concluded that the defendant did not exhibit deficits in adaptive behavior based on lay testimony of the defendant's ex-girlfriend, who also was a close friend of the murder victim,¹⁴² that the defendant could perform day-to-day tasks.¹⁴³ The *White* Court held that while the science of psychiatry may inform legal determinations, a court may not rely so extensively on mental condition testimony so that the ultimate decision as to whether the defendant is mentally retarded is decided by the experts.¹⁴⁴

Because Ohio courts have found that defendants with an IQ score below seventy are not mentally retarded, Ohio courts determine whether mental retardation manifested during the developmental period via IQ scores alone, and at least one Ohio court has disregarded expert opinion entirely to determine if the defendant was mentally retarded, the State of Ohio is only in partial compliance with Recommendation #1.

B. Recommendation #2

All actors in the criminal justice system, including police, court officers, prosecutors, defense attorneys, prosecutors, judges, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.

The State of Ohio requires that law enforcement officers receive specialized training on recognizing mental retardation in individuals within the criminal justice system, however, mandatory training on recognition of mental retardation in capital defendants and death-row inmates is not required of any other actors in the Ohio criminal justice system.

The Ohio Attorney General requires that all law enforcement in Ohio complete 558 hours of basic training¹⁴⁵ and that peace officers in Ohio complete up to 24 hours of continuing

¹⁴⁰ *State v. White*, 2005 WL 3556634, *8 (Ohio Ct. App. 9th Dist. Dec. 30, 2005) (citing *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002)).

¹⁴¹ *White*, 2005 WL 3556634, at *4-7.

¹⁴² The lay witness, Heather Kawczk, was a former co-worker and close friend of the murder victim; the murder victim was also the mother of Kawczk's boyfriend at the time of the offense. See *State v. White*, 709 N.E.2d 140, 145-146 (Ohio 1999).

¹⁴³ *White*, 2005 WL 3556634, at *4-7. These tasks included, among others, driving a car, having a conversation on the phone, and buying clothes for witness's children. *Id.* at *5. Defendant also fathered children with other women and "was clever enough" to hide a romantic relationship with another woman while he was dating the witness. *Id.* The court also appointed one additional expert who testified that the defendant should not have been interviewed in order for any expert to determine if the defendant exhibited deficits in adaptive behavior. *Id.*

¹⁴⁴ *Id.* at *6.

¹⁴⁵ OFFICE OF THE OHIO ATTORNEY GENERAL, OHIO PEACE OFFICER BASIC TRAINING, REQUIREMENTS AND OPTIONS FOR ATTENDING, available at http://www.ag.state.oh.us/le/training/pubs/requirements_options.pdf (last visited Sept. 13, 2007). The Ohio Peace Officer Training Commission recommends rules to the Attorney General with respect to, among

professional training each year.¹⁴⁶ Sixteen hours of basic training consists of instruction on “dealing with the special needs population,” which includes interaction with mentally retarded and mentally ill individuals.¹⁴⁷ In the training materials, officers are informed of the causes and symptoms of mental retardation as well as how to respond to a person whom the officer believes to be mentally retarded.¹⁴⁸

Some correctional personnel also are trained to detect mental retardation in death-row inmates. As soon as possible after an inmate is admitted to an Ohio Department of Rehabilitation and Correction (DOC) facility, the bureau of examination and classification within that facility must conduct a sociological, psychological, and psychiatric examination of the inmate.¹⁴⁹ If the admittee is determined to be mentally retarded, the bureau must notify the sentencing court of this determination.¹⁵⁰ The DOC also must “provide for the needs of mentally ill and mentally retarded persons who are incarcerated in state correctional institutions” and may designate a special unit within an institution for the custody, care, special training, treatment, and rehabilitation of mentally ill or mentally retarded inmates.¹⁵¹ Additionally, training for all correctional officers is four weeks, eight hours of which must include training on mental health of inmates, including mental retardation and mental illness.¹⁵² Correctional officers also must complete forty hours of continuing education each year, which may include training on mental health issues.¹⁵³

The Ohio Office of Criminal Justice Services (OCJS) issued a pamphlet in 2004 for law enforcement, prosecutors, and first responders on how to recognize and interact with mentally retarded and developmentally disabled individuals.¹⁵⁴ The pamphlet defines mental retardation, details how to recognize if a person is mentally retarded, and offers suggestions for law enforcement interaction with mentally retarded individuals.¹⁵⁵ However, this guide was given only by request to police departments, probation

others, the minimum courses of study and attendance requirements for peace officer training for all law enforcement in Ohio. OHIO REV. CODE § 109.73(A) (West 2007). The Attorney General then promulgates the rules and requirements for peace officer training. OHIO REV. CODE § 109.74 (West 2007).

¹⁴⁶ OFFICE OF THE OHIO ATTORNEY GENERAL, OHIO PEACE OFFICER TRAINING COMMISSION, CONTINUING PROFESSIONAL TRAINING “FACTSHEET” 2, *available at* http://www.ag.state.oh.us/le/training/pubs/CPT_factsheet.pdf (last visited Sept. 13, 2007).

¹⁴⁷ Email to Christine Waring from Lt. Michael Woody, Ret., Former Director of Training for the Akron Police Dep’t (Apr. 25, 2007) (on file with author); *see also* Ohio Peace Officer Training Commission, Curriculum for Handling the Special Needs Population, at 1 (on file with author).

¹⁴⁸ Ohio Peace Officer Training Commission, Curriculum for Handling the Special Needs Population, at 25, 68 (on file with author).

¹⁴⁹ OHIO REV. CODE § 5120.11 (West 2007).

¹⁵⁰ *Id.*

¹⁵¹ OHIO REV. CODE § 5120.051 (West 2007).

¹⁵² Telephone interview by Christine Waring with Elizabeth Kreger, Pre-service Training Center, Corrections Training Academy at the Ohio Department of Rehabilitation and Correction, Orient, Ohio (Apr. 30, 2007).

¹⁵³ *Id.*

¹⁵⁴ Telephone interview by Christine Waring with Lisa Shoaf, Director, Statistical Analysis Center of the Office of Criminal Justice Services in Columbus, Ohio (Apr. 20, 2007).

¹⁵⁵ OHIO OFFICE OF CRIMINAL JUSTICE SERVICES, MR/DD AND THE JUSTICE SYSTEM, *available at* <http://www.ocjs.state.oh.us/Publications/MRDD%208.28.pdf> (last visited Sept. 13, 2007).

departments, correctional facilities, and others -- it is not mandatory that any agency keep this information available.¹⁵⁶

Finally, through the Ohio Supreme Court's "Advisory Committee on the Mentally Ill in the Courts,"¹⁵⁷ some counties in Ohio have created a mental health docket in which court personnel, prosecutors, and defense attorneys are specially trained in the recognition and effects of mental retardation and mental illness on the criminal justice system.¹⁵⁸ However, we were unable to determine if local jurisdictions assign mentally retarded capital defendants to a mental health docket.¹⁵⁹

Because training in recognizing mental retardation is required for law enforcement and within correctional facilities, the State of Ohio is in partial compliance with Recommendation #2.

C. 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 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.

Ohio does not have any policies in place to ensure that capital defendants who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. Instead, capital defendants who may be mentally retarded are assigned counsel under the same rules and fee structure as every other capital defendant.

Training of Capital Defense Attorneys on Mental Retardation

¹⁵⁶ Email correspondence to Christine Waring from Lisa Shoaf, Director, Statistical Analysis Center of the Office of Criminal Justice Services in Columbus, Ohio (Apr. 27, 2007).

¹⁵⁷ Telephone interview by Christine Waring with Kevin Lottes, Supreme Court of Ohio Specialized Dockets in Columbus, Ohio (Apr. 20, 2007).

¹⁵⁸ *Id.*

¹⁵⁹ While the Cuyahoga County Local Court Rules do not appear to prohibit a mentally retarded capital defendant from assignment to the mental health docket, there is no indication that a capital defendant has ever been assigned to a mental health docket because of his/her mental retardation or mental illness. *See* Telephone interview by Christine Waring with Chris Hill, Bailiff for Judge Timothy McMonagle, Chair of the Mental Health Docket in Cuyahoga County, Ohio (Apr. 27, 2007). However, some jurisdictions entirely prohibit persons charged with serious offenses from assignment to the mental health docket. *See, e.g.,* HAMILTON COUNTY MUNICIPAL CT. ADMIN. R. 7.12 (permitting only those facing misdemeanor charges to be assigned to the mental health docket).

The Ohio Supreme Court Rules of Superintendence mandate that attorneys representing capital defendants at trial and on appeal meet prerequisite experience and training requirements.¹⁶⁰ Any attorney appointed to represent a capital defendant at trial must “have specialized training, as approved by the [Committee on the Appointment of Counsel for Indigent Capital Cases], on subjects that will assist counsel in the defense of persons accused of capital crimes” two years before making application to represent a capital defendant.¹⁶¹ This specialized training must include, among others, training in the use of experts in the trial and penalty phase, as well as investigation, preparation, and presentation of mitigation.¹⁶² The curriculum for an approved death penalty appeal seminar must include, among other things, specialized training in reviewing the record for unique death penalty issues, preservation and presentation of constitutional issues, unique aspects of death penalty practice in local, state, and federal courts, and the procedure and practice in collateral litigation, extraordinary remedies, state post-conviction litigation, and federal habeas corpus litigation.¹⁶³ While training in these areas may include recognition and litigation of a capital defendant’s mental retardation, such training is not required.

Since 1995, various approved training programs for capital counsel, annually sponsored by the Ohio Association of Criminal Defense Lawyers, the Ohio State Bar Association, and the Cuyahoga County Bar Association, have included one-hour presentations on such topics as “Mental Retardation: *Atkins v. Virginia*, *State v. Lott*: Litigating Your Client’s Cognitive Deficiencies at Trial, on Appeal, and in Postconviction” and “Utilizing *Atkins* and Mental Retardation Claims to Prohibit Imposition of the Death Penalty, and as Mitigation.”¹⁶⁴ Additionally, as described in Recommendation #2,¹⁶⁵ in the counties that have instituted mental health courts, a capital defense attorney who has been trained to represent defendants assigned to the mental health docket will be specially trained in the recognition and effects of mental retardation and mental illness in criminal defendants.¹⁶⁶

Sufficient Funds and Resources to Detect and Prove Mental Capacities of Capital Defendants

Ohio counties provide varying degrees of reimbursement for expert assistance in capital cases and impose pleading requirements in order for a defendant to demonstrate that he/she should be entitled to expert assistance during his/her trial. The Ohio Revised

¹⁶⁰ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II) (delineating requirements for lead trial counsel and co-counsel, as well as appellate counsel representing capital defendants).

¹⁶¹ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(II)(A)(2)(c).

¹⁶² RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(A)(2)(d), (e).

¹⁶³ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(VI)(B)(2)(c),(g), (i).

¹⁶⁴ See Margery Koosed, “Death Penalty Seminar Sessions Discussing Mental Health Issues 1995-present” (on file with author).

¹⁶⁵ See *supra* note 157 and accompanying text.

¹⁶⁶ Telephone interview by Christine Waring with Kevin Lottes, Supreme Court of Ohio Specialized Dockets in Columbus, Ohio (Apr. 20, 2007); see also, e.g., CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(I)(A)(4).

Code requires that if “the court determines that the defendant is indigent and that investigative services, experts, or other services are reasonably necessary” for representation at trial of a defendant charged with a capital offense, the court must authorize the defendant’s counsel to obtain the necessary services and order payment of the fees and expenses for these services.¹⁶⁷ Additionally, the Ohio Supreme Court Rules of Superintendence for the Courts of Ohio provide that whenever counsel is appointed for the defendant, the appointing court must:

provide appointed counsel, as required by Ohio law or the federal Constitution, federal statutes, and professional standards, with the investigator, mitigation specialists, mental health professional, and other forensic experts and other support services reasonably necessary or appropriate for counsel to prepare for and present an adequate defense at every stage of the proceedings, including, but not limited to, determinations relevant to competency to stand trial, a not guilty by reason of insanity plea, cross-examination of expert witnesses called by the prosecution, disposition following conviction, and preparation for and presentation of mitigating evidence in the sentencing phase of trial.¹⁶⁸

In order to demonstrate that the requested services are “reasonably necessary,” the capital defendant must make a particularized showing¹⁶⁹ (1) of a reasonable probability that the requested expert would aid in his/her defense, and (2) that denial of the requested expert assistance would result in an unfair trial.¹⁷⁰ The Ohio Supreme Court also has required that a defendant show that there was no alternative means of fulfilling the same functions that the requested expert would provide.¹⁷¹ It is within the “sound discretion” of the trial court to decide whether to grant funds for the defendant’s expert and investigative assistance.¹⁷²

Notably, the Ohio Supreme Court has held that trial courts and post-conviction courts should rely on professional evaluations to determine if a capital defendant or death-row inmate is mentally retarded and therefore cannot be subject to the death penalty.¹⁷³ An Ohio Court of Appeals also has held that a capital defendant “must be allowed access to the resources that might permit him to rebut [the presumption that his I.Q. was over seventy]”¹⁷⁴ and the defendant must be afforded a “full and fair opportunity to litigate his[her] claim of mental retardation as a complete bar” to a death sentence.¹⁷⁵ During

¹⁶⁷ OHIO REV. CODE § 2929.024 (West 2007); *see also* Telephone Interview by Halli Brownfield with Dennis Sipe, counsel for Gary Hughbanks (Aug. 31, 2005) (stating that counsel may make a pretrial request for expert evaluation of the defendant).

¹⁶⁸ RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(D).

¹⁶⁹ A “particularized showing” requires the defendant to show more than the “mere possibility” of assistance from an expert. *State v. Mason*, 694 N.E.2d 932, 943 (Ohio 1998).

¹⁷⁰ *Id.* at 944 (citing *Little v. Armontrout*, 835 F.2d 1240 (8th Cir. 1987)).

¹⁷¹ *State v. Tibbetts*, 749 N.E.2d 226, 241 (Ohio 2001).

¹⁷² *Mason*, 694 N.E.2d at 944.

¹⁷³ *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002).

¹⁷⁴ *State v. Bays*, 824 N.E.2d 167, 171-72 (Ohio Ct. App. 2d Dist. 2005).

¹⁷⁵ *State v. Hughbanks*, 823 N.E.2d 544, 547 (Ohio Ct. App. 1st Dist. 2004).

post-conviction proceedings, experts and funds should be provided if the petitioner has demonstrated substantive grounds for relief based on *Atkins*, regardless of whether the defendant raised the issue of mental retardation as mitigation at the penalty phase of the original trial.¹⁷⁶

Ohio counties have promulgated varying requirements to obtain expert and investigative services and provide disparate funding levels for such services. If a county has promulgated rules on the reimbursement of such fees and the appointing court has approved the expenses, the Ohio Public Defender will provide reimbursement for up to fifty percent of expenses “reasonably related and necessary to the defense of an indigent client.”¹⁷⁷

Montgomery County, for example, specifically allows reimbursement for additional expenses incurred in the course of representation of a capital defendant, which may include experts to detect and prove the mental capacities of capital defendants.¹⁷⁸ Montgomery County permits reimbursement for “reasonable expenses associated with providing representation” of a capital defendant subject to approval of the court.¹⁷⁹ These expenses include hourly rates of \$50 per hour of out-of-court work and \$60 per hour of in-court work for special research and writing, field investigation, and other activities approved in advance by the court.¹⁸⁰ An Ohio Court of Appeals has held that a trial court may not reduce the amount of compensation approved for investigatory services performed on behalf of a capital defendant without a hearing on the matter.¹⁸¹ Additionally, in at least one instance, Montgomery County has approved payment of \$8,401.50 for expert fees, representing psychiatric services rendered at a rate of \$270 per hour on behalf of a capital defendant.¹⁸²

Other counties place particularly onerous requirements on assigned counsel seeking investigatory and/or expert services for a capital defendant. In Cuyahoga County, “it is intended that counsel assigned to represent indigent defendants shall themselves investigate cases to which they have been assigned.”¹⁸³ Counsel must receive leave of

¹⁷⁶ See *State v. Carter*, 813 N.E.2d 78, 82 (Ohio Ct. App. 1st Dist. 2004); see also *Bays*, 824 N.E.2d at 171 (noting the difference between expert testimony for mitigation purposes and expert testimony offered for *Atkins* purposes; finding that the trial court abused its discretion in denying an indigent defendant’s request for funds to specifically address his *Atkins* claim). However, a capital defendant is generally prohibited from presenting expert testimony during post-conviction proceedings to challenge incompetency finding made at trial. See *supra* note 158 and accompanying text.

¹⁷⁷ OFFICE OF THE OHIO PUBLIC DEFENDER, STATE MAXIMUM FEE SCHEDULE FOR APPOINTED COUNSEL REIMBURSEMENT 7, available at http://opd.ohio.gov/reimb/rm_std.pdf (last visited Sept. 13, 2007).

¹⁷⁸ MONTGOMERY COUNTY COMMON PLEAS CT. LOCAL R. 3.11(III).

¹⁷⁹ MONTGOMERY COUNTY COMMON PLEAS CT. LOCAL R. 3.11(III)(A)(5)(a).

¹⁸⁰ MONTGOMERY COUNTY COMMON PLEAS CT. LOCAL R. 3.11(III)(A)(2), app. J.

¹⁸¹ *State v. Whitfield*, 854 N.E.2d 562, 564-65 (Ohio Ct. App. 2d Dist. 2006). In *Whitfield*, the Court of Appeals held that while the trial court has broad discretion in determining the amount approved for investigatory services rendered on behalf of a capital defendant, the court cannot arbitrarily reduce the amount it had approved for investigatory services from \$15,497.67 to \$7,500 without a hearing. *Id.*

¹⁸² *Id.*

¹⁸³ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(E).

court to employ an investigator.¹⁸⁴ Counsel must file an application for use of an investigator in writing at least thirty days before trial setting forth, in detail, the “basic reason for the need for such request and the approximate amount that would be incurred if the request was granted,” as well as verification that the investigator is licensed by the State of Ohio as a private investigator under a Class A or Class B license.¹⁸⁵ Compensation paid to an investigator may not exceed \$25 per hour, and may not exceed \$500.00 in total fees, or in “extraordinary cases,” may not exceed a \$1000.00 in total fees.¹⁸⁶

While there is no statutory cap on expert fees in Cuyahoga County capital cases, a trial judge may order a cap on such fees in an individual case.¹⁸⁷ Hamilton County compensates “specialists in mental diseases to examine the mental condition of the accused” at the rate of \$125 per hour for the examination and testimony of the specialist, not to exceed \$625 in total fees; however, additional compensation may be provided at the discretion of the court.¹⁸⁸ Hamilton County also will reimburse expenses for services provided by investigators on behalf of a capital defendant, subject to approval of the trial court.¹⁸⁹

Additionally, courts in Cuyahoga County will not approve payment for “any expert or specialist relating to psychological, mitigation or similar services. . .” unless appointed counsel provides, with specificity:

- (1) The name of the individual sought to be appointed, and his/her professional qualifications or credentials demonstrated by an attached resume or curriculum vitae;
- (2) The services sought to be provided including, but not limited to, research, investigation, testimony and/or consultation;
- (3) The hourly rate to be charged by such individual for each service and the estimated number of hours;
- (4) Any additional expense anticipated in connection with such services; and
- (5) The total projected expense anticipated for each individual.¹⁹⁰

Appointed counsel may, however, make such request for a mental health expert *ex parte* or under seal with prior permission for the trial court.¹⁹¹

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*; Section 3949.03 of the Ohio Revised Code sets out the requirements to be licensed as a private investigator in the State of Ohio. OHIO REV. CODE § 3949.03 (West 2007).

¹⁸⁶ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(E).

¹⁸⁷ Interview by Sarah Turberville with Mary Kay Ellis, Assigned Counsel Coordinator, Cuyahoga County Court of Common Pleas in Cleveland, Ohio (May 9, 2007).

¹⁸⁸ HAMILTON COUNTY COMMON PLEAS CT. LOCAL R. 20(D).

¹⁸⁹ *See* Telephone Interview by Sarah Turberville with Louis Stigary, Public Defender for Hamilton County (Apr. 20, 2007) (on file with author).

¹⁹⁰ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(E).

¹⁹¹ *Id.*

Because training on recognition and implications of mental retardation are not required of capital counsel, and because some Ohio counties place burdensome requirements on counsel's ability to secure investigative and expert assistance, the State of Ohio is not in compliance with Recommendation #3.

D. Recommendation #4

For cases commencing after the United States Supreme Court's decision in *Atkins v. Virginia*¹⁹² 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.

The Ohio Supreme Court permits capital defendants to raise a claim of mental retardation as a bar to execution prior to or at trial, although the State does not require that a defendant raise and adjudicate the issue of his/her mental retardation prior to trial.¹⁹³ Accordingly, the State of Ohio is in compliance with Recommendation #4.

E. Recommendation #5

The burden of disproving mental retardation should be placed on the prosecution, where the defense has presented a substantial showing that the defendant may have mental retardation. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.

When a capital defendant raises his/her mental retardation as a bar to execution at trial, the Ohio Supreme Court requires the defendant to show, by a preponderance of the evidence, that he/she was mentally retarded at the time of the offense.¹⁹⁴ If the defendant raises the issue of his/her mental retardation during post-conviction proceedings, he/she must prove his/her mental retardation by clear and convincing evidence.¹⁹⁵ Therefore, the State of Ohio is in compliance with Recommendation #5.

F. Recommendation #6

¹⁹² 536 U.S. 304 (2002).

¹⁹³ *State v. Lott*, 779 N.E.2d 1011, 1014 (Ohio 2002); *see also* Telephone interview by Halli Brownfield with Dennis Sipe, Counsel for Gary Hughbanks (Aug. 31, 2005) (on file with author). Mr. Sipe confirmed that the defendant's request for a forensic psychologist to examine the defendant prior to an *Atkins* hearing was granted pre-trial. *Id.* Also, we are aware of one case where a defendant charged with aggravated murder with rape specifications argued, pretrial, that he should not face the death penalty because he was mentally retarded. Telephone Interview by Phyllis L. Crocker with Warren McClennan, Cuyahoga County Public Defender (Mar. 29, 2005). Judge Sutula of the Cuyahoga County Court of Common Pleas found Antwan Williams mentally retarded and dismissed the specifications. *Id.*

¹⁹⁴ *Lott*, 779 N.E.2d at 1015. However, if the defendant's IQ is above seventy, there is a rebuttable presumption that the defendant is not mentally retarded. *Id.* at 1014.

¹⁹⁵ *Id.* at 1016; *see also* OHIO REV. CODE §§ 2953.21, .23 (West 2007).

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.

The State of Ohio trains law enforcement on the effects that an individual's mental retardation will have on his/her ability to withstand police questioning. Additionally, the State has published materials indicating that a mentally retarded suspect may have difficulty in understanding his/her *Miranda* rights and the implications of a *Miranda* waiver. Nonetheless, the State of Ohio has not adopted any laws, rules, or procedures requiring that special steps be taken to ensure that mentally retarded offenders are sufficiently protected during investigations.

Police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Ohio certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)¹⁹⁶ are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on interviews and interrogations.¹⁹⁷ The CALEA further requires a written directive for assuring compliance with all applicable constitutional requirements pertaining to interviews, interrogations and access to counsel.¹⁹⁸ Although written directives produced in an effort to comply with the CALEA standards may include procedures designed to ensure that the *Miranda* rights of mentally retarded individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, we were unable to assess the extent to which law enforcement agencies across the State have adopted any such procedures.

As described in Recommendation #2, the Ohio Attorney General requires that all law enforcement in Ohio complete 558 hours of basic training¹⁹⁹ which consists of, among other requirements, four hours on the legal aspects of interviews and interrogations and

¹⁹⁶ Sixty-four police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Ohio have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies (CALEA). See CALEA Online, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Sept. 13, 2007) (use second search function, designating "U.S.," "Ohio," and "Law Enforcement Accreditation" as search criteria); see also CALEA Online, About CALEA, available at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Sept. 13, 2007) (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 (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)).

¹⁹⁷ COMMISSION ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standard 42.2.1).

¹⁹⁸ *Id.* at 1-3 (Standard 1.2.3).

¹⁹⁹ OFFICE OF THE OHIO ATTORNEY GENERAL, OHIO PEACE OFFICER BASIC TRAINING, REQUIREMENTS AND OPTIONS FOR ATTENDING, available at http://www.ag.state.oh.us/le/training/pubs/requirements_options.pdf (last visited Sept. 13, 2007).

four hours on interview and interrogation techniques.²⁰⁰ Sixteen hours of training consists of instruction on “dealing with the special needs population,” which inform officers of the special considerations that should be taken into account when dealing with a mentally retarded suspect.²⁰¹ This includes the information that mentally retarded individuals are more likely to be “scapegoated,” i.e. “set up by others and do things that they would not otherwise do,” and that mentally retarded persons may be eager to please, easily influenced by law enforcement, and say what the mentally retarded individual believes the officer wants to hear, “which may or may not be the truth.”²⁰²

Additionally, the Ohio Office of Criminal Justice Services publishes a pamphlet entitled “*Mental Retardation and Developmental Disabilities: A Guide for Law Enforcement, Prosecutors, and First Responders*,” which has been given by request to police departments, probation offices, and correctional facilities, and explains common traits among mentally retarded persons, including:

- (1) A desire to please authority figures;
- (2) Unable to understand the *Miranda* warning and quick to waive rights contained therein;
- (3) Watching for clues from interrogators in an effort to give a response the individual believes will please the questioner and without understanding that he/she is admitting guilt;
- (4) A tendency to easily follow others and may commit crimes under the domination of a “friend” who does not have a disability;
- (5) Quick to take blame and may plead guilty to crimes they did not commit in an attempt to make their accusers like them; and
- (6) Lack of understanding of court proceedings.²⁰³

While some law enforcement departments received this pamphlet in addition to receiving mandatory training on mental retardation and its effects, a review of case law in Ohio reveals that the practices described therein may not always be adhered to in Ohio. For example, in *State v. Hill*,²⁰⁴ police did not take care to have a mentally retarded, illiterate defendant sign his first statement to the police, the defendant was interrogated by a police officer who was a relative of the defendant’s family and who had previously physically disciplined the defendant when he was younger, the defendant testified that the detective kicked him in order to get the defendant to “start talking,” and during interrogation, the police convinced the defendant that another suspect would blame the defendant for the

²⁰⁰ *Id.*

²⁰¹ Email to Christine Waring from Lt. Michael Woody, Ret., Former Director of Training for the Akron Police Dep’t (Apr. 25, 2007) (on file with author); *see also* Ohio Peace Officer Training Commission, Curriculum for Handling the Special Needs Population, at 1 (on file with author).

²⁰² *Id.* at 25, 68 (on file with author).

²⁰³ *See* OHIO OFFICE OF CRIMINAL JUSTICE SERVICES, MR/DD AND THE JUSTICE SYSTEM, available at <http://www.ocjs.state.oh.us/Publications/MRDD%208.28.pdf> (last visited Sept. 13, 2007).

²⁰⁴ 595 N.E.2d 884 (Ohio 1992).

murder.²⁰⁵ Under these circumstances, the Ohio Supreme Court held that “we do not find that the interrogation tactics used by the police, even in light of the defendant’s mental capacity, rendered the statements involuntary, or that the officers improperly induced the defendant to make incriminating statements.”²⁰⁶

However, in at least one case, an Ohio Court of Appeals found that a mentally retarded suspect did not knowingly and voluntarily waive his *Miranda* rights upon examination of evidence produced at trial showing that the defendant had an IQ score of sixty-five and that the arresting police officers testified that the defendant appeared “a little slow.”²⁰⁷ The court held that “[l]aw enforcement officers questioning suspects they know to be ‘slow’ must take extra precautions to ensure that any waiver of rights is done knowingly and with full awareness both of the nature of the right being waived and of the consequences of the decision to abandon it.”²⁰⁸

The above practices of law enforcement during interrogation of mentally retarded suspects are especially disconcerting in light of Ohio law enforcement’s recognition that a mentally retarded person is more likely to give responses that he/she believes an officer wants to hear, which may or may not be truthful, and at least one Court of Appeals’ admonition that law enforcement must take extra precaution when questioning suspects officers know to be “slow.”

Although law enforcement training entities recognize that mentally retarded suspects are not as able to understand and waive *Miranda* rights, and after such a waiver, may give inaccurate or false statements, law enforcement officers in Ohio are not required to ensure that the *Miranda* rights of mentally retarded suspects are sufficiently protected or that false, coerced, or garbled confessions are not used. Therefore, the State of Ohio 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 mentally retarded persons are protected against "waivers" that are the product of their mental disability.

²⁰⁵ State v. Hill, 595 N.E.2d 884, 890-91 (Ohio 1992); see also State v. Lynch, 787 N.E.2d 1185, 1200-01 (Ohio 2003) (finding that mentally retarded defendant’s confession was knowing, intelligent, and voluntary, despite use of deception by police to get defendant to the police station and over five hour interrogation of the defendant prior to confession); State v. Eley, 1995 WL 758808, *9-10 (Ohio Ct. App. 7th Dist. 1995) (holding that defendant’s drug abuse over the two days prior to his arrest and his low score (twelfth percentile) on the “WECHSLER Adult Intelligence Test” did not present sufficient evidence of police coercion to warrant suppression of the defendant’s confession).

²⁰⁶ Hill, 595 N.E.2d at 891; see also State v. Williams, 2003 WL 22805741, *4 (Ohio Ct. App. 8th Dist. Nov. 26, 2003) (unreported opinion) (“While appellant’s low I.Q. may have saved him from the death penalty, it did not impair him to the point that he was unable to make a knowing, voluntary, and intelligent statement to the police”).

²⁰⁷ State v. Rossiter, 623 N.E.2d 645, 649 (Ohio Ct. App. 4th Dist. 1993).

²⁰⁸ Id. at 650.

Courts can protect against waivers of rights, such as the right to counsel and to present mitigation, by holding a hearing (either *sua sponte* or upon the request of one of the parties) to determine whether the defendant's mental disability affects his/her ability to make a knowing and voluntary waiver and by rejecting any waivers that are the product of the defendant's mental disability.

In order for a capital defendant to waive his/her right to counsel, Ohio courts must, at a minimum, conduct some level of inquiry to determine whether the defendant is making a knowing and voluntary waiver. The defendant must be fully advised of his/her right to assigned counsel and any waiver of counsel must be made knowingly, intelligently, and voluntarily.²⁰⁹ A waiver of counsel also must be made in open court and recorded and for serious offenses, such as aggravated murder, the waiver must be in writing.²¹⁰ The fact that a defendant may tell the court that he/she is informed of a constitutional right to counsel and desires to waive that right does not end the trial court's responsibility.²¹¹ To be valid, such waiver must be made:

“with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.”²¹²

Some Ohio Courts of Appeals have held that a waiver of counsel actually involves a two-part analysis, requiring the court first to determine whether the defendant is *competent* to waive counsel before it makes certain that such a waiver is knowing, intelligent, and voluntary.²¹³ However, it does not appear that most trial courts in Ohio inquire into the defendant's competency to waive counsel. Additionally, at least one Ohio Court of Appeals has held that the trial court has a duty to protect the defendant from his own incapacity to represent himself, including appointing counsel over the protestations of the defendant if necessary, when “there is an indication...that the obstructive tactics of [the *pro se*] defendant may be the result of mental capacity rather than intelligent design.”²¹⁴

Similarly, a defendant may waive his/her right to a trial by jury prior to the commencement of the trial if such waiver is made knowingly, intelligently and voluntarily, in writing, and after the defendant has had the opportunity to consult with

²⁰⁹ OHIO R. CRIM. P. 44(A).

²¹⁰ OHIO R. CRIM. P. 44(C).

²¹¹ *State v. Gibson*, 345 N.E.2d 399, 406 (1976).

²¹² *Id.* at 406 (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 723 (1948)). The defendant must fully understand the advantages that counsel can provide, the practical effect of relinquishing the right to counsel, as well as be informed of the standards to which he/she must comply in conducting his/her own defense, such as the rules of evidence and the rules of criminal procedure. *Id.* at 405-06.

²¹³ *See State v. Watson*, 724 N.E.2d 469, 472-73 (Ohio Ct. App. 8th Dist. 1998); *see also State v. Vordenberge*, 774 N.E.2d 278, 281 (Ohio Ct. App. 1st Dist. 2002). In *Watson*, the Ohio Court of Appeals stated that the U.S. Supreme Court, in *Godinez v. Moran*, required trial courts to determine first whether the defendant is competent to waive counsel if the court has reason to doubt the defendant's competence. *Id.* (citing *Godinez v. Moran*, 509 U.S. 389, 400-02 (1993)).

²¹⁴ *State v. Jackson*, 303 N.E.2d 903, 910 (Ohio Ct. App. 10th Dist. 1973).

counsel.²¹⁵ Ohio courts are permitted, but are not required, to enumerate to a defendant the possible implications of a waiver of a jury.²¹⁶ However, at least one Ohio Court of Appeals has held that when the court has reason to know that the defendant's mental condition is at issue, and considering the strong presumption against waiver of a jury trial, a court should make a "careful inquiry" into whether the defendant is making a knowing, intelligent, and voluntary waiver of the right to a trial by jury.²¹⁷

A defendant also may waive the right to present mitigating evidence during the penalty phase of his/her capital trial.²¹⁸ When a capital defendant seeks to waive all mitigating evidence, the court must determine whether the defendant is competent, whether the waiver is knowing and voluntary, and whether the defendant understands his/her rights in the plea process and in the sentencing proceeding.²¹⁹ The court must (1) inform the defendant of the right to present mitigating evidence and explain what mitigating evidence is; and (2) inquire of the defendant and make a determination on the record whether the defendant understands the importance of mitigating evidence, the use of such evidence to offset the aggravating circumstances, and the effect of failing to present that evidence.²²⁰ After the court is assured that the defendant understands these concepts, the court must inquire as to whether the defendant desires to waive presentation of mitigating evidence and must make findings of fact as to the defendant's understanding and waiver of this right.²²¹

Ohio courts are not required to hold a competency evaluation in every case in which a defendant chooses to waive mitigating evidence, but the Ohio Supreme Court advises that "a trial court should be cognizant of actions on the part of the defendant that would call into question the defendant's competence."²²²

Regardless of whether a defendant can make a competent, knowing, and intelligent waiver of any constitutional rights in a criminal proceeding, Ohio law prohibits a defendant from waiving his/her direct appeal.²²³

²¹⁵ See OHIO REV. CODE § 2945.05 (West 2007); OHIO R. CRIM. P. 23(A). Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. *Id.*

²¹⁶ *State v. Jells*, 559 N.E.2d 464 (Ohio 1990); see also *United States v. Martin*, 704 F.2d 267, 273 (6th Cir. 1983) (holding that a defendant need not have a complete or technical understanding of the jury trial right in order to knowingly and intelligently waive a jury trial and that "a defendant is sufficiently informed to make an intelligent waiver if he is aware that a jury is composed of 12 members of the community, he[*/she*] may participate in the selection of the jurors, the verdict must be unanimous, and a judge alone will decide guilt or innocence should he[*/she*] waive his jury trial right").

²¹⁷ See *State v. Haight*, 649 N.E.2d 294, 310 (Ohio Ct. App. 10th Dist. 1994). In *Haight*, the court found that the trial court had been "on notice" of the defendant's mental condition because one of the judges on the panel had ordered the defendant to undergo a competency determination and one psychiatric expert had reported to the trial court that the defendant was legally insane. *Id.*

²¹⁸ *State v. Ashworth*, 706 N.E.2d 1231, 1236-37 (1999).

²¹⁹ *Id.* at 1237.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ See *State v. Rojas*, 583 N.E.2d 972 (Ohio 1992) (denying motion to withdraw appeal).

While Ohio courts must inquire as to whether a capital defendant has knowingly and voluntarily waived his/her right to counsel and presentation of mitigation, it is unclear whether courts inquire into a defendant's competency to waive his/her right to counsel and courts are not required to inquire into a defendant's decision to waive a jury trial. Therefore, the State of Ohio only is in partial compliance with Recommendation #7.

III. ANALYSIS - MENTAL ILLNESS

A. Recommendation #1

All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, and prison authorities, should be trained to recognize mental illness in capital defendants and death row inmates.

As in the case with mental retardation, apart from law enforcement and correctional officers, the State of Ohio does not require training on recognizing mental illness in capital defendants or death-row inmates of other actors, such as judges, prosecutors, or defense counsel.

Sixteen hours of basic training for law enforcement in Ohio consists of instruction on “dealing with the special needs population,” including information on the causes and symptoms of several mental illnesses, (including schizophrenia and paranoid schizophrenia, anxiety disorders, personality disorders, bipolar disorder, and serious depression), as well as how to respond to a person who the officer believes to be mentally ill.²²⁴ Some local police departments also have created “Crisis Intervention Teams” (CIT), in which officers are specially trained to handle incidents involving mentally ill individuals.²²⁵ As of December 2006, fifty-six Ohio counties had trained 2,144 officers in the CIT program.²²⁶ Although originally intended for police officers, the program has been expanded to include corrections officers, court officers, hospital security officers, and probation officers.²²⁷ However, no criminal justice entity in Ohio is required to retain CIT-trained officers and it does not appear that the goal of CIT – to direct mentally ill persons into treatment rather than incarceration – is suited for instances in which a mentally ill person is suspected of committing aggravated murder.

Additionally, eight hours of the four weeks of required training for correctional officers covers mental illness and mental retardation in inmates.²²⁸ Correctional officers must also complete forty hours of continuing education each year, which may include training on mental health issues.²²⁹ The Ohio Department of Rehabilitation and Correction (DOC) also must conduct a sociological, psychological, and psychiatric examination as soon as possible after the admittance of each inmate into a DOC facility,²³⁰ must “provide for the needs of mentally ill...persons who are incarcerated in state correctional

²²⁴ Ohio Peace Officer Training Commission, Curriculum for Handling the Special Needs Population, at 50-54, 89-91 (on file with author).

²²⁵ Ohio Criminal Justice Coordinating Center of Excellence, Crisis Intervention Team, *available at* <http://www.neoucom.edu/CJCCOE/cit.html> (last visited Sept. 13, 2007).

²²⁶ Email to Christine Waring from Lt. Michael Woody, Ret., Former Director of Training for the Akron Police Dep’t (Apr. 25, 2007) (on file with author).

²²⁷ *Id.*

²²⁸ Telephone interview by Christine Waring with Elizabeth Kreger, Pre-service Training Center, Corrections Training Academy at the Ohio Department of Rehabilitation and Correction, Orient, Ohio (Apr. 30, 2007).

²²⁹ *Id.*

²³⁰ OHIO REV. CODE § 5120.11 (West 2007).

institutions,” and may designate a special unit within an institution for the custody, care, special training, treatment, and rehabilitation of the mentally ill.²³¹

While no criminal justice entity in the State of Ohio is required to train prosecutors, defense attorneys, or judges within the criminal justice system on mental illness in criminal defendants or inmates, voluntary training on mental illness is available. Since 1995, various approved training programs for capital counsel, sponsored by the Ohio Association of Criminal Defense Lawyers, the Ohio State Bar Association, and the Cuyahoga County Bar Association, have included one-hour presentations on mental illness, including a program entitled “The Death Penalty and Mental Health Issues: They Cannot be Ignored” on the importance of recognition of mental illness in a client charged with a capital offense.²³² Additionally, as described in Recommendation #2,²³³ some Ohio counties have instituted mental health courts and defense counsel, prosecutors, and court personnel assigned to the mental health docket are specially trained to recognize mental illness.²³⁴ While there is no indication that a capital case has been assigned to any mental health docket,²³⁵ a capital defendant may benefit from the training that court personnel and attorneys assigned to the mental health docket have received if these individuals qualify for assignment in capital cases as well.

The Ohio Office of Criminal Justice Services also has published a pamphlet entitled “Mental Illness: A Guide for Law Enforcement, Prosecutors, and First Responders,” which has been given by request to police departments, probation offices, and correctional facilities,²³⁶ that defines mental illness, describes possible symptoms and effects of mental illness, and suggests how to interact with someone who is mentally ill.²³⁷

Because training in recognizing mental illness is required for law enforcement and within correctional facilities and is on a voluntary basis for all other legal actors, the State of Ohio is only in partial compliance with Recommendation #2.

B. Recommendation #2

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.

²³¹ OHIO REV. CODE § 5120.051 (West 2007).

²³² See Margery Koosed, Death Penalty Seminar Sessions Discussing Mental Health Issues 1995-present (on file with author).

²³³ See Recommendation #2, *supra* note 157 and accompanying text.

²³⁴ Telephone interview by Christine Waring with Kevin Lottes, Supreme Court of Ohio Specialized Dockets in Columbus, Ohio (Apr. 20, 2007).

²³⁵ Telephone interview by Christine Waring with Chris Hill, Bailiff for Judge Timothy McMonagle, Chair of the Mental Health Docket in Cuyahoga County, Ohio (Apr. 27, 2007).

²³⁶ Email correspondence to Christine Waring from Lisa Shoaf, Director, Statistical Analysis Center of the Office of Criminal Justice Services in Columbus, Ohio (Apr. 27, 2007).

²³⁷ OHIO OFFICE OF CRIMINAL JUSTICE SERVICES, MENTAL ILLNESS AND THE JUSTICE SYSTEM, *available* at <http://www.ocjs.state.oh.us/Publications/Mental%20Illness%208.28.pdf> (last visited Sept. 13, 2007).

While the State of Ohio trains law enforcement on the causes and effects of mental illness, the State of Ohio has not adopted any laws, rules, or procedures requiring that special steps be taken to ensure that mentally ill offenders are sufficiently protected during investigations.

Police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Ohio certified by the Commission on Accreditation for Law Enforcement Agencies, Inc. (CALEA)²³⁸ are required to adopt written directives establishing procedures to be used in criminal investigations, including procedures on interviews and interrogations.²³⁹ The CALEA further requires a written directive for assuring compliance with all applicable constitutional requirements pertaining to interviews, interrogations and access to counsel.²⁴⁰ Although written directives produced in an effort to comply with the CALEA standards may include procedures designed to ensure that the *Miranda* rights of mentally ill individuals are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used, we were unable to assess the extent to which law enforcement agencies across the State have adopted any such procedures.

As stated in Recommendation #1, basic training for Ohio law enforcement consists of, among other requirements, four hours on the legal aspects of interviews and interrogations, four hours on interview and interrogation techniques,²⁴¹ and sixteen hours on "dealing with the special needs population."²⁴² The training materials advise that individuals suffering from mental illness may exhibit thought disorders, including delusions, hallucinations, unusual realities, grandiose thinking, and paranoia that others are plotting against him/her.²⁴³ Crisis Intervention Team (CIT) officers are similarly

²³⁸ Sixty-four police departments, sheriff's departments, state law enforcement agencies, state highway patrols, transportation police departments, training academies, and university police departments in Ohio have been accredited or are in the process of obtaining accreditation by the Commission on Accreditation for Law Enforcement Agencies (CALEA). See CALEA Online, at <http://www.calea.org/agcysearch/agencysearch.cfm> (last visited Sept. 13, 2007) (use second search function, designating "U.S.," "Ohio," and "Law Enforcement Accreditation" as search criteria); see also CALEA Online, About CALEA, available at <http://www.calea.org/Online/AboutCALEA/Commission.htm> (last visited Sept. 13, 2007) (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 (IACP); National Organization of Black Law Enforcement Executives (NOBLE); National Sheriffs' Association (NSA); and Police Executive Research Forum (PERF)).

²³⁹ COMMISSION ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42-2 (4th ed. 2001) [hereinafter CALEA STANDARDS] (Standard 42.2.1).

²⁴⁰ *Id.* at 1-3 (Standard 1.2.3).

²⁴¹ OFFICE OF THE OHIO ATTORNEY GENERAL, OHIO PEACE OFFICER BASIC TRAINING, REQUIREMENTS AND OPTIONS FOR ATTENDING, available at http://www.ag.state.oh.us/le/training/pubs/requirements_options.pdf (last visited Sept. 13, 2007); see also *supra* note 145 and accompanying text.

²⁴² Ohio Peace Officer Training Commission, Curriculum for Handling the Special Needs Population, at 9-16 (on file with author).

²⁴³ *Id.*

trained on the symptoms and effects of mental illness.²⁴⁴ Despite this recognition that mental illness affects an individual's ability to act voluntarily, knowingly, and intelligently, we were unable to determine the extent to which Ohio law enforcement protects the *Miranda* rights of mentally ill suspects, if at all. In fact, law enforcement training materials indicate that officers may interrogate a mentally ill person, advising only that the officer should question the individual "in a neutral, even tone of voice," and that an officer may need to repeat questions asked of a mentally ill individual.²⁴⁵

Additionally, the Ohio Office of Criminal Justice Services' pamphlet, entitled "Mental Illness: A Guide for Law Enforcement, Prosecutors, and First Responders," defines mental illness, suggests how to interact with someone who is mentally ill, and describes possible symptoms and effects of mental illness which will affect a mentally ill individual's ability to understand and waive his/her *Miranda* rights.²⁴⁶ These include that the individual (1) states that he/she hears or sees things that others do not see or hear; (2) doesn't think logically; (3) has irrational ideas and thoughts; and (4) has impaired judgment and insight into problems.²⁴⁷

Nonetheless, the Ohio Supreme Court has held that law enforcement is under no legal obligation to take special steps to protect the rights of mentally ill suspects. Although a defendant's mental illness may be a significant factor in determining whether a *Miranda* waiver was voluntary, the Ohio Supreme Court has held that this fact alone does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, demonstrates an unconstitutional waiver of the defendant's *Miranda* rights.²⁴⁸ A waiver must be made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it, but this does not mean that an Ohio criminal defendant must know and understand every possible consequence of a waiver of his Fifth Amendment right against compelled self-incrimination.²⁴⁹ The Ohio Supreme Court has further advised that law enforcement is under no obligation to *sua sponte* supply a mentally ill suspect or defendant with a lawyer, nor must police consult a psychiatrist prior to questioning a defendant.²⁵⁰

Individual jurisdictions may voluntarily institute procedures to ensure that the *Miranda* rights of mentally ill suspects are protected and that no false, coerced, or garbled confessions are obtained or used against a mentally ill defendant. However, because the

²⁴⁴ Ohio Criminal Justice Coordinating Center of Excellence, Crisis Intervention Team, *available at* <http://www.neoucom.edu/CJCCOE/cit.html> (last visited Sept. 13, 2007).

²⁴⁵ Ohio Peace Officer Training Commission, Curriculum for Handling the Special Needs Population, at 44 (on file with author).

²⁴⁶ OHIO OFFICE OF CRIMINAL JUSTICE SERVICES, MENTAL ILLNESS AND THE JUSTICE SYSTEM, *available at* <http://www.ocjs.state.oh.us/Publications/Mental%20Illness%208.28.pdf> (last visited Sept. 13, 2007).

²⁴⁷ *Id.*

²⁴⁸ *State v. Hughbanks*, 792 N.E.2d 1081, 1093 (Ohio 2003) (citing *Colorado v. Connelly*, 479 U.S. 157, 164 (1986)); *see also State v. Dailey*, 559 N.E.2d 459, 463 (Ohio 1990) (holding that a defendant who had a low IQ and a reading comprehension below a third grade level knowingly and intelligently waived his *Miranda* rights after he indicated that he understood his rights as read to him by the police).

²⁴⁹ *State v. Salvatore*, 2003 WL 723214, *3 (Ohio Ct. App 10th Dist. Mar. 4, 2003) (citing *Moran v. Burbine*, 475 U.S. 412 (1986)).

²⁵⁰ *Hughbanks*, 792 N.E.2d at 1094.

Ohio Supreme Court is unlikely to evaluate the validity of confession based upon the unique circumstances present when a mentally ill suspect waives his/her *Miranda* rights, the State of Ohio is only in partial compliance with Recommendation #2.

C. Recommendation #3

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.

Training for Capital Defense Attorneys on Mental Illness

The State of Ohio does not require defense attorneys to receive training on mental illness. However, since 1995, various approved training programs for capital counsel, sponsored by the Ohio Association of Criminal Defense Lawyers, the Ohio State Bar Association, and the Cuyahoga County Bar Association, have included one-hour presentations on mental illnesses and the effects of a capital defendant’s mental illness on a capital trial.²⁵¹ These included presentations on the importance of mental health experts, mental illness mitigation, various mental illnesses from which a capital defendant may be suffering, and the insanity defense.²⁵² Additionally, in the Ohio counties that have instituted a mental health docket,²⁵³ counsel representing defendants assigned to the mental health docket must be specially trained in recognition and effects of mental illness in criminal defendants.²⁵⁴ Although there is no indication that a capital case has been assigned to the mental health docket,²⁵⁵ as stated in Recommendation #2, a capital defendant could be represented by an attorney who is qualified to try capital cases and is specially trained to represent defendants before the mental health court.²⁵⁶

Sufficient Funds and Resources to Detect and Prove Mental Illness in Capital Defendants

²⁵¹ See Margery Koosed, Death Penalty Seminar Sessions Discussing Mental Health Issues 1995-present, (on file with author).

²⁵² See *id.*

²⁵³ Telephone Interview by Christine Waring with Kevin Lottes, Supreme Court of Ohio Specialized Dockets in Columbus, Ohio (Apr. 20, 2007).

²⁵⁴ *Id.*; see also, e.g., CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(I)(A)(4) (requiring training for defense counsel in mental health court to received specific training on mental health issues in defendants).

²⁵⁵ Telephone Interview by Christine Waring with Chris Hill, Bailiff for Judge Timothy McMonagle, Chair of the Mental Health Docket in Cuyahoga County, Ohio (Apr. 27, 2007).

²⁵⁶ See *supra* note 235 and accompanying text.

Ohio law requires local jurisdictions to provide, if the court determines that the defendant is indigent, investigative services, experts, or other services that are “reasonably necessary” for the proper representation of a defendant charged with aggravated murder at trial or at the sentence hearing.²⁵⁷ The Ohio Supreme Court Rules of Superintendence also require that the court provide a capital defendant with resources, such as an investigator, mitigation specialists, mental health professionals, and other forensic experts and support services who are “reasonably necessary or appropriate” for counsel to prepare for and present an adequate defense at every stage of the proceedings.²⁵⁸ Pursuant to these provisions, counties set differing pleading requirements and provide varying degrees of reimbursement for investigative and experts’ services.

For example, Montgomery County has approved payment of \$8,401.50 for psychiatric services rendered at a rate of \$270 per hour on behalf of a capital defendant;²⁵⁹ however, in Hamilton County, “specialists in mental diseases [who] examine the mental condition of the accused” may not be compensated over \$625 in total fees.²⁶⁰ However, in Cuyahoga County, “it is intended that counsel assigned to represent indigent defendants shall themselves investigate cases to which they have been assigned”²⁶¹ and compensation paid to an investigator may not exceed \$25 per hour, up to \$500.00 in total compensation, or in “extraordinary cases,” total compensation may not exceed a \$1000.00.²⁶² For a detailed discussion on Ohio counties’ varying procedures for reimbursement of investigator and expert fees, see Recommendation #3 in the Mental Retardation Analysis.²⁶³

Although information is available to defense attorneys on recognition and effects of mental illness in a capital defendant, the State of Ohio does not require that any such training be provided to capital defense attorneys. Additionally, jurisdictions vary greatly in the funding mechanisms available to capital defense attorneys seeking to prove the mental capacities of their clients, with some counties placing burdensome requirements on counsel’s ability to secure investigative and expert assistance. Therefore, the State of Ohio is not in compliance with Recommendation #3.

D. Recommendation #4

²⁵⁷ OHIO REV. CODE § 2929.024 (West 2007). “Reasonable necessity” exists “when the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his/[her] defense, and (2) that denial of the requested expert assistance would result in an unfair trial.” *State v. Mason*, 694 N.E.2d 932, 944 (Ohio 1998) (citing *State v. Jenkins*, 473 N.E.2d 264, 292 (Ohio 1984)). The Ohio Supreme Court has also required that a defendant show that he/she had no alternative means of fulfilling the same functions that the requested expert would provide. *State v. Tibbetts*, 749 N.E.2d 226, 241 (Ohio 2001).

²⁵⁸ See OHIO REV. CODE § 2929.024 (West 2007); RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(D).

²⁵⁹ *State v. Whitfield*, 854 N.E.2d 562, 564-65 (Ohio Ct. App. 2d Dist. 2006).

²⁶⁰ HAMILTON COUNTY COMMON PLEAS CT. LOCAL R. 20(D). Mental health specialists may not be compensated at a rate greater than \$125 per hour for the examination and testimony of the specialist. *Id.* However, additional compensation may be provided at the discretion of the court. *Id.*

²⁶¹ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II)(E).

²⁶² *Id.*

²⁶³ See *supra* note 64 and accompanying text.

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.

When the court approves funding for a mental health expert to evaluate an indigent defendant, this expert should only serve the needs of the defendant. However, under Ohio law, that expert may serve the defense alone or the expert may be considered “neutral,” – i.e. the expert must release his/her report to the defense and prosecution.

Appointment of Mental Health Expert Pursuant to Section 2929.024 of the Ohio Rev. Code

As described in Recommendation #3,²⁶⁴ section 2929.024 of the Ohio Rev. Code. requires that when “the court determines that the defendant is indigent and that investigative services, experts, or other services are reasonably necessary” for representation at trial of a defendant charged with a capital offense, the court must authorize the defendant’s counsel to obtain to the necessary services and order payment of the fees and expenses for these services.²⁶⁵ Whenever an expert is appointed pursuant to section 2929.024 of the Ohio Rev. Code, the preparation and disposition of the expert’s report is within the control of the defense and the defendant can decide whether to put the expert’s findings before the jury.²⁶⁶ The United States Court of Appeals for the Sixth Circuit also has held that the trial court should appoint an independent psychiatrist – i.e. a psychiatrist appointed to assist the defense and whose report is not available to both the defense and prosecution – to examine the defendant during the guilt and penalty phases of the capital defendant’s trial.²⁶⁷

However, before a trial court will provide funding for a capital defendant to seek the assistance of an independent mental health expert, the defendant must often show that he/she has no alternative means of fulfilling the same function that the requested expert would provide.²⁶⁸ Additionally, there are no state-wide standards or procedures governing the method by which a defendant may seek to have an expert evaluate his/her mental condition. This has given rise to individual counties in Ohio promulgating varying rules as to how a trial court may permit an indigent defendant to obtain an expert. For example, in Cuyahoga County, a trial court can not approve payment for “any expert

²⁶⁴ See *supra* note 258.

²⁶⁵ OHIO REV. CODE § 2929.024 (West 2007).

²⁶⁶ Glenn v. Tate, 71 F.3d 1204, 1209 (6th Cir. 1995).

²⁶⁷ Powell v. Collins, 332 F.3d 376, 392, 396 (6th Cir. 2003). While the Sixth Circuit Court of Appeals found the trial court’s failure to appoint an independent psychiatrist to examine the defendant during the guilt phase of the trial harmless error, it vacated the defendant’s death sentence due to the harmful error caused by the trial court’s failure to allow for an independent evaluation of the defendant for presentation of mitigation during the penalty phase of the trial. *Id.* at 394-396.

²⁶⁸ State v. Tibbetts, 749 N.E.2d 226, 241 (Ohio 2001).

or specialist relating to psychological, mitigation or similar services. . .” unless counsel provides, with specificity:

- (1) The name of the individual sought to be appointed, and his/her professional qualifications or credentials demonstrated by an attached resume or curriculum vitae;
- (2) The services sought to be provided including, but not limited to, research, investigation, testimony and/or consultation;
- (3) The hourly rate to be charged by such individual for each service and the estimated number of hours;
- (4) Any additional expense anticipated in connection with such services; and
- (5) The total projected expense anticipated for each individual.²⁶⁹

Furthermore, there is no statutory right to appointment of any expert in post-conviction proceedings, nor does it appear that post-conviction courts use their discretion to appoint experts.²⁷⁰

Pre-Sentence Examination of the Defendant Pursuant to Section 2929.03 of the Ohio Rev. Code

Defense counsel must distinguish between a request for appointment of an expert pursuant to section 2929.024 of the Ohio Rev. Code and a request for a pre-sentence investigation of the defendant pursuant to section 2929.03 of the Ohio Rev. Code. Under section 2929.03(D)(1), whenever death may be imposed as a penalty, the defense may request a pre-sentence investigation prior to the sentencing hearing, as well as request that a mental health expert examine the defendant.²⁷¹ However, experts appointed pursuant to section 2929.03(D)(1) need not be a psychologist or psychiatrist of the defendant’s own choosing²⁷² and copies of any expert’s report prepared under this section must be furnished to the court, the trial jury, and the prosecutor.²⁷³ In at least one case, a defendant requested a pre-sentence evaluation and the mental health experts

²⁶⁹ CUYAHOGA COUNTY RULES OF THE COURT OF COMMON PLEAS R. 33(II). Appointed counsel may, however, make such request for a mental health expert *ex parte* or under seal with prior permission for the trial court. *Id.*

²⁷⁰ There is no statutory right to appointment of an expert in post-conviction proceedings, even where the statute provides for counsel in a post-conviction proceeding. *See, e.g.,* State v. Monroe, 2005 WL 2403957, *4 (Ohio Ct. App. 10th Dist. Sept. 30, 2005); State v. Madsen, 2005 WL 1792337, *4 (Ohio Ct. App. 8th Dist. July 28, 2005); State v. Hoop, 2005 WL 694545, *1 (Ohio Ct. App. 12th Dist. March 28, 2005) (unreported opinion). Post-conviction courts also refuse to appoint experts to challenge the findings of a mental health expert appointed at trial because such appointment “would turn . . . post-conviction proceedings into a never ending battle of experts,” and would “encourage post-conviction expert shopping.” State v. Braden, 2003 WL 21321457, *5 (Ohio Ct. App. 10th Dist. June, 10 2003). The exception to this rule is claims during post-conviction that the defendant was mentally retarded at the time of the offense and therefore cannot be subject to the death penalty. *See* State v. Lott, 779 N.E.2d 1011, 1014-16 (Ohio 2002).

²⁷¹ OHIO REV. CODE § 2929.03(D)(1) (West 2007); OHIO REV. CODE § 2947.06 (West 2007).

²⁷² State v. Esparza, 529 N.E.2d 192, 196 (Ohio 1988).

²⁷³ OHIO REV. CODE § 2929.03(D)(1) (West 2007). “Court-appointed expert[’s],” reports will be “given to the jury willy-nilly” pursuant to section 2929.03(D)(1). Glenn v. Tate, 71 F.3d 1204, 1210 (6th Cir. 1995).

appointed to perform the evaluation were briefed only by the prosecution and had no communication with defense counsel.²⁷⁴ Additionally, the Ohio Supreme Court has held that “the defendant decides whether to expose himself to the risk of potentially incriminating pre-sentence investigations, including mental examinations,” when the defendant requests an examination pursuant to section 2929.03(D)(1).²⁷⁵ Indeed, defense counsel may find itself attempting to impeach the reliability and accuracy of findings of a mental health examination made at the defendant’s request pursuant to section 2929.03(D)(1) of the Ohio Rev. Code.²⁷⁶

Appointment of Expert to Evaluate Defendant Who Intends to Pursue an Insanity Defense

Whenever a defendant raises an insanity defense, the court may order one or more evaluations of the defendant’s mental condition at the time of the offense.²⁷⁷ If the court orders more than one evaluation, the prosecution and defendant each may recommend to the court an examiner to perform one of the evaluations.²⁷⁸ If the court does not appoint an examiner recommended by the defendant and the defendant is indigent, he/she will be afforded funds to retain an expert at the State’s expense.²⁷⁹ Persons appointed as examiners must be paid “a reasonable amount for their services and expenses, as certified by the court.”²⁸⁰ Once an examiner is appointed by the court to perform the evaluation of the defendant, the examiner must file a written report with the trial court and the trial court must provide copies of the report to the prosecution and defense counsel.²⁸¹

Appointment of Expert to Evaluate Death-Row Inmate’s Competency to be Executed

²⁷⁴ *Tate*, 71 F.3d at 1209. In *Glenn*, the court-appointed expert’s evaluation which, by law, must be submitted to the trial jury and the prosecution, was particularly devastating to the defendant as it concluded “within reasonable certainty, I do not see any imitating [sic] circumstances in this particular [sic] individual;” however, experts who testified at defendant’s post-conviction hearing stated that the defendant exhibited an IQ of 56 when he was fourteen years old and defendant suffered from an organic brain injury, occurring before he was born, that was global in nature, impairing the defendant’s capacity to conform his conduct to the requirements of the law. *Id.* at 1208-1210.

²⁷⁵ *Esparza*, 529 N.E.2d at 195 (citing *State v. Buell*, 489 N.E.2d 795, 808 (Ohio 1986)).

²⁷⁶ *Id.* at 196 (“[T]he record reflects that defense counsel not only had the opportunity but took the opportunity to impeach the reliability and accuracy of the report during cross-examination.”).

²⁷⁷ OHIO REV. CODE § 2945.371(A) (West 2007).

²⁷⁸ OHIO REV. CODE § 2945.371(B) (West 2007).

²⁷⁹ OHIO REV. CODE § 2945.371(B) (West 2007): *see also Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003) (“An indigent defendant’s constitutional right to psychiatric assistance in preparing an insanity defense is not satisfied by court-appointment of a “neutral psychiatrist,” – i.e. one whose report is available to both the defense and the prosecution.”).

²⁸⁰ OHIO REV. CODE § 2945.371(K) (West 2007).

²⁸¹ OHIO REV. CODE § 2945.371(G) (West 2007). The examiner’s report must include: (1) the examiner’s findings; (2) the facts in reasonable detail on which the findings are based; and (3) the examiner’s findings as to whether the defendant, at the time of the offense charged, did know, as a result of severe mental disease or defect, the wrongfulness of the defendant’s acts as charged. OHIO REV. CODE § 2945.371(G)(1)-(4) (West 2007). If the trial court appoints an examiner not of the defendant’s choosing, we were not able to determine if an expert chosen by the defense is also required to release his/her report to the trial court.

Whenever a death-row inmate appears to be “insane,”²⁸² the warden or the sheriff having custody of the death-row inmate, the inmate’s counsel, or a psychiatrist or psychologist who has examined the inmate must give notice to the judge who imposed the death sentence of the inmate’s apparent “insanity.”²⁸³ If the judge determines that “probable cause exists to believe that the convict is insane,”²⁸⁴ the trial court must hold an inquiry on the issue.²⁸⁵ The death-row inmate must be represented by counsel at the hearing, but it is within the hearing judge’s discretion to appoint one or more psychiatrists or psychologists who are *not* employed by the Department of Rehabilitation and Correction to examine the inmate.²⁸⁶ The psychiatrist or psychologist, if appointed, must submit his/her report on the inmate’s competency to be executed to the trial court.²⁸⁷

Because Ohio law does not require that mental health experts be appointed to serve the defendant confidentially in some cases, and in other cases, trial courts and post-conviction courts will not permit the appointment of any mental health expert to assist the defense, the State of Ohio is only in partial compliance with Recommendation #4.

E. Recommendation #5

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.

As discussed in Recommendation #3, capital defendants, during the guilt and sentencing phase of the defendant’s trial, may request that the court provide funds for expert services if the funds are “reasonably necessary or appropriate” for counsel to prepare for and present an adequate defense.²⁸⁸ This requires that the defendant demonstrate a particularized showing²⁸⁹ (1) of a reasonable probability that the requested expert would aid in his/[her] defense, and (2) that denial of the requested expert assistance would result in an unfair trial.²⁹⁰ As discussed under Recommendation #3 of this section and the Mental Retardation Analysis, Ohio counties adopt local rules for reimbursement of expert

²⁸² A death-sentenced inmate is not competent to be executed, i.e. the inmate is “insane,” when the person “does not have the mental capacity to understand the nature of the death penalty and why it was imposed [on the person].” OHIO REV. CODE § 2949.28(A) (West 2007).

²⁸³ OHIO REV. CODE § 2949.28(B)(1) (West 2007).

²⁸⁴ OHIO REV. CODE § 2949.28(B)(2) (West 2007).

²⁸⁵ OHIO REV. CODE § 2949.28(B)(2) (West 2007).

²⁸⁶ OHIO REV. CODE § 2949.28(B)(3) (West 2007).

²⁸⁷ OHIO REV. CODE § 2949.28(C) (West 2007).

²⁸⁸ See OHIO REV. CODE § 2929.024 (West 2007); RULES OF SUPERINTENDENCE FOR THE CTS. OF OHIO R. 20(IV)(D).

²⁸⁹ A “particularized showing” requires the defendant to show more than the “mere possibility” of assistance from an expert. *State v. Mason*, 694 N.E2d 932, 943 (Ohio 1998).

²⁹⁰ *Mason*, 694 N.E2d at 944 (citing *Little v. Armontroun*, 835 F.2d 1240, 1244 (8th Cir. 1987)).

fees in capital cases, resulting in disparate funding levels.²⁹¹ Additionally, there is no statutory right to expert assistance in post-conviction proceedings²⁹² and Ohio courts have repeatedly rejected requests from death-row inmates for funding for experts during post-conviction proceedings, citing that such experts “would turn . . . post-conviction proceedings into a never ending battle of experts.”²⁹³

Due to the disparate funding levels provided by Ohio counties for mental health experts, we are unable to assess whether the State of Ohio is in compliance with Recommendation #5.

F. Recommendation #6

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, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

Recommendation #7

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.]

The State of Ohio excludes from the death penalty defendants who have mental retardation at the time of offense, defined as “(1) significantly subaverage intellectual functioning[;] (2) significant limitations in two or more adaptive skills, such as communication, self-care and self direction[;] and (3) onset before the age of 18.”²⁹⁴ This prohibition does not include defendants who have mental disabilities other than mental retardation, such as dementia or traumatic brain injury, which result in significant impairments in both intellectual and adaptive functioning, but may manifest after the age of eighteen.²⁹⁵ This exclusion also does not apply to individuals who, at the time of the

²⁹¹ See *supra* note 178, 259 and accompanying text.

²⁹² State v. Monroe, 2005 WL 2403957, *4 (Ohio Ct. App. 10th Dist. Sept. 30, 2005); see also *supra* note 158 and accompanying text.

²⁹³ State v. Braden, 2003 WL 21321457, *5 (Ohio Ct. App. 10th Dist. June 10, 2003); see also State v. Nields, 2000 WL 1714176, *4 (Ohio Ct. App. 1st Dist. Nov. 17, 2000) (stating that appointment of experts at post-conviction would turn the proceeding “into a psycholegal quagmire[,] a never ending battle of experts similar to a medical malpractice claim”).

²⁹⁴ State v. Lott, 779 N.E.2d 1011, 1014 (Ohio 2002); see also Atkins v. Virginia, 536 U.S. 304, 308, n. 3 (2002).

²⁹⁵ At least one Ohio Court of Appeals has found a defendant eligible for capital punishment despite the existence of uncontested evidence that the defendant currently had significantly subaverage intellectual

offense, had a severe mental disorder that significantly impaired their capacity to appreciate the nature, consequences, or wrongfulness of their conduct, to exercise rational judgment in relation to that conduct, or to conform their conduct to the requirements of the law. Therefore, the State of Ohio is not in compliance with Recommendation #6 or Recommendation #7.

G. Recommendation #8

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 #6 and #7 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.

The Ohio Rev. Code contains one mitigating circumstance that specifically permits a capital jury to consider the defendant's mental condition: "[w]hether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of the offender's conduct or to conform the offender's conduct to the requirements of the law."²⁹⁶ The Ohio Rev. Code also allows the jury to consider "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death"²⁹⁷ and instructs that a capital defendant "shall be given great latitude" in the presentation of all statutory mitigating factors.²⁹⁸ However, neither the Ohio Rev. Code nor the Ohio Jury Instructions require or recommend that judges instruct capital juries that mental illness is a mitigating, not an aggravating, factor.

Jury instructions in Ohio must inform the jury of the aggravating circumstances the jury is to consider and must identify these aggravating circumstances specifically in the instructions.²⁹⁹ The jury must also be instructed that that it "may only consider the aggravating circumstance(s) that (was) (were) just described to you and which accompanied the aggravated murder."³⁰⁰ While this provision may inform juries that they may not consider any other aggravating factor, such as future dangerousness, Ohio law does not require, nor do the Ohio Jury Instructions inform, the jury that it may not consider a mental disorder or disability to conclude that the defendant represents a future danger to society.

functioning and significant limitations in two or more adaptive skills. *State v. Stallings*, 2004 WL 1932869, *2-3 (Ohio Ct. App. 9th Dist. Sept. 1, 2004).

²⁹⁶ OHIO REV. CODE § 2929.04(B)(3) (West 2007).

²⁹⁷ OHIO REV. CODE § 2929.04(B)(7) (West 2007).

²⁹⁸ OHIO REV. CODE § 2929.04(C) (West 2007).

²⁹⁹ 4 OHIO JURY INSTRUCTION 503.011(7), cmt.

³⁰⁰ 4 OHIO JURY INSTRUCTION 503.011(8).

Mitigating evidence of a mental disease or defect requires the defendant to show a “substantial lack of capacity to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law;” while insanity requires a complete lack of such capacity.³⁰¹ However, the Ohio Supreme Court has held that during the sentencing hearing, the trial court is not required to instruct the jury that evidence of a mental disease or defect as mitigation need not be legally sufficient to have established an insanity defense.³⁰²

Because the State of Ohio does not require jurors to be instructed, when applicable, on any of the three issues contained within this recommendation, the State of Ohio is not in compliance with Recommendation #8.

H. Recommendation #9

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 State of Ohio does not require and has not promulgated any pattern jury instructions to communicate to jurors that (1) the defendant is under medication for a mental disorder or disability; (2) this affects the defendant’s perceived demeanor; and (3) such demeanor should not be considered in aggravation. Accordingly, the State of Ohio is not in compliance with Recommendation #9.

I. Recommendation #10

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 #10 is divided into two parts; the first, which is identical to Recommendation #7 in the Mental Retardation section, pertains to the existence of state mechanisms that protect against waivers resulting from an inmate’s mental disability, and the second pertains to the specific mechanism of “next friend” petitions.

³⁰¹ OHIO REV. CODE § 2929.04(B)(3) (West 2007) (“Criteria for imposing death or imprisonment for a capital offense”); OHIO REV. CODE § 2901.01(A)(14) (West 2007) (definition of insanity).

³⁰² *State v. Rogers*, 478 N.E.2d 984, 993 (Ohio 1985) (overruled on other grounds) (“Any attempt to define or explain [mental illness mitigation] may have been viewed as an attempt to restrict that factor”).

As discussed in the Mental Retardation Analysis, the State of Ohio has in place mechanisms to determine whether a capital defendant has knowingly and voluntarily waived his/her right to counsel and presentation of mitigation.³⁰³ However, it is unclear whether courts inquire into a defendant's competency to waive his/her right to counsel and courts are not required to inquire into a defendant's decision to waive a jury trial.³⁰⁴ Therefore, we cannot determine whether the State of Ohio is in compliance with the first part of Recommendation #10.

Apart from mechanisms discussed in Recommendation #7 of the Mental Retardation section, the State of Ohio has no statute or rule providing a mechanism by which a "next friend" may pursue collateral relief on behalf of an inmate suffering from a mental disease or defect and who seeks to waive or withdraw his/her post-conviction relief. In practice, if counsel appointed to represent a death-row inmate during his/her post-conviction proceedings has a good-faith belief that the inmate seeking to terminate his/her post-conviction relief is incompetent, counsel may move the post-conviction court to conduct a competency hearing.³⁰⁵

Under *State v. Berry*, a death-row inmate is entitled to a competency hearing when he/she is seeking to terminate all further challenges to his/her death sentence.³⁰⁶ In order to determine whether a death-row inmate is competent to waive or withdraw his/her post-conviction proceedings, the court must determine:

whether he[/she] has capacity to appreciate his[/her] position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether [s/]he is suffering from a mental disease, disorder, or defect which may substantially affect his[/her] capacity in the premises.³⁰⁷

If the death-row inmate is deemed competent to waive or terminate all post-conviction relief and decides to forgo all further challenges, "the decision must be respected, for 'however wise or foolish his decisions, they are his.'" ³⁰⁸

³⁰³ See *supra* note 209 and accompanying text.

³⁰⁴ See *id.*

³⁰⁵ Interview by Sarah Turberville with Greg Meyers, Counsel for John Eley, Ohio Public Defender's Office (May 11, 2007). In order for a trial court to grant an evidentiary hearing on the petitioner's competency, defense counsel must put forward sufficient evidence in post-conviction pleadings and exhibits, within the 180-day statute of limitations for filing of post-conviction petitions. *Id.*; see also OHIO REV. CODE § 2953.21(I)(1) (West 2007) (requiring counsel to be appointed to represent death-row inmates during collateral proceedings if the person is indigent); OHIO REV. CODE § 2953.21(A)(2) (West 2007) (requiring that a post-conviction petition be filed no later than 180 days after the date on which the trial transcript is filed in the Ohio Supreme Court).

³⁰⁶ *State v. Eley*, 2001 WL 1497095, *15 (Ohio Ct. App. 7th Dist. Nov. 6, 2001) (citing *State v. Berry*, 686 N.E.2d 1097 (Ohio 1997)).

³⁰⁷ *Berry*, 686 N.E.2d at 1101 (overruled on other grounds) (quoting *Rees v. Peyton*, 384 U.S. 312, 314 (1966)), *aff'd*, *Franklin v. Francis*, 144 F.3d 429, 431 (6th Cir. 1998).

³⁰⁸ *Eley*, 2001 WL 1497095, at *16 (citing *Berry*, 686 N.E.2d at 1107).

Notably, since Ohio resumed executions in 1999, nearly a quarter of the individuals executed--seven of the twenty-six inmates executed in Ohio--waived either part or all of their post-conviction appeals and effectively “volunteered” to be executed.³⁰⁹ A review of nationwide executions between 1977 and 2005 demonstrated that 77.36 percent of inmates who “volunteered” to be executed had documented mental illness.³¹⁰ In light of the fact that the State of Ohio generally will not appoint a mental health expert to examine a death-row inmate during post-conviction proceedings,³¹¹ the percentage of “volunteers” on Ohio’s death row raises additional concerns over the adequacy of competency determinations for death-row inmates in the State of Ohio.

Federal courts in the State of Ohio do, however, permit a “next friend” to act on behalf of a death-row inmate who wishes to forgo his/her federal *habeas corpus* relief.³¹² In order to have standing to present the issue for review, the purported “next friend” must show that (a) the real party in interest is unable to litigate his own cause due to mental incapacity; and (b) that the “next friend” is truly dedicated to the best interests of the person on whose behalf he/she seeks to litigate.³¹³

Because the State of Ohio does not appoint a next friend to act on behalf of a death-row inmate who seeks to waive or withdraw his/her post-conviction relief but is not competent to do so, the State of Ohio is not in compliance with the second part of Recommendation #10.

J. Recommendation #11

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

³⁰⁹ See Ohio Department of Rehabilitation and Correction, Ohio Executions 1999 to Present, available at <http://www.drc.state.oh.us/web/Executed/executed25.htm> (last visited Sept. 13, 2007); Matthew T. Norman, *Standards and Procedures for Determining Whether a Defendant is Competent to Make the Ultimate Choice – Death: Ohio’s New Precedent for Death Row “Volunteers,”* 13 J.L. & HEALTH 103, 105-06 (1999). This includes Wilford Berry, the first inmate to be executed under Ohio’s post-*Furman* death penalty scheme. *Id.*

³¹⁰ John H. Blume, *Killing the Willing: “Volunteers,” Suicide and Competency,* 103 MICH. L. REV. 939, 962-63 (2005). Of the 106 inmates who had volunteered to be executed between 1977 and 2005, 82 had documented mental illness, 56 of 106 had severe substance-abuse disorders, and at least 30 of 106 had previously attempted suicide. *Id.*

³¹¹ See *supra* notes 288-293 and accompanying text; *State v. Braden*, 2003 WL 21321457, *5 (Ohio Ct. App. 10th Dist June 10, 2003); see also *State v. Nielsds*, 2000 WL 1714176, *4 (Ohio Ct. App. 1st Dist. Nov. 17, 2000) (stating that appointment of experts at post-conviction would turn the proceeding “into a psycholegal quagmire[,] a never ending battle of experts similar to a medical malpractice claim”).

³¹² See, e.g., *Franklin v. Francis*, 144 F.3d 429, 432 (6th Cir. 1998).

³¹³ *Franklin v. Francis*, 997 F. Supp. 916, 923 (S.D. Ohio 1998) (overruled on other grounds) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990)).

option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.

Under Ohio law, post-conviction relief is not a constitutional right, but instead is a statutory right. As such, a post-conviction petitioner is entitled only to the rights prescribed in the post-conviction statute.³¹⁴ While the State of Ohio permits a court to hold a competency hearing to determine whether an inmate is competent to waive or withdraw his/her post-conviction review,³¹⁵ there is no constitutional or statutory entitlement to competency to proceed with post-conviction relief and the petitioner need not be competent to participate.³¹⁶ Consequently, the State of Ohio does not stay post-conviction proceedings where a death-row inmate's mental disease or defect impairs the inmate's ability or capacity to understand, communicate, or otherwise assist counsel in connection with post-conviction proceedings; nor does the State reduce a death-row inmate's sentence to the sentence available 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. Therefore, the State of Ohio fails to meet the requirements of Recommendation #11.

K. Recommendation #12

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.

Recommendation #12 is divided into two parts; the first pertains to the State's standard for determining whether a death-row inmate is competent to be executed, and the second pertains to the State's sentencing procedures after a death-row inmate has been found incompetent to be executed.

Standard for Competency to Be Executed

In order for a death-row inmate to be “competent” for execution under Recommendation #12, the death-row inmate must not only “understand” the nature and purpose of the

³¹⁴ See *State v. Moore*, 651 N.E.2d 1319, 1320 (Ohio App. Ct. 1st Dist. 1994) (citing *State v. Crowder*, 572 N.E.2d 652 (Ohio 1991)).

³¹⁵ *State v. Eley*, 2001 WL 1497095, *15 (Ohio Ct. App. 7th Dist. Nov. 6, 2001) (citing *State v. Berry*, 686 N.E.2d 1097 (Ohio 1997)).

³¹⁶ *Eley*, 2001 WL 1497095, at *16 (“We specifically hold a capital defendant is neither statutorily nor constitutionally entitled to a competency hearing as part of his or her post-conviction proceedings.”); see also *State v. Ahmed*, 2006 WL 3849862, *6-7 (Ohio Ct. App. 7th Dist. Dec. 28, 2006) (“Thus, this court has made clear that a postconviction petitioner is not constitutionally entitled to a competency determination.”).

punishment, but he/she also must “appreciate” its personal application in the death-row inmate’s own case—that is, why it is being imposed on the death-row inmate.

Under Ohio law, whenever a death-row inmate appears to be “insane,” meaning that the “convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict,”³¹⁷ the warden or the sheriff having custody of the death-row inmate, the inmate’s counsel, or a psychiatrist or psychologist who has examined the inmate must give notice to the judge who imposed the death sentence that the death-row inmate appears to be “insane.”³¹⁸ The judge will determine “whether probable cause exists to believe that the convict is insane”³¹⁹ and if such probable cause exists, an inquiry into the inmate’s sanity will take place.³²⁰ If the death-row inmate demonstrates that he/she is insane by a preponderance of the evidence,³²¹ then upon order of the Ohio Supreme Court, the inmate’s execution will be suspended.³²²

Sentencing Procedures after a Finding of Insanity

If the convict is not found to be “insane,” the execution will take place at the time previously appointed.³²³ If the inmate is found to be insane, the inmate will continue to be confined to death-row or in a maximum security medical or psychiatric facility and the trial judge will order treatment for the inmate.³²⁴ At any time after a finding of insanity, the court may conduct, or on motion of the prosecuting attorney, the court must conduct, a hearing about the death-row inmate’s insanity.³²⁵ If the court determines that that death-row inmate is no longer insane at the new hearing, a new execution date will be set unless the previously appointed date has not lapsed.³²⁶ Under this procedure, the court may continually stay the execution of an “insane” death-row inmate, but at no point will the inmate’s sentence be reduced from death to the sentence imposed in capital cases when execution is not an option.

The Ohio definition of “insanity” as it pertains to death-row inmates who are not competent to be executed reflects that of Recommendation #12; however, when an execution has been scheduled and a death-row inmate has been found insane, the State of Ohio will not reduce an inmate’s death sentence to the sentence imposed in capital cases

³¹⁷ OHIO REV. CODE § 2949.28(A) (West 2007); *see also* State v. Scott, 748 N.E.2d 11, 12 (Ohio 2001).

³¹⁸ OHIO REV. CODE § 2949.28(B)(1) (West 2007). If a three-judge panel imposed a death-sentence on the inmate, then one of three judges must be notified that the inmate appears insane to be executed. *Id.*

³¹⁹ OHIO REV. CODE § 2949.28(B)(2) (West 2007).

³²⁰ OHIO REV. CODE § 2949.28(B)(3) (West 2007). The inquiry may take place at the inmate’s place of confinement. *Id.*

³²¹ OHIO REV. CODE § 2949.29(C) (West 2007).

³²² OHIO REV. CODE § 2949.29(B)(4) (West 2007).

³²³ OHIO REV. CODE § 2949.29(A) (West 2007). If the time set for execution has elapsed, then the judge conducting the inquiry, if authorized by the Ohio Supreme Court, must appoint a time for execution to be effective fifteen days from the date of the entry of the judge’s finding in the inquiry. *Id.*

³²⁴ OHIO REV. CODE § 2949.29(B) (West 2007).

³²⁵ *Id.*

³²⁶ *Id.*

when execution is not an option. Therefore, the State of Ohio is only in partial compliance with Recommendation #12.

Based on this information, the Ohio Death Penalty Assessment Team recommends that the State of Ohio adopt a law or rule excluding individuals with serious mental disorders other than mental retardation from being sentenced to death and/or executed.

L. Recommendation #13

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.

Law enforcement (especially Crisis Intervention Team-trained officers) and correctional personnel receive several hours of training on symptoms and effects of mental illness³²⁷ and law enforcement must inform jail staff if an officer believes a suspect taken into custody suffers from a mental illness.³²⁸ The Ohio Department of Corrections must also screen every inmate entering into a DOC facility for mental illness and provide adequate treatment for these individuals while incarcerated.³²⁹ Additionally, the Ohio Office of Criminal Justice Services (OCJS) has issued various educational documents for law enforcement, prosecutors, and first responders on how to recognize and interact with persons with mental illness, mental retardation, and developmental disabilities.³³⁰ These materials also include contact information of other state and private entities that specialize in mental illness.³³¹ Finally, in various counties throughout Ohio that have instituted mental health courts, court personnel, prosecutors, and defense counsel are trained on mental health issues in the criminal justice system, as well as advised of best practices by the Ohio Supreme Court's "Advisory Committee on Mentally Ill and the Courts."³³²

Because the State of Ohio has developed and disseminated models of best practices on ways to identify and protect mentally ill individuals within the criminal justice system, the State of Ohio is in compliance with Recommendation #13.

³²⁷ Ohio Peace Officer Training Commission, Curriculum for Handling the Special Needs Population, at 50-54, 89-91 (on file with author).

³²⁸ *Id.* at 54 (on file with author).

³²⁹ OHIO REV. CODE § 5120.11 (West 2007).

³³⁰ Telephone interview by Christine Waring with Lisa Shoaf, Statistical Analysis Center Director in the Office of Criminal Justice Services in Columbus, Ohio. (Apr. 20, 2007).

³³¹ See OHIO OFFICE OF CRIMINAL JUSTICE SERVICES, MENTAL ILLNESS AND THE JUSTICE SYSTEM, available at <http://www.ocjs.state.oh.us/Publications/Mental%20Illness%208.28.pdf> (last visited Sept. 13, 2007); OHIO OFFICE OF CRIMINAL JUSTICE SERVICES, MR/DD AND THE JUSTICE SYSTEM, available at <http://www.ocjs.state.oh.us/Publications/MRDD%208.28.pdf> (last visited Sept. 13, 2007).

³³² Telephone interview by Christine Waring with Kevin Lottes, Supreme Court of Ohio Specialized Dockets in Columbus, Ohio (Apr. 20, 2007).

APPENDIX

**Racial and Geographic Disparities in Death Sentencing in Ohio
1981-2000**

Glenn Pierce
Michael L. Radelet
Raymond Paternoster

Sept. 2, 2007

In this paper, we examine twenty years of Ohio homicides, 1981-2000, in order to identify potential racial and/or geographic factors that correlate with the decision to sentence defendants to death.

Background

Capital punishment in Ohio has always been aggressively pursued¹ and controversial.² A 2002 study estimated that there had been 467 executions in the history of the state, including 19 juveniles and four women.³ The state imposed 172 executions between 1930 and 1967, ranking sixth among states behind Georgia, New York, Texas, California, and North Carolina.⁴

In 1961, Ohio's state legislature commissioned a comprehensive study of capital punishment in the state.⁵ Among other things, the authors of this study examined 67 inmates admitted to Ohio penal institutions under sentence of death between July 1, 1949 and June 30, 1959.⁶ The main focus of the report was to provide an historical and international overview of the death penalty and the question of deterrence.

Unfortunately, while 25 of the 67 inmates were Black, no analysis was done of possible racial disparities other than to note that a similar proportion of the state's general prison

¹ For general information about the death penalty in Ohio, see Ohio Department of Rehabilitation and Correction, *Capital Punishment in Ohio*, available at <http://www.drc.state.oh.us/Public/capital.htm> (last visited Sept. 1, 2007).

² Albert Post, *The Anti-Gallows Movement in Ohio*, 54 THE OHIO STATE ARCHAEOLOGICAL AND HISTORICAL QUARTERLY 105 (1945).

³ Eugene G. Wanger, *Capital Punishment in Ohio: A Brief History*, 16 OHIO LAWYER 8 (Nov.-Dec.), 2002. For information on executions of women in Ohio, see VICTOR L. STREIB, THE FAIRER DEATH: EXECUTING WOMEN IN OHIO (2006).

⁴ U.S. DEPARTMENT OF JUSTICE, CAPITAL PUNISHMENT 1977 14 (Table 3) (1978). Of the 172 executed, 60 percent were White and 39 percent were Black. *Id.*

⁵ Ohio Legislative Service Committee, *Capital Punishment*, Staff Research Report No. 46 (January 1961).

⁶ *Id.*, at 66.

population was also Black.⁷ On the other hand, county variations in death sentencing rates were noted with concern:

Although no conclusive proof is available, some statistical evidence suggests that juries and courts in some counties are somewhat more likely to pronounce the death sentence than are juries and courts in other counties.⁸

We are aware of no systematic study of county variations in Ohio death sentencing that has been conducted since. Therefore, the first goal of the present study will be to examine geographic disparities in death sentencing in Ohio in the modern era.

As of January 1, 2007, Ohio had 191 inmates on death row, ranking sixth among states behind California, Florida, Texas, Pennsylvania, and Alabama. Overall, 11.5 percent of Ohio's 11.4 million residents are African American.⁹ However, among Ohio's condemned population, 50 percent are African American and 46 percent are White.¹⁰ As of May 2007, approximately 70 percent of Ohio death row inmates were sentenced to death for killing Whites.¹¹ A total of 26 executions have occurred in Ohio since 1976, including two in 2007 (through September 1) and five in 2006. In 2006, Ohio had more executions than any state except Texas.¹² Of the 26 executed since 1976, 22 were Whites convicted of killing other Whites, five Blacks convicted of killing Blacks, and four Blacks sentenced to death for killing Whites. Overall, 21 of the 26

⁷ *Id.*, at 74-75.

⁸ *Id.*, at 54.

⁹ U.S. Bureau of Census, *Profile of General Demographic Characteristics, 2000 (Ohio)*, available at http://factfinder.census.gov/servlet/QTTTable?_bm=y&-geo_id=04000US39&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U (last visited Sept. 1, 2007).

¹⁰ NAACP Legal Defense and Educational Fund, *Death Row USA* (Winter 2007) at 30, available at http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2007.pdf (last visited Sept. 1, 2007).

¹¹ Brenda L. Jones, *Death Penalty Proportionality Statistics*, May 2, 2007 (Ohio Public Defender Office), available at http://opd.ohio.gov/dp/dp_prosta.pdf (last visited Sept. 1, 2007).

¹² Death Penalty Information Center, *Executions By State*, available at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last visited Sept. 1, 2007).

people executed (81 percent) in Ohio were convicted of killing Whites.¹³ Seven of the 26 put to death in Ohio dropped their appeals and volunteered for execution; all were Whites convicted of killing other Whites.

The first post-*Furman*¹⁴ examination of patterns of death sentencing in Ohio was undertaken three decades ago by William Bowers and one of the present authors.¹⁵ Their study included data from all persons under a sentence of death in Ohio when the Supreme Court invalidated their statute in *Lockett v. Ohio* on July 3, 1978.¹⁶ Included were 2,193 Ohio homicides from November 1, 1974 through December 31, 1977, of which 101 (4.6 percent) resulted in a death sentence for the convicted perpetrator.¹⁷ They found that 25 percent of the Blacks killing Whites were sentenced to death, followed by 4.6 percent of the Whites convicted of killing other Whites and 1.7 percent of the Blacks convicted of killing other Blacks. None of the 47 cases where Whites were suspected of killing Blacks ended with a death sentence.

The second post-*Furman* study of Ohio sentencing patterns was published by Marian Williams and Jefferson Holcomb in 2001.¹⁸ Using data from the Supplemental Homicide Reports and the Office of the Ohio Public Defender, they looked at 6,441 Ohio homicides, 1981-1994, of which 185 resulted in a death sentence. The authors found that the odds of a death sentence were 1.6 times higher in cases with White victims than in similar cases among Black victims. Even when they restricted their analysis to homicides

¹³ Death Penalty Information Center, *Searchable Data Base of Executions*, available at <http://www.deathpenaltyinfo.org/executions.php> (last visited Sept. 1, 2007).

¹⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁵ William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQUENCY 563 (1980).

¹⁶ *Lockett v. Ohio*, 438 U.S. 586 (1978).

¹⁷ Bowers & Pierce, at 594.

¹⁸ Marian R. Williams & Jefferson E. Holcomb, *Racial Disparity and Death Sentences in Ohio*, 29 JOURNAL OF CRIMINAL JUSTICE 207 (2001).

with accompanying felony circumstances, the odds of a death sentence were 1.75 times higher for those suspected of killing Whites than those suspected of killing Blacks. They also found that the odds of a death sentence were 2.3 times higher in cases with female victims than in cases with male victims.

Working with Stephen Demuth, Holcomb and Williams expanded their analysis in 2004.¹⁹ Again, data on homicides was obtained from the Supplemental Homicide Reports, although the database was expanded from their 2001 study to include all homicides from 1981 through 1997. They found that with several factors controlled, the odds of a death sentence were 1.77 times higher in cases with White victims than in cases with Black victims, and that the odds of a death sentence were 2.6 times higher in cases with female victims than in cases with male victims. They also found that “the odds of a death sentence in homicides with White male victims (odds ratio = .322) and Black female victims (odds ratio = .385) are 68% and 61% lower than the odds for homicides with White female victims.”²⁰

Methodology²¹

To study potential disparities between the races of homicide suspects and victims and death penalty decisions as well as disparities across different geographic regions and death penalty decisions, researchers must compare two groups of suspects and victims: those involved in cases in which the death penalty is imposed, and those involved in

¹⁹ Jefferson E. Holcomb, Marian R. Williams, & Stephen Demuth, *White Female Victims and Death Penalty Disparity Research*, 21 JUSTICE QUARTERLY 877 (2004).

²⁰ *Id.*, at 893.

²¹ Because of similar methodology, this section is taken (with minor changes) from Glenn L. Pierce, Michael L. Radelet, & Raymond Paternoster, *Race and Death Sentencing in Tennessee, 1981-2000* (American Bar Association 2007).

homicides that do not result in death sentences. Should rates of death sentencing vary between races of suspects and victims (e.g., if higher rates of death sentencing are found among those who kill Whites than those who kill Blacks) and/or geographic regions, researchers must then examine legally relevant factors to ascertain if such factors account for the different rates between races.

To allow us to make comparisons between all homicide suspects and the subset of those suspects who were ultimately sentenced to death, information was collected on 1) all suspects 18 years of age or older²² associated with homicides committed in Ohio over the twenty-year study period (1981 through 1999) where the races of both the offender(s) and victim(s) were either White or Black (n=7,622),²³ and 2) the subset of all those homicides which ended with a defendant being sentenced to death.

Ohio judicial districts were employed to examine potential geographic variations in death penalty decisions. Judicial districts were identified by the county where the homicide offense occurred. Of the twelve judicial districts in Ohio, three Districts were identified as independent regions, Hamilton County (District 1), Cuyahoga County (District 8) and Franklin County (District 10). The rest of the districts were grouped in a single category of “Other”. In the SHR data there were 474 (6.2 percent) offenders where the “county” in which the offense occurred was not identified. The judicial district for these offenders was coded as “other.”

This information was collected from the following two data sources:

²² Cases involving suspects under age 18 were excluded because individuals under the age of 18 were not been eligible for the death penalty in Ohio during the time period under study. *See* Ohio Revised Code, 2929.023, 1999.

²³ Homicides where either a victim or suspect was not White or Black were excluded because they constitute too few cases to analyze when the appropriate control variables are incorporated into the analysis. Hispanics were also excluded because of the low number of Hispanic defendants (3) and associated victims (2) sentenced to death in Ohio during the study period.

1. *Supplemental Homicide Reports (SHRs)*: The Supplemental Homicide Reports are the product of the FBI's national data collection system for all homicide incidents reported to local law enforcement agencies. SHR reports on homicides are collected by local police agencies throughout the United States. These agencies report the SHR data to the FBI either directly or through their state's crime reporting program. Eventually, information on each homicide collected through the SHR reporting system is included in the FBI's Uniform Crime Reports. While the SHR reports do not record the suspects' or victims' names or the specific date of the homicide, they do include the following information: the month, year, and county in which the homicide occurred; the age, gender, race, and ethnicity of the suspects and victims; the victim-suspect relationship; the weapon used; and information on whether the homicide was accompanied by additional felonies (e.g., robbery or rape).²⁴ Since local law enforcement agencies usually report these data long before the suspect has been convicted (or sometimes even before the suspect has been arrested), these data are for homicide "suspects," not arrested defendants or convicted offenders.²⁵

2. *Death Sentence Data Set*: Information on all cases that ended in a death sentence for murders committed in Ohio during the study period was obtained and checked by the Ohio Death Penalty Assessment Team ("the Team"). A total of 222 cases that ended with a death sentence for homicides that occurred between January 1, 1981 and December 31, 2000 were identified. The team obtained the majority of this information from trial judge reports, aggravated murder indictments, the Ohio

²⁴ *Id.*

²⁵ *Id.*

Department of Corrections' "Offender Search," the Attorney General's 2006 Annual Report on Capital Crimes, the Office of the Public Defender website, and case law.

In addition to information on the races of suspects and victims, both data sets collected information on legally relevant factors that are known to be important (and legitimate) in death penalty decisions. For this analysis, we examined two of the most important legally relevant aggravating factors that are related to the decision of who is sentenced to death: 1) whether the crime took the life of more than one victim, and 2) whether the homicide involved an accompanying felony, such as a rape or a robbery. Considering these two aggravating factors allowed us to focus our analysis on the question of who is sentenced to death among all those who commit what most would agree are truly some of the “worst of the worst” homicides.²⁶ With these two variables, we were able to classify each homicide in both the SHR and the Death Sentence Data Set as involving zero, one, or two potentially aggravating factors. In addition, each homicide incident was also classified by the decade in which the homicide occurred (*i.e.*, 1981-1990 or 1991-2000). This allowed us to examine whether any patterns of death sentencing changed over time.

To conduct the analysis of death sentencing patterns, we merged the SHR “suspect” Data Set with the Death Sentence “defendant” Data Set by matching cases based on victim’s race (White or Black), suspect’s race (White or Black), aggravating circumstances (none, one, or two), and time period (1981-1990 vs. 1991-2000). In effect, this procedure involved identifying which of the 7,622 cases in the SHR data ended with a death sentence. We were unable to match six of the 238 death penalty cases with a

²⁶ As we will see *infra*, the presence of one or two of these aggravating factors is a strong predictor of who is sentenced to death in Indiana. We have also found that these two factors also are important predictors of who is sentenced to death in California. Pierce & Radelet, *supra* note 10, at 23-24.

corresponding case in the SHR data set.²⁷ In order to include the case in the analysis, we constructed a new case for this homicide and added it to the SHR data, thereby increasing our sample of SHR homicide suspects from 7,622 to 7,628. All our analyses focus on 7,628 suspects. Each was coded as killing one or more Whites or one or more Blacks (not both), so when we address issues related to victims, we also use 7,628 cases. That is, each suspect was coded as killing a White or a Black, regardless of the actual number of people she or he killed. We capture multiple murders in one of our measures of aggravating factors.

Results

Table 1 shows that there were 238 death sentences imposed in Ohio for homicides that occurred between January 1, 1981, and December 31, 2000; during the period 3.1 percent of all Ohio homicides ended with a death sentence. While this proportion is lower than the 4.6 percent found by Bowers and Pierce with Ohio data in the 1970s, it is significantly higher than comparable rates found in recent studies in Indiana (1.8 percent), Georgia (1.04 percent), and Tennessee (1.9 percent).²⁸ Table 1 also shows that the rates of death sentencing in Ohio are almost identical for the first decade (1981-1990) and second decade (1991-2000) of our study.

Table 2 shows that Whites suspected of homicides are 1.8 times more likely to be sentenced to death than Blacks suspected of committing homicides (.043 ÷ .024).

²⁷ The lack of a matching case in the SHR data set occurs because of either a failure of the police to report the homicide to the SHR reporting program or reporting a case with several variables missing that are needed for matching.

²⁸ Studies of death sentencing in these three states were conducted by the present authors (with slightly different methodology in each state), and are available through the Death Penalty Moratorium Implementation Project, American Bar Association, <<http://www.abanet.org/moratorium/>>.

However, as seen in Table 3, the differences between Black and White suspects in the probability of being sentenced to death are much smaller than are the race-of-victim differences. Table 32 shows that those suspected of killing Whites are 3.86 times more likely to be sentenced to death than those suspected of killing Blacks ($.054 \div .014$).

Table 4 presents data that show that the race-of-victim differences in death sentencing rates are becoming larger, not smaller. In the period 1981-1990, 4.6 percent of those suspected of killing Whites were sentenced to death, compared to 1.6 percent of those suspected of killing Blacks, a ratio of 2.94. However, in the period 1991-2000, those who killed Whites were 5.2 times more likely to be sentenced to death ($.062 \div .012$).

The data in Table 5 shed more light on different death sentencing rates by categories of suspect's and victim's races. Over the two decades, nine percent of the Blacks suspected of killing Whites were sentenced to death, followed by 4.5 percent of the Whites suspected of killing other Whites. When Blacks are murdered, there are only small differences in the probabilities of a death sentence by race of the suspect: 1.8 percent of the Whites suspected of killing Blacks are sentenced to death, compared to 1.4 percent of the Blacks suspected of killing other Blacks.

We counted two potential aggravators in each case: whether the police suspected the homicide was accompanied by additional felonies (e.g., rape or robbery), and if the homicide event took the life of more than one person. Each case was classified as having none, one, or two of these factors present. Table 6 shows, as expected, that the probability of a death sentence varies with the number of aggravating circumstances in the case. Only one-half of one percent of those cases with non aggravators ended with a

death sentence, compared to 10.9 percent of those with one and almost 32 percent of those with two aggravators.

Table 7 shows that the differences in the probability of death sentences between cases with White or Black homicide victims persists, and is remarkably consistent, over different levels of aggravation. In cases with no aggravating factors present, those who are suspected of killing Whites are three times more likely than those suspected of killing Blacks to be sentenced to death ($.009 \div .003$). Similarly, among cases with one aggravator present, those suspected of killing Whites are 3.27 times more likely than those suspected of killing Blacks to be sentenced to death ($.170 \div .052$). Among cases with two aggravating factors present, those with White victims are also three times more likely to be sentenced to death.

In Table 8 we cross-classify the probabilities of being sentenced to death by both the race of the suspect and the race of the victim and the number of aggravating factors in the case. Recall that we saw in Table 5 that Blacks suspected of killing Whites had the highest overall probability of being sentenced to death. In Table 8 we see that this is true only among the less aggravated cases (those with no aggravators), where 1.9 percent of the Black-on-White homicides ended with a death sentence, compared to .8 percent of the White-on-White cases. Cases with no aggravating factory present represent 78 percent of all cases in our study ($5,953 \div 7,628$). Among the smaller number of cases with one or two aggravating factors present, the highest rates of death sentencing are among the White-on-White cases.

Tables 9 and 10 focus on geographical disparities in Ohio death sentencing. Table 9 shows that statewide, 3.1 percent of homicides end with a death sentence.

Cuyahoga County (Cleveland area), with a 2.3 death sentencing rate, is below this average, as is Franklin County (Columbus area), with a 1.4 death sentencing rate. However, Hamilton County (Cincinnati and area) has a death sentencing rate of 8.7 percent, which is 2.8 times higher than the state average.

One might argue that this disparity occurs because Hamilton County tends to have more aggravated homicides than in other areas of the state. Table 10 tests this hypothesis. It can be seen that any differences in death rates between counties in cases where one aggravating factor is present are not statistically significant ($p < .066$), although even here Hamilton County has the highest death sentencing rates. In cases where two aggravating factors are present, Hamilton County also has the highest death sentencing rate, with death sentences returned at about twice the rate as the statewide average. These differences are statistically significant at the .05 level. By far the biggest differences are found among cases where one aggravating factor is present -- either an accompanying felony or a multiple murder. Here almost 62 percent of the cases from Hamilton County end with a death sentence, which is 5.7 times higher than the state average.

To examine the combined effects of victim's race and aggravating circumstances on death penalty decisions in Ohio, a multivariate statistical technique was used. For the analysis of dichotomous dependent variables (such as death sentence vs. no death sentence), the appropriate statistical technique is logistic regression analysis.²⁹

²⁹ As we have explained elsewhere, "Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is $.75/.25$ or 3 to 1. Simply put, the odds of getting the death sentence in this case is 3 to 1. The dependent variable is a natural logarithm of the odds ratio, y , of having received the death penalty. Thus, $y = P / 1 - P$ and $(1) \ln(y) = \hat{\alpha} + X\hat{\beta} + \xi_i$ where

Table 11 presents the results of the logistic regression analysis. The independent variables are all entered into the analysis as dichotomous measures or “dummy” (yes-no) variables. Thus, where there was one aggravating circumstance or two aggravating circumstances, such data were entered as dichotomous variables, while cases with neither aggravating circumstance present were left out of the equation so they could be used as the reference or comparison category. Similarly, three variables measuring race were entered as dummy (or yes-no) variables – one variable measuring if the case had a Black suspect and White victim, a second measuring Black suspect/White victim, and the third a White suspect/White victim. We left cases with Black suspects and victims out of the equation, so the coefficients for the three race variables measure the difference between that variable and the omitted (Black-Black) cases. Three “county” variables were also used, to be compared with the omitted category (“other counties”).

Table 11 presents the estimated effect of a single independent variable, controlling for the effects of all other variables, using the exponentiated value of the Beta (β) coefficient, which is the logistic regression beta coefficient, $\text{Exp}(\beta)$. The results of the analysis, shows that there are three statistically significant factors that help explain who is sentenced to death over this ten-year period. The $\text{Exp}(\beta)$ in Table 11 shows that the odds of receiving a death sentence for homicide cases with one aggravating circumstance increase by a factor of 31.45, controlling for the other independent

α_0 is an intercept, α_i are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and ξ_i is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, an odds ratio of 1 means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the increase in the odds of receiving the death penalty for each unitary increase in the predictor.” Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988-1997*, 81 OR. L. REV. 39, 59 (2002).

variables. The odds of receiving a death sentence for homicide cases with two aggravating circumstances present increase by a factor of 127.6, again controlling on all the other independent variables.

Compared to other counties, the odds of a death sentence in Cuyahoga County are 17 percent lower (1.0 minus .827). The odds are 63 percent lower in Franklin County, again holding other factors in the equation constant, compared to other counties. For similar homicides, the odds of a death sentence in Hamilton County are 7.5 times higher than the odds in the “other” counties.

In addition, Table 11 shows that the odds of receiving a death sentence for homicide cases with White suspects and White victims increase by a factor of 4.08 compared with those cases with Black defendants and Black victims. In other words, between 1981 and 2000 in Ohio, the odds of a death sentence among homicides with a similar level of aggravation were 4 times higher for cases where Whites were suspected of killing Whites than are the odds of a death sentence for cases in which Blacks were suspected of killing Blacks. The odds of a death sentence for cases where Blacks are suspected of killing Whites are 3.06 times higher than the odds of a death sentence in Black-on-Black cases. There are no statistically significant differences between cases with Black suspects and Black victims and cases with White suspects and Black victims.

Conclusion

This study found relatively strong disparities in death sentencing in Ohio; for similar homicides, the odds of a death sentence for Whites suspected of killing Whites were four times higher than the odds of a death sentence in cases with a Black suspect

and a Black victim. In addition, we found that death sentencing rates vary markedly between Ohio's largest counties, with unusually high rates of death sentencing in Hamilton County.

Unfortunately, because of a relatively small sample size, we were unable to simultaneously include an examination of the victim's gender in our analysis: we classified homicides by the number of aggravating circumstances by county by defendant's and victim's race and by the number of aggravating factors, but further subdividing the population into male and female victims would simply leave too few cases for analysis. Clearly, however, future researchers will want to study the combined effects of race, gender, and geography.

Michael V. DiSalle presided over six executions and commuted the death sentences of five men and one woman while he was governor of Ohio, 1959-1963.³⁰ A life-long foe of the death penalty, he wrote:

Punishment is too often a matter of emotion rather than of cold logic. Under a system of justice not free from inequities, the question of who should be put to death in the name of the law and who should live is often decided by men [sic] influenced more by public climate and public clamor than by abstract justice.³¹

³⁰ MICHAEL V. DISALLE, *THE POWER OF LIFE OR DEATH* 5, 27 (1965); *see also* Michael V. DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO STATE LAW JOURNAL 71 (1964).

³¹ *Id.*, at 4.

Table 1
Sentencing Outcome by Decade

	1981-1990	1991-2000	Total	χ^2 Sign ³²
Not Death	4,097	3,293	7,390	
Death	127	111	238	
Proportion Death Sentence	.030	.033	.031	
TOTAL	4,224	3,404	7,628	not significant

³² Fisher's Exact Test (2-sided).

Table 2
Sentencing Outcome by Suspect/Defendant's Race
1981-2000

	White Suspect	Black Suspect	Total	χ^2 Sign ³³
Not Death	2,776	4,614	7,390	
Death	125	113	238	
Proportion Death Sentence	.043	.024	.031	
TOTAL	2,901	4,727	7,628	p < .001

³³ Fisher's Exact Test (2-sided).

Table 3
Sentencing Outcome by Victim's Race
1981-2000

	White Victim	Black Victim	Total	χ^2 Sign ³⁴
Not Death	3,130	4,260	7,390	
Death	177	61	238	
Proportion Death Sentence	.054	.014	.031	
TOTAL	3,307	4,321	7,628	p < .001

³⁴ Fisher's Exact Test (2-sided).

Table 4
Sentencing Outcome by Victim's Race
By Decade

		White Victim	Black Victim	Total	χ^2 Sign ³⁵
1981-90	Not Death	1,815	2,282	4,097	
	Death	90	37	127	
	Proportion Death Sentence	.047	.016	.030	
	TOTAL	1,905	2,319	4,224	p = .000

		White Victim	Black Victim	Total	χ^2 Sign ³⁶
1991-2000	Not Death	1,315	1,978	3,293	
	Death	87	24	111	
	Proportion Death Sentence	.062	.012	.033	
	TOTAL	1,402	2,002	3,404	p = .000

³⁵ Fisher's Exact Test (2-sided).

³⁶ Fisher's Exact Test (2-sided).

Table 5
Sentencing Outcome by Suspect/Defendant-Victim's Race
1981-2000

	WkW ³⁷	WkB ³⁸	BkW ³⁹	BkB ⁴⁰	Total	χ^2 Sig.
Sentence						
Not Death	2,562	214	568	4,046	7,390	
Death	121	4	56	57	238	
Proportion Death Sentences	.045	.018	.090	.014	.031	
TOTAL	2,683	218	624	4,103	7,628	p < .001 ⁴¹

³⁷ White kills White.

³⁸ White kills Black.

³⁹ Black kills White.

⁴⁰ Black kills Black.

⁴¹ Pearson Chi Square. No cells had an expected frequency of less than 5.

Table 6
Sentencing Outcome by Number of Aggravating Factors
1981-2000

	None	One	Two	Total	χ^2 Sig.
Sentence					
Not Death	5,921	1,394	75	7,390	
Death	32	171	35	238	
Proportion Death Sentences	.005	.109	.318	.031	
TOTAL	5,953	1,565	110	7,628	$p < .001$ ⁴²

⁴² Pearson Chi-Square. One cell had an expected frequency of less than 5.

Table 7**Sentencing Outcome by Victim's Race by Number of Aggravating Factors
1981-2000**

		White Victim	Black Victim	Total	χ^2 Sign ⁴³
Aggravating Factors	Not Death	2,476	3,445	5,921	
	Zero				
	Death	23	9	32	
	Proportion Death Sentence	.009	.003	.005	
	TOTAL	2,499	3,454	5,953	p < .001

One	Not Death	629	765	1,394	
	Death	129	42	171	
	Proportion Death Sentences	.170	.052	.109	
	TOTAL	758	807	1,565	p < .001

Two	Not Death	25	50	75	
	Death	25	10	35	
	Proportion Death Sentences	.500	.167	.318	
	TOTAL	50	60	110	p < .001

⁴³ Fisher's Exact Test (2-sided).

Table 8
Sentencing Outcome by Suspect/Defendant-Victim's Race
by Number of Aggravating Factors
1981-2000

Aggravating Factors		WkW ⁴⁴	WkB ⁴⁵	BkW ⁴⁶	BkB ⁴⁷	Total	χ^2 Sig.
Zero	Not Death	2,165	161	311	3,284	5,921	
	Death	17	0	6	9	32	
	Proportion Death Sentences	.008	.000	.019	.003	.005	
	TOTAL	2,182	161	317	3,293	5,953	p = .000 ⁴⁸

One	Not Death	387	50	242	715	1,394	
	Death	86	4	43	38	171	
	Proportion Death Sentences	.182	.074	.151	.050	.109	
	TOTAL	473	54	285	753	1,565	p = .000

Two	Not Death	10	3	15	47	75	
	Death	18	0	7	10	35	
	Proportion Death Sentences	.643	.000	.318	.175	.318	
	TOTAL	28	3	22	57	110	p = .000 ⁴⁹

⁴⁴ White kills White.

⁴⁵ White kills Black.

⁴⁶ Black kills White.

⁴⁷ Black kills Black.

⁴⁸ Pearson Chi Square. Two cells had an expected frequency of less than 5.

⁴⁹ Two cells had an expected frequency of less than 5.

Table 9
Sentencing Outcome by County

	Cuyahoga	Franklin	Hamilton	Other	Total	χ^2 Sign
Not Death	2,040	1,087	554	3,709	7,390	
Death	47	15	53	123	238	
Proportion Death Death Sentence	.023	.014	.087	.032	.031	
TOTAL	2,087	1,102	607	3,832	7,628	p=.000

Table 10
Sentencing Outcome by County
by Number of Aggravating Factors
1981-2000

Aggravating Factors		Cuyahoga	Franklin	Hamilton	Other	Total	χ^2 Sign ⁵⁰
Zero	Not Death	1,577	817	525	3,002	5,921	
	Death	7	0	5	20	32	
	Proportion Death Sentences	.004	.000	.009	.007	.005	
	TOTAL	3,022	817	530	3,022	5,953	p < .066 ⁵¹

One	Not Death	441	257	26	670	1,394	
	Death	35	11	42	83	171	
	Proportion Death Sentences	.074	.041	.618	.110	.109	
	TOTAL	476	268	68	753	1,565	p = .000

Two	Not Death	22	13	3	37	75	
	Death	5	4	6	20	35	
	Proportion Death Sentences	.185	.235	.667	.351	.318	
	TOTAL	27	17	9	57	110	p < .045 ⁵²

⁵⁰ Pearson Chi Square. Two cells had an expected frequency of less than 5.

⁵¹ Pearson Chi Square. No cells had an expected frequency of less than 5.

⁵² Pearson Chi-Square. One cell had an expected frequency of less than 5.

Table 11

**Logistic Regression Analysis of
Suspect/Victim Races and Aggravating Circumstances on the Imposition of a Death
Sentence
1981-2000**

Independent Variables**	β	Sig.	Exp(β)
One aggravating circumstance	3.45	.000	31.451
Two aggravating circumstances	4.92	.000	137.596
Cuyahoga County	-.189	.315	.827
Franklin County	-1.003	.000	.367
Hamilton County	2.02	.000	7.536
Black Suspect/ White Victim	1.118	.000	3.058
White Suspect/ Black Victim	.189	.728	1.207
White Suspect/ White Victim	1.406	.000	4.078
Constant	-6.350	.000	.002

Number of cases = 7,628

-2 Log likelihood = 1423.556

“Death Sentence” is coded as 0 = no death sentence, 1 = death sentence.

“One aggravating circumstance” is coded: 0 = either no circumstance or two circumstances, 1 = one circumstance

“Two aggravating circumstances” is coded: 0 = no or one circumstance, 1 = two circumstances