MANDATORY JUSTICE
Eighteen Reforms to the Death Penalty
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Preface

The Constitution Project, housed at Georgetown University in Washington, D.C., seeks to develop bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education. In May 2000, the Constitution Project created a death penalty initiative to address the deeply disturbing risk that Americans are being wrongfully convicted of capital crimes or wrongfully sentenced to death. The Constitution Project convened the thirty members of the death penalty initiative’s blue-ribbon committee to examine our country's present course, and to recommend ways to ensure that fundamental fairness is guaranteed for all.

The committee's members are supporters and opponents of the death penalty, Democrats and Republicans, conservatives and liberals. They are former judges, prosecutors, and other public officials, as well as victim advocates, defense lawyers, journalists, scholars, and other concerned Americans. They have extensive and varied experience in the criminal justice system. They may disagree on much, including whether abolition of the death penalty is warranted, but they are united in their profound concern that, in recent years, and around the country, procedural safeguards and other assurances of fundamental fairness in the administration of capital punishment have been revealed to be deeply flawed.

The members of the committee have brought a wide variety of philosophies, experiences, and perspectives to their work. They have deliberated long and hard about the recommendations presented here, seeking consensus because they recognized the need to overcome past divisions. For too long, society has cast the death penalty debate as one between “liberals” and “conservatives,” those who are “soft on crime” and those who “care about victims of crime,” or “abolitionists” and hard-line death penalty proponents. If we ever could, we can no longer afford to carry on the debate in this manner. Much is riding on our country’s ability to put these stereotypes aside.

The committee’s mission statement says that individuals who commit violent crimes deserve swift and certain punishment. Some of the members of the committee believe that the range of punishment may include death; others do not. But they all agree that no one should be denied basic constitutional protections, including a competent lawyer, a fair trial, and full judicial review of the conviction and sentence. The denial of such protections heightens the danger of wrongful conviction and sentence.

In the months since the initiative was created, there has been a dramatic increase in the number of those released from death row because they have been shown—often at nearly the last minute—to be innocent. This is deeply disturbing to all of the committee's members, as it should be to all Americans. Committee members continue to be greatly troubled, as well, by executions of persons with mental retardation and those who committed crimes as juveniles. While some states are considering reforms to narrow the application of capital punishment, especially with regard to persons with mental retardation, others are enacting new laws that would actually increase its application.

Too often, cases of wrongful conviction involve defense lawyers who lacked the appropriate experience and resources. Sometimes, capital defense lawyers were also under the influence of alcohol or drugs, or slept through parts of a trial. The number of capital defense lawyers
who were subsequently disbarred or otherwise cited for serious ethical violations is shock-
ingly high.

The problems with the current process are perhaps best evidenced by the explosion of DNA evidence on the criminal justice scene. Changes in technology permit individuals accused or convicted of capital crimes to develop and present important evidence that was not available earlier, or could not be reliably tested. Frequently, however, these individuals are unable even to have the evidence tested and face procedural barriers to presenting the results to any court.

DNA evidence has illuminated some of our criminal justice system's failings, but it by no means reveals them all. Many cases do not involve biological evidence, and in other cases, evidence is destroyed after trials. As a result, DNA evidence is unavailable in the vast majority of criminal cases. If so many individuals have been exonerated by DNA evidence, what about these cases where there is no DNA evidence to be tested? Society cannot be reassured that the system can catch and correct its errors simply because DNA testing is now much more sophisticated and widely available.

One major goal of these recommendations is to create additional safeguards against the endemic tendency of decision-makers in the criminal justice system to “pass the buck.” The system is far too lax in catching errors and injustices in part because many of those who might catch these errors and injustices do not fully understand their own duty to ensure that a death sentence is the appropriate punishment. Several of these recommendations are addressed to those who occupy critical roles in the capital punishment system, including the defense attorney, the prosecutor, the jury, the trial judge, and the reviewing courts. They emphasize that each, individually, has the responsibility to ensure, to the best of his or her ability, that justice is done.

Some federal and state legislatures are enacting new restrictions that include short filing deadlines, limits on evidentiary hearings that may preclude defendants from presenting new evidence, and other procedural hurdles that prevent prompt, if any, consideration of the merits of cases. It is especially difficult for inmates to obtain judicial consideration of new facts that may support a claim of innocence. Access to the courts to protect individual rights is a fundamental tenet of our democracy, and all Americans should be concerned by its erosion.

The courts' inability to promptly consider the merits of a case, along with the inadequacies of our capital representation system and a host of other problems discussed in these recommendations, increases the number of appeals and causes delays that thwart society's interest in finality and certainty of punishment.

Many of the committee's members have served as judges, prosecutors, and defense lawyers. They, along with all of the members, greatly admire the work of the hard-working, conscientious participants in the criminal justice system who strive to do their best, often under the most difficult of circumstances. The criminal justice system often suffers from misallocated, misdirected, and, in some instances, inadequate resources, and, as a result, those working within the system may have to struggle to do their jobs in a thorough and professional manner. This also means that those the system is designed to protect instead frequently feel victimized by it.
The committee members’ own experiences have led them to conclude that the current system serves none of us adequately—not victims, not defendants, and not society. The system is replete with delays and mistakes that prevent victims from experiencing finality and that cost unjustly accused or convicted individuals years of their lives.

Committee members stress that their concern is not only for those who are wrongfully convicted. When we convict the innocent, we also fail to bring to justice those who are actually guilty, thus creating a continued threat to public safety and an enduring tragedy for the family of the murder victim. Members strongly share concerns about crime victims’ needs for finality and closure. At the same time, society cannot ignore a concern for the truth and for the Constitution.

No matter what their individual views about the death penalty, the committee’s members do not in these recommendations seek its abolition. They understand that implementing these reforms will be difficult, but they believe such basic changes are essential to a death penalty system that has a claim on fairness and justice. The committee’s members have broad experience in all aspects of this nation’s justice system. It is this experience that leads them to state with confidence that the state and federal legislatures or courts, bar associations, and other appropriate authorities must take these recommendations seriously and consider them expeditiously. At long last, these authorities must acknowledge the need to provide sufficient resources for the capital punishment system. They can and must recognize that access to the courts is a fundamental right that protects the liberty of all of us, not just those who are accused or convicted of heinous crimes.

The committee members generously committed their time and energy to this undertaking. It is their own, hands-on experiences with the system that dictated the subjects, and the reforms, addressed in these recommendations. They were also informed by the thorough and thoughtful advice of four leading scholars—DePaul University Law School professor Susan Bandes, Northeastern University professor William Bowers, Duke University Law School professor Robert Mosteller, and George Washington Law School professor Stephen Saltzburg. We are especially indebted to Professors Bandes and Mosteller, who conducted an extensive review of the relevant literature and case law and drafted the recommendations with great skill and attention to detail. The law firm of Latham & Watkins, through a generous pro bono commitment of time and resources, studied hundreds of capital cases to support the committee’s work. Professors Samuel Gross of the University of Michigan Law School and James Liebman of the Columbia Law School supplied invaluable advice, and Thomas Kerner and Marlaine Williams of the law firm of Wilmer Cutler & Pickering provided cite-checking and other much-needed assistance. The Constitution Project and members of the committee are deeply grateful for these contributions. Finally, none of this work would have been possible without the generous support of the Open Society Institute, Deer Creek Foundation, Arca Foundation, Columbia Foundation and Vietnam Veterans of America Foundation. In the end, though, it was the committee members themselves who set the course of this review and who sought and attained the extraordinary consensus that underlies these recommendations.

The recommendations included here were arrived at through a variety of meetings, conference and other telephone calls, and electronic and other communications. They do not, as some state commissions do, examine specific cases. Rather, they are a broad nationwide
view, and an important compilation of the accumulated experience with and wisdom of the members of the committee about the current flawed death penalty system. These recommendations should not, however, be considered the final word. Capital punishment is an extraordinarily complex area of the law, and our nation's understanding of it and its problems has evolved with the accumulation of experience. The committee issues these recommendations because its members are confident of their wisdom and because a crisis in the death penalty system exists now and must be addressed as expeditiously as possible. Future recommendations may be expected as additional experience, study, and reflection bring to further consensus.

The philosopher Albert Camus, in *Reflections on the Guillotine*, wrote of a Burton Abbott, executed in California in 1957. “Today, as yesterday, the chance of error remains. Tomorrow another expert testimony will declare the innocence of some Abbott or other. But Abbott will be dead, scientifically dead, and the science that claims to prove innocence as well as guilt has not yet reached the point of resuscitating those it kills... If justice admits that it is frail, would it not be better for justice to be modest and to allow its judgments sufficient latitude so that a mistake can be corrected?” Camus’ statement, written in 1957, is as true today as it was then. No matter whether we support or oppose the death penalty, we must admit that the system is still fallible. The Committee took this fallibility into account in crafting these recommendations.

Committee members present these recommendations for reforms because they are urgently needed. In the name of justice, fairness, efficiency, and common sense, the recommendations should command the support of all Americans, no matter what their views about capital punishment.

Virginia E. Sloan
Executive Director
The Constitution Project
Summary of Recommendations

I. Effective Counsel

Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train, and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers’ performance. An existing public defender system may comply if it implements the proper standards and procedures.

Capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators.

The current Supreme Court standard for effective assistance of counsel (Strickland v. Washington) is poorly suited to capital cases. It should be replaced in such cases by a standard requiring professional competence in death penalty representation.

II. Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides

Persons with mental retardation should not be eligible for the death penalty.

Persons under the age of eighteen at the time the crime was committed should not be eligible for the death penalty.

Persons convicted of felony murder, and who did not kill, intend to kill, or intend that a killing take place, should not be eligible for the death penalty.

III. Expanding and Explaining Life without Parole (LWOP)

Life without the possibility of parole should be a sentencing option in all death penalty cases in every jurisdiction that imposes capital punishment.

The judge should inform the jury in a capital sentencing proceeding about all statutorily authorized sentencing options, including the true length of a sentence of life without parole. This is commonly known as “truth in sentencing.”

IV. Safeguarding Racial Fairness

All jurisdictions that impose the death penalty should create mechanisms to help ensure that the death penalty is not imposed in a racially discriminatory manner.

V. Proportionality Review

Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed fashion, to provide a check on broad
prosecutorial discretion, and to prevent discrimination from playing a role in the capital decision-making process.

VI. Protection against Wrongful Conviction and Sentence

DNA evidence should be preserved and it should be tested and introduced in cases where it may help to establish that an execution would be unjust.

All jurisdictions that impose capital punishment should ensure adequate mechanisms for introducing newly discovered evidence that would more likely than not produce a different outcome at trial or that would undermine confidence that the sentence is reliable, even though the defense would otherwise be prevented from introducing the evidence because of procedural barriers.

VII. Duty of Judge and Role of Jury

If a jury imposes a life sentence, the judge in the case should not be allowed to “override” the jury’s recommendation and replace it with a sentence of death.

The judge in a death penalty trial should instruct the jury at sentencing that if any juror has a lingering doubt about the defendant's guilt, that doubt may be considered as a “mitigating” circumstance that weighs against a death sentence.

The judge in a death penalty trial must ensure that each juror understands his or her individual obligation to consider mitigating factors in deciding whether a death sentence is appropriate under the circumstances.

VIII. Role of Prosecutors

Prosecutors should provide “open-file discovery” to the defense in death penalty cases. Prosecutors' offices in jurisdictions with the death penalty must develop effective systems for gathering all relevant information from law enforcement and investigative agencies. Even if a jurisdiction does not adopt open-file discovery, it is especially critical in capital cases that the defense be given all favorable evidence (Brady material), and that the jurisdiction create systems to gather and review all potentially favorable information from law enforcement and investigative agencies.

Prosecutors should establish internal guidelines on seeking the death penalty in cases that are built exclusively on types of evidence (stranger eyewitness identifications and statements of informants and co-defendants) particularly subject to human error.

Prosecutors should engage in a period of reflection and consultation before any decision to seek the death penalty is made or announced.
Black Letter Recommendations

I. Effective Counsel

A. Creation of Independent Appointing Authorities

Each state should create or maintain a central, independent appointing authority whose role is to “recruit, select, train, monitor, support, and assist” attorneys who represent capital clients (ABA Report). The authority should be composed of attorneys knowledgeable about criminal defense in capital cases, and who will operate independent of conflicts of interest with judges, prosecutors, or any other parties. This authority should adopt and enforce a set of minimum standards for appointed counsel at all stages of capital cases, including state or federal post-conviction and certiorari. An existing statewide public defender office or other assigned counsel program should meet the definition of a central appointing authority, providing it implements the proper standards and procedures.

B. Provision of Competent and Adequately Compensated Counsel at All Stages of Capital Litigation and Provision of Adequate Funding for Expert and Investigative Services

Every capital defendant should be provided with qualified and adequately compensated attorneys at every stage of the capital proceeding, including state and federal post-conviction and certiorari. Each jurisdiction should adopt a stringent and uniform set of qualifications for capital defense at each stage of the proceedings. Capital attorneys should be guaranteed adequate compensation for their services, at a level that reflects the “extraordinary responsibilities inherent in death penalty litigation” (ABA Report). Such compensation should be set according to actual time and service performed, and should be sufficient to ensure that an attorney meeting his or her professional responsibility to provide competent representation will receive compensation adequate for reasonable overhead; reasonable litigation expenses; reasonable expenses for expert, investigative, support, and other services; and a reasonable return.

C. Replacement of the Strickland v. Washington Standard for Effective Assistance of Counsel at Capital Sentencing

Every state that permits the death penalty should adopt a more demanding standard to replace the current test for effective assistance of counsel in the capital sentencing context. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case, and possess adequate time and resources to prepare (NLADA Standards). Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney’s incompetence. Moreover, there should be a strong presumption in favor of the attorney’s obligation to offer at least some mitigating evidence.
II. Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides

To reduce the unacceptably high risk of wrongful execution in certain categories of cases, to ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty, jurisdictions should limit the cases eligible for capital punishment to exclude those involving (1) persons with mental retardation, (2) persons under the age of eighteen at the time of the crimes for which they were convicted, and (3) those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur.

III. Expanding and Explaining Life without Parole (LWOP)

A. Availability of Life Sentence without Parole

In all capital cases, the sentencer should be provided with the option of a life sentence without the possibility of parole.

B. Meaning of Life Sentence without Parole (Truth in Sentencing)

At the sentencing phase of any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court shall inform the jury of the minimum length of time those convicted of murder must serve before being eligible for parole. However, the trial court should not make statements or give instructions suggesting that the jury's verdict will or may be reviewed or reconsidered by anyone else, or that any sentence it imposes will or may be overturned or commuted.

IV. Safeguarding Racial Fairness

Each jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex and difficult, two approaches are appropriate. One very important component—perhaps the most important—is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring members of all races into every level of the decision-making process.

V. Proportionality Review

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner.
VI. **Protection against Wrongful Conviction and Sentence**

A. **Preservation and Use of DNA Evidence to Establish Innocence or Avoid Unjust Execution**

In cases where the defendant has been sentenced to death, states and the federal government should enact legislation that requires the preservation and permits the testing of biological materials not previously subjected to effective DNA testing, where such preservation or testing may produce evidence favorable to the defendant and relevant to the claim that he or she was wrongfully convicted or sentenced. These laws should provide that biological materials must be generally preserved and that, as to convicted defendants, existing biological materials must be preserved until defendants can be notified and provided an opportunity to request testing under the jurisdiction's DNA testing requirements. These laws should provide for the use of public funds to conduct the testing and to appoint counsel where the convicted defendant is indigent. If exculpatory evidence is produced by such testing, notwithstanding other procedural bars or time limitations, legislation should provide that the evidence may be presented at a hearing to determine whether the conviction or sentence was wrongful. If the conviction or sentence is shown to be erroneous, the legislation should require that the conviction or sentence be vacated.

B. **Lifting Procedural Barriers to Introduction of Exculpatory Evidence**

State and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence.

VII. **Duty of Judge and Role of Jury**

A. **Eliminating Authorization for Judicial Override of a Jury's Recommendation of a Life Sentence to Impose a Sentence of Death**

Judicial override of a jury's recommendation of life imprisonment to impose a sentence of death should be prohibited. Where a court determines that a death sentence would be disproportionate, where it believes doubt remains as to the guilt of one sentenced to death, or where the interests of justice require it, the trial court should be granted authority to impose a life sentence despite the jury's recommendation of death.

B. **Lingering (Residual) Doubt**

The trial judge, in each case in which he or she deems such an instruction appropriate, should instruct the jury, at the conclusion of the sentencing phase of a capital case and before the jury retires to deliberate, as follows: "If you have any lingering doubt as to the defendant's guilt of the crime or any element of the
crime, even though that doubt did not rise to the level of a reasonable doubt
when you found the defendant guilty, you may consider that doubt as a mitigat-
ing circumstance weighing against a death sentence for the defendant.”

C. Ensuring That Capital Sentencing Juries Understand Their Obligation to
Consider Mitigating Factors

Every judge presiding at a capital sentencing hearing has an affirmative obliga-
tion to ensure that the jury fully and accurately understands the nature of its
duty. The judge must clearly communicate to the jury that it retains the ultimate
moral decision-making power over whether the defendant lives or dies, and must
also communicate that (1) mitigating factors do not need to be found by all
members of the jury in order to be considered in the individual juror’s sentencing
decision, and (2) mitigating circumstances need to be proved only to the satisfac-
tion of the individual juror, and not beyond a reasonable doubt, to be considered
in the juror’s sentencing decision. In light of empirical evidence documenting
serious juror confusion on the nature of the jury’s obligation, judges must ensure
that jurors understand, for example, that this decision rests in the jury’s hands,
that it is not a mechanical decision to be discharged by a numerical tally of
aggravating and mitigating factors, that it requires the jury to consider the
defendant’s mitigating evidence, and that it permits the jury to decline to
sentence the defendant to death even if sufficient aggravating factors exist.

The judge’s obligation to ensure that jurors understand the scope of their moral
authority and duty is affirmative in nature. Judges should not consider it dis-
charged simply because they have given standard jury instructions. If judges have
reason to think such instructions may be misleading, they should instruct the
jury in more accessible and less ambiguous language. In addition, if the jury asks
for clarification on these difficult and crucial issues, judges should offer clarifica-
tion and not simply direct the jury to reread the instructions.

VIII. Role of Prosecutors

A. Providing Expanded Discovery in Death Penalty Cases and Ensuring That in
Death Penalty Prosecutions Exculpatory Information Is Provided to the Defense

Because of the paramount interest in avoiding the execution of an innocent
person, special discovery provisions should be established to govern death penalty
cases. These provisions should provide for discovery from the prosecution that is
as full and complete as possible, consistent with the requirements of public safety.

Full “open-file” discovery should be required in capital cases. However, discovery
of the prosecutor’s files means nothing if the relevant information is not con-
tained in those files. Thus, to make discovery effective in death penalty cases, the
prosecution must obtain all relevant information from all agencies involved in
investigating the case or analyzing evidence. Disclosure should be withheld only
when the prosecution clearly demonstrates that restrictions are required to protect witnesses’ safety or shows similarly substantial threats to public safety.

If a jurisdiction fails to adopt full open-file discovery for its capital cases, it must ensure that it provides all exculpatory (Brady) evidence to the defense. In order to ensure compliance with this obligation, the prosecution should be required to certify that (1) it has requested that all investigative agencies involved in the investigation of the case and examination of evidence deliver to it all documents, information, and materials relevant to the case and that the agencies have indicated their compliance, (2) a named prosecutor or prosecutors have inspected all these materials to determine if they contain any evidence favorable to the defense as to either guilt or sentencing, and (3) all arguably favorable information has been either provided to the defense or submitted to the trial judge for in camera review to determine whether such evidence meets the Brady standards of helpfulness to the defense and materiality to outcome. When willful violations of Brady duties are found, meaningful sanctions should be imposed.

B. Establishing Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed

Because eyewitness identifications by strangers are fallible, co-defendants are prone to lie and blame other participants in order to reduce their own guilt or sentence, and jailhouse informants frequently have the opportunity and the clear motivation to fabricate evidence to benefit their status at the expense of justice, prosecutors should establish guidelines limiting reliance on such questionable evidence in death penalty cases. The guidelines should put that penalty off limits where the guilt of the defendant or the likelihood of receiving a capital sentence depends upon these types of evidence and where independent corroborating evidence is unavailable.

C. Requiring Mandatory Period of Consultation before Commencing Death Penalty Prosecution

Before the decision to prosecute a case capitally is announced or commenced, a specified time period should be set aside during which the prosecution is to examine the propriety of seeking the death penalty and to consult with appropriate officials and parties.
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*Formerly known as the National Committee to Prevent Wrongful Executions.

**Review of recommendations pending.
MANDATORY JUSTICE
Eighteen Reforms to the Death Penalty
I. EFFECTIVE COUNSEL

Summary

• Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train, and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers’ performance. An existing public defender system may comply if it implements the proper standards and procedures.

• Capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators.

• The current Supreme Court standard for effective assistance of counsel (Strickland v. Washington) is poorly suited to capital cases. It should be replaced in such cases by a standard requiring professional competence in death penalty representation.

Introduction

The lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair, and fraught with serious error—including the real possibility of executing an innocent person. A defendant tried without adequate counsel is far more likely to be charged with and convicted of a capital crime, and to receive a death sentence. Indeed, as capital litigator and Yale law professor Stephen Bright has observed, the quality of capital defense counsel seems to be the most important factor in predicting who is sentenced to die—far more important than the nature of the crime or the character of the accused.

The lack of adequate counsel is a one-two punch. Substandard counsel is more likely not only to result in a client’s receiving a death sentence, but also to create an inadequate trial record through failure to investigate and failure to preserve objections. The attorney’s errors, unless they meet the problematic standards of Strickland v. Washington, 466 U.S. 668 (1984) (discussed below), not only adversely affect the client at trial and sentencing, but also vastly reduce the scope of appellate review, decreasing the possibility that errors will be corrected later. Furthermore, because there is no constitutional right to counsel after the first state appeal, even in capital cases, some states do not appoint counsel for post-conviction or habeas corpus review, further insulating trial errors from correction.

Death penalty litigation is a highly specialized, legally complex field, a “minefield for the unwary,” in the words of the ABA Criminal Justice Section. American Bar Association, Criminal Justice Section Report, reprinted in 40 American University Law Review 1, 69 (1990). Adequate preparation requires not only a grasp of rapidly changing substantive and procedural doctrine, but also labor-intensive and time-consuming factual investigation. Capital attorneys, from the trial stage through post-conviction review, should be well-trained, experienced, and adequately compensated, and have sufficient time and resources to perform competently when representing clients who are facing the possibility of execution. Instead, study after study documents a national crisis in the quality of counsel in death penalty cases and calls for reform—with little success.

Some states (for example, Alabama, Mississippi, and Texas) have no public defender system, and no central appointing authority to screen and monitor appointed counsel. Many
states assign only a single lawyer to represent a capital defendant; do not require any level of experience or expertise; do not provide or require training; do not screen out lawyers with serious disciplinary records; fail to monitor performance of counsel; inadequately compensate counsel; and refuse to provide funds for crucial investigators, experts, and other essential resources. Unsurprisingly, few attorneys are willing to take on capital cases, and those who do are often “thoroughly incapable of mounting an effective defense during either the guilt or punishment phases of the capital case.” Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 Harvard Law Review 355, 398 (1995).

Nevertheless, courts have found that the vast majority of this attorney incompetence does not fall below the lax standards for effective counsel under Strickland, which requires the defendant to show both that counsel’s performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence. Therefore, the client continues to pay for the attorney’s errors, sometimes with his or her life. The state, the families of victims, and society as a whole pay the price as well. Litigation becomes increasingly protracted, complicated, and costly, putting legitimate convictions at risk, subjecting the victims’ families to continuing uncertainty, and depriving society of the knowledge that the real perpetrator is behind bars. In short, the likelihood of error precludes the assurance that the outcome is fair or reliable.

Our recommendations seek to improve this state of affairs in three overlapping ways. First, we recommend the creation of central, independent authorities to appoint, monitor, train, and screen capital attorneys, and otherwise ensure the quality of capital representation— at all stages of litigation. Second, we recommend that each jurisdiction adopt standards for the appointment of counsel by these authorities, and, additionally, that each jurisdiction adopt standards ensuring adequate compensation of such counsel, as well as adequate funding for expert and investigative services. Third, we recommend that the current standard of review for ineffective assistance be replaced, in capital sentencing, with a more stringent standard better keyed to the particular requisites of capital representation.

A. Creation of Independent Appointing Authorities

RECOMMENDATION

Each state should create or maintain a central, independent appointing authority whose role is to “recruit, select, train, monitor, support, and assist” attorneys who represent capital clients. 1990 ABA Criminal Justice Section Report at 9. The authority should be composed of attorneys knowledgeable about criminal defense in capital cases, and who will operate independent of conflicts of interest with judges, prosecutors, or any other parties. This authority should adopt and enforce a set of minimum standards for appointed counsel at all stages of capital cases, including state or federal post-conviction and certiorari. An existing statewide public defender office or other assigned counsel program should meet the definition of a central appointing authority, providing it implements the proper standards and procedures.

COMMENTARY

This recommendation, similar to recommendations made by the ABA, the National Legal Aid Defender Association (NLADA), and other groups, is based on the recognition
that each jurisdiction needs a formal, centralized, and reasoned process for ensuring that every capital defendant receives competent counsel. Without such a process, as numerous studies have shown, competent representation becomes more a matter of luck than of constitutional guarantee.

The recommendation provides two approaches to achieving this centralization. In jurisdictions with a public defender system or other centralized appointing authority, that authority may be fully adequate, either currently or by adding steps to ensure proper monitoring, training, and other assistance. Such training and assistance should be available to all capital defense attorneys in the jurisdiction. In jurisdictions with no public defender system in place, the recommendation calls for establishing a central appointing authority. It provides some flexibility in determining who appoints or sits on the central appointing authority. However, the independence of the authority and its freedom from judicial or prosecutorial conflicts are crucial to ensure that its members can act without partisanship and in a manner consistent with the highest professional standards.

Some of the recommendation’s language is identical to that of the 1990 ABA recommendations, but the ABA recommendations have been widely ignored. Instead, many states award capital cases by contract or appointment, employing explicit or implicit incentives to these attorneys to keep their costs low and their hours on the case few. The attorneys may be chosen based on friendship with the judge, a desire not to “rock the boat,” their willingness to work cheaply, their presence in the halls of the courthouse, or other factors poorly correlated with zealous or even competent representation. Many of them have little knowledge of capital litigation or even criminal law in general. Many of them have little experience or skill in the courtroom. A disproportionate number of them have records of disciplinary action, and even disbarment. See, e.g., Texas Civil Rights Project, The Death Penalty in Texas: Due Process and Equal Justice or Rush to Execution?, THE SEVENTH ANNUAL REPORT ON THE STATE OF HUMAN RIGHTS IN TEXAS (Sept. 2000) (finding that fully a third of those recently executed were represented by lawyers who were later disbarred, suspended, or otherwise sanctioned). Even the best of these lawyers are placed in a situation in which most incentives are skewed toward doing a cursory job, or even losing—especially in high profile cases. Establishing independent appointing authorities to alleviate many of these problems is a crucial and central recommendation of this committee.

B. Provision of Competent and Adequately Compensated Counsel at All Stages of Capital Litigation and Provision of Adequate Funding for Expert and Investigative Services

RECOMMENDATION

Every capital defendant should be provided with qualified and adequately compensated attorneys at every stage of the capital proceeding, including state and federal post-conviction and certiorari. Each jurisdiction should adopt a stringent and uniform set of qualifications for capital defense at each stage of the proceedings. Capital attorneys should be guaranteed adequate compensation for their services, at a level that reflects the “extraordinary responsibilities inherent in death penalty litigation.” 1990 ABA Criminal Justice Section Report at 22. Such compensation should be set according to actual time and service performed, and should be sufficient to ensure that an attorney meeting his or her professional responsibility to
provide competent representation will receive compensation adequate for reasonable overhead; reasonable litigation expenses; reasonable expenses for expert, investigative, support, and other services; and a reasonable return.

COMMENTARY

Qualifications of Counsel

Providing qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing, and execution of capital defendants. It is also a safeguard far too often ignored. All jurisdictions should adopt minimum standards for the provision of an adequate capital defense at every level of litigation. The most crucial stage of any capital case is trial. Qualified counsel at this stage would add immeasurably to the effort to keep the trial “the main event” in the capital process, and to streamline the post-trial appellate and conviction procedures. But even with improved representation at trial, the need for quality legal representation at post-trial stages will continue to be great, given the unacceptability of error, the rapid changes in the substantive law, and the possibilities of newly discovered evidence at later stages.

The standards for qualified counsel will vary according to the requisites of the particular stage of proceedings. There is some flexibility as to which minimum standards a jurisdiction ought to adopt. However, we suggest that minimum standards should, at the least, require two attorneys on each capital case. We recommend that jurisdictions adopt the ABA or NLADA standards for appointment of counsel in capital cases. At the trial level, these include, among other requirements, that (1) the lead attorney have at least five years of criminal litigation experience, as well as experience as lead or co-counsel in at least one capital case, (2) co-counsel have at least three years of criminal litigation experience, (3) each counsel have significant experience in jury trials of serious felony cases, (4) each attorney have had recent training in death penalty litigation, and (5) each attorney have demonstrated commitment and proficiency. Similar standards should be met at the appellate and post-conviction stages, although at these stages the type of relevant prior experience will vary. The important thing is that, at all stages, a set of stringent and uniform minimum standards should be adopted, implemented, and enforced.

Compensation of Counsel

A major cause of inadequacy of capital representation is the lack of adequate compensation for those taking on demanding, time-consuming cases, which, if done correctly, demand thousands of hours of preparation time. Douglas Vick estimates that a capital case may take from 500 to 1,200 hours at the trial level alone, and an additional 700 to 1,000 hours for direct appeal of a death sentence, with hundreds of additional hours required at each successive stage. Douglas W. Vick, Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences, 43 B UFFALO L AW R EVIEW 329 (1995). Assuming an hourly wage of $100, he estimates that the cost of attorney time in a typical capital case, excluding any additional services, would be about $190,000. Many jurisdictions impose shockingly low maximum hourly rates or arbitrary fee caps for capital defense. See, e.g., Alabama, which sets an hourly rate of $20 to $40 and a maximum of $2,000 per case, meaning that an attorney devoting 600 hours to pretrial preparation in Alabama would earn $3.33 an hour. See also Tennessee, which sets an hourly rate of $20 to $30, and Mississippi,
which imposes a $1,000 cap per case. Even the most dedicated lawyer will find it difficult to spend the time needed on a capital case under these conditions. As the NLADA notes, these are “confiscatory rates” that impermissibly interfere with the Sixth Amendment right to counsel. NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, Standards for the Appointment and Performance of Counsel in Death Penalty Cases 47 (December 1, 1987). Moreover, courts often will not make funds available for reasonable expert, investigative, support, or other expenses. Factual investigation, including witness interviews, document review, and forensic (for example, DNA, blood, or ballistics) testing, is a crucial component of adequate preparation for both trial and sentencing in capital cases. In addition, the defense’s frequent inability to hire experts on central issues in a case, such as forensics or psychological background, is another major obstacle to the fairness of the proceedings, particularly in light of far greater prosecutorial access to such resources. Attorneys should not be forced to choose whether to spend a severely limited pool of funds on their own fees or on experts and investigators.

Each jurisdiction should develop standards that avoid arbitrary ceilings or flat payment rates, and instead take into consideration the number of hours expended plus the effort, efficiency, and skill of capital counsel (NLADA Standards). The hourly rate should reflect the extraordinary responsibilities and commitment required of counsel in death penalty cases (1990 ABA Criminal Justice Section Report, NLADA Standards). Failure to provide adequate funding and resources is a failure of the system that forces even the most committed attorneys to provide inadequate assistance. Its consequences should fall not on the capital defendant, but on the government. One model for imposing such consequences is that proposed by the ABA: Where the capital defendant was not provided with qualified and adequately compensated counsel, several procedural barriers to review should be held inapplicable.

C. Replacement of the Strickland v. Washington Standard for Effective Assistance of Counsel at Capital Sentencing

RECOMMENDATION

Every state that permits the death penalty should adopt a more demanding standard to replace the current test for effective assistance of counsel in the capital sentencing context. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case, and possess adequate time and resources to prepare (NLADA Standards). Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney’s incompetence. Moreover, there should be a strong presumption in favor of the attorney’s obligation to offer at least some mitigating evidence.

COMMENTARY

The adoption of a more stringent standard can be accomplished by each state, either legislatively or judicially, so long as the state court relies on state rather than federal law. See, e.g., State v. Davis, 561 A.2d 1082, 1089 (N.J. 1989), in which the New Jersey Supreme
Court held that competence in the capital context should be measured with reference to the special expertise required in capital cases. The current Supreme Court standard for effective assistance of counsel, Strickland v. Washington, 466 U.S. 668 (1984), permits “effective but fatal counsel” and requires the defendant to show both that counsel’s performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence. Randall Coyne and Lyn Entzeroth observe: “Myriad cases in which defendants have actually been executed confirm that Strickland’s minimal standard for attorney competence in capital cases is a woeful failure. Demonstrable errors by counsel, though falling short of ineffective assistance, repeatedly have been shown to have had fatal consequences.”


Strickland is a poorly conceived standard in all criminal cases. It is particularly unfortunate in capital cases for two reasons. First, the standard is inadequate simply because the consequences of attorney error at trial are so great in a capital case, and the opportunities for error so vast. Second, the standard, inadequate as it has been in measuring the competence of attorneys at trial, has proven especially poorly suited for measuring competence in the punishment phase of a capital trial. Moreover, the requirement that the capital defendant prove not only the ineffectiveness of counsel, but also that it caused the defendant prejudice, is extremely hard to satisfy when the question is whether he or she would have received a different sentence had counsel done a better job. Given the unpredictability of a jury’s decision whether to exercise mercy in light of a particular set of facts, and given the fact that the attorney’s very failure to investigate deprives the defendant of crucial information, the standard rarely can be met. The harshness of Strickland’s prejudice prong means that capital defendants whose counsel was ineffective even under Strickland’s stringent ineffectiveness prong will nevertheless be executed unless they can meet the onerous standard of demonstrating a reasonable probability that, if not for attorney incompetence, they would not have been sentenced to death. Instead of perpetuating this unfair standard, we should shift the burden to the state. After a finding of attorney ineffectiveness, if the state cannot show that the defendant would have been sentenced to death even with competent counsel, the sentence ought to be reversed and the defendant re-sentenced.

In case after case, attorneys who failed to present any mitigation evidence at all, or who have presented a bare minimum of such evidence, were found to have satisfied Strickland. See, e.g., Funchess v. Wainwright, 772 F.2d 683 (11th Cir. 1985). See also Neal v. Puckett, 239 F.3d 683 (5th Cir. 2001), in which the federal appeals court found that trial counsel for a death row inmate with mental retardation was ineffective in failing to present mitigation evidence, and that the failure was prejudicial, but that the court would nevertheless defer to the state supreme court’s interpretation of Strickland and uphold the sentence of death. Yet mitigation evidence is an absolutely essential part of the punishment phase. See Lockett v. Ohio, 438 U.S. 586, 604 (1978). As capital litigation expert Welsh White has observed, “the failure to present mitigation evidence is a virtual invitation to impose the death penalty.” Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 University of Illinois Law Review 323, 341 (1993). The proper development of mitigating evidence involves a complete construction of the defendant’s social history, including all significant relationships and events. This duty cannot be satisfied merely by interviewing the defendant. Moreover, the utility of offering mitigation evidence cannot be determined in advance of a thorough investigation. Indeed, White asserts that every capital
attorney he interviewed agreed that “developing the defendant's social history will always lead to some mitigating evidence that can be effectively presented at the penalty phase.” Id. at 342. There may be the rare case in which an attorney makes an informed decision not to put on any mitigation evidence, but such a scenario is highly unlikely. Therefore, there should be a strong presumption in favor of the attorney's duty to put on some mitigation evidence.
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II. PROHIBITING EXECUTION IN CASES INVOLVING QUESTIONABLE CATEGORIES OF DEFENDANTS AND HOMICIDES

Summary

- Persons with mental retardation should not be eligible for the death penalty.
- Persons under the age of eighteen at the time the crime was committed should not be eligible for the death penalty.
- Persons convicted of felony murder, and who did not kill, intend to kill, or intend that a killing take place, should not be eligible for the death penalty.

Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides

RECOMMENDATION

To reduce the unacceptably high risk of wrongful execution in certain categories of cases, to ensure that the death penalty is reserved for the most culpable offenders, and to effectuate the deterrent and retributive purposes of the death penalty, jurisdictions should limit the cases eligible for capital punishment to exclude those involving (1) persons with mental retardation, (2) persons under the age of eighteen at the time of the crimes for which they are convicted, and (3) those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur.

COMMENTARY

Executing persons with mental retardation; those who were juveniles at the time of the crimes for which they were convicted; or those convicted of felony murder who did not kill, attempt to kill, or intend that a killing occur creates an unacceptably high likelihood of singling out for the death penalty those who do not deserve this most serious and final punishment. At the same time, allowing the execution of these classes of defendants does little to advance the goals of capital punishment.

As the Supreme Court has repeatedly emphasized since it permitted the reinstatement of capital punishment in Gregg v. Georgia, 428 U.S. 153 (1976), statutory schemes regulating the death penalty, in order to be constitutional, must guide the states so that the penalty is not meted out in an arbitrary and capricious manner, and so that it is reserved for the most heinous and serious crimes. See Zant v. Stephens, 462 U.S. 862 (1983). For certain categories of defendants, such guidance must come, in the first instance, in the form of statutory rules meaningfully narrowing the class of death-eligible offenders. The risk of arbitrary and capricious results cannot be adequately addressed once such categories of defendants are charged with a capital crime.

Persons with mental retardation; those who were juveniles at the time of the crimes for which they were convicted; and those convicted of felony murder who did not kill, attempt to kill, or intend that a killing occur are three such categories of defendants. For defendants who fall within these categories, the usual approach, which permits the jury to consider defendants’ arguments in mitigation, fails to address the serious risk of error. For both
persons with mental retardation and those who were juveniles at the time the crimes were committed, the integrity of the system is threatened by the defendants’ difficulties in navigating the system and assisting in their own defense. For all three categories of defendants, asking the jury to weigh the defendant’s membership in the particular category against the severity of his or her crime and other factors does not sufficiently address the problem of arbitrariness. That problem is best addressed in advance, by statute. These recommendations are not intended to bar imposition of any sentence except death, and they contemplate that every state will offer the sentencing option of life imprisonment without parole.

Persons with Mental Retardation

Approximately two-and-a-half percent of the U.S. population has mental retardation, and there is no evidence that persons with mental retardation commit crimes more frequently than do those in the general population. Yet these individuals make up between twelve and twenty percent of those on death row. Emily Fabrycki Reed, The Penalty (1993). Since the death penalty was reinstated in 1976, at least thirty-five people with mental retardation have been executed in the United States. Human Rights Watch, Beyond Reason: The Death Penalty And Offenders With Mental Retardation (March 2001). The Supreme Court, in Penry v. Lynaugh, 492 U.S. 302 (1989), found insufficient evidence of a national consensus against the execution of persons with mental retardation to justify a categorical rule prohibiting such executions. The Court believed that such decisions could be made by juries on a case-by-case basis. The Court will reconsider the issue shortly in McCarver v. North Carolina, and it is arguable that such a consensus now exists. Sixteen states and the federal government now prohibit executing persons with mental retardation, with other states considering doing so. In addition, the United States is one of only three countries permitting such executions. Nevertheless, the argument for a categorical rule does not rest on the existence of a national consensus that executing persons with mental retardation constitutes cruel and unusual punishment.

The death penalty is meant to be reserved for the most morally culpable offenders. Culpability is defined as personal responsibility or moral guilt. The overwhelming number of persons with mental retardation do not fall into the “most morally culpable” category, due to their impairment. Persons with mental retardation suffer from substantial disabilities affecting moral reasoning, cognitive functioning, control of impulsivity, and understanding of the basic relationship between cause and effect. These disabilities severely hamper their ability to act with the level of moral culpability that would justify imposition of a death sentence. These concerns are not likely to be given due consideration by juries in mitigation, for a variety of reasons, including inadequate representation, lack of resources for expert testimony on the effects of mental retardation, jury fear of dangerousness, and jury misunderstanding of the true meaning of a life sentence. The unfortunate experience in Texas, whose courts have twice failed to instruct juries properly on the role of mental retardation in their sentencing of Johnny Paul Penry, illustrates the difficulty of leaving this decision to juries on a case-by-case basis.

Therefore, the risk of executing defendants with mental retardation who do not possess the required level of moral culpability is unacceptably high. State statutes ought to exclude all defendants with mental retardation from eligibility for the death penalty to help ensure that all who are sentenced to death deserve such a sentence. Carol Steiker & Jordan Steiker,

The most commonly articulated goals of capital punishment are deterrence and retribution. The deterrence goal of the death penalty is unlikely to be served by executing persons with mental retardation, due to the effects of their disabilities, as mentioned above. Persons with mental retardation are unlikely to deliberate, premeditate, weigh consequences, or even understand cause and effect (Reed). As for retribution (or just deserts), this purpose is also poorly served by executing those incapable of moral culpability or understanding.

On a practical level, convictions and sentences against persons with mental retardation have a high chance of being unreliable. Defendants with mental retardation may accept responsibility for an act with which they had little or nothing to do. They are likely to confess out of a desire to please or out of an inability either to understand or to knowingly waive their rights. They will likely find it difficult to participate meaningfully in their own defense. Ronald Tabak & J. Mark Lane, The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty, 23 LOYOLA OF LOS ANGELES LAW REVIEW 59 (1989). The recent exoneration of Earl Washington, Jr., in Virginia is a stark example of these problems. Washington, a man with mental retardation, confessed to a crime he did not commit because he did not understand the proceedings and wanted to please his accusers. He spent almost seventeen years in prison, including ten on death row, before he was released. Even more recently, a man with mental retardation spent twenty-two years behind bars in Florida for six murders was ordered freed on June 15, 2001, after DNA evidence exonerated him. He had confessed to the crimes in order to please police and prosecutors. As the ABA said in recommending against executing persons with mental retardation, the integrity of the criminal justice system is eroded by executing a defendant who cannot understand the penalty to be imposed and who cannot communicate information relevant to the decision whether to execute him or her.*

Persons under the Age of Eighteen at the Time of the Crimes for Which They Were Convicted

There is a strong and growing consensus that executing juveniles serves no acceptable purpose. In addition to the ABA, which in 1983 recommended against executing those who were juveniles at the time of the crimes for which they were convicted, and the American Law Institute (ALI), which wrote such a prohibition into the Model Penal Code, over three-fourths of the nations that permit capital punishment have set age eighteen as a minimum for execution. The United Nations took this position in 1976. AMERICAN BAR ASSOCIATION, House of Delegates Proceedings, REPORTS OF THE AMERICAN BAR ASSOCIATION 814 (1983). Yet twenty-three states currently permit the execution of persons who were under the age of eighteen at the time of the crimes for which they were convicted, and approximately eighty juvenile offenders are currently on death row. Kari Haskell, One Step Further from Death, NEW YORK TIMES, August 27, 2000, § 4, at 3. The Supreme Court has declined to exempt sixteen-year-olds from execution because of the absence of a discernible national consensus against their execution. See Stanford v. Kentucky, 492 U.S. 361 (1989). Yet, again, the arguments for a categorical exemption against executing defendants for crimes committed as juveniles do not rest on the existence of a national consensus.

*See appendix for additional statement of Cardinal William H. Keeler.
Many of the arguments against executing defendants for crimes committed as juveniles are similar to those against executing persons with mental retardation. A child or adolescent generally does not possess the level of moral responsibility and culpability that society expects of an adult. Juveniles are particularly unlikely to be deterred by the specter of punishment. As the American Bar Association has noted: “We know even less about death as a deterrent for adolescents than we do about death as a deterrent for adults. Most would agree that adolescents live for today with little thought of the future consequences of their actions. [Any] deterrent effect probably loses any power it once may have had when translated into an adolescent’s world.” American Bar Association, Report of the Section of Criminal Justice, reprinted in Reports of the American Bar Association 990 (1983). We recognize the public safety concerns raised by the possibility that gangs will recruit juveniles to commit crimes. However, to the extent that juveniles are deterred by the specter of punishment, we believe that such concerns are adequately addressed by the life imprisonment without parole option.

As to retribution, or just deserts, a sentence of death for a crime committed as a juvenile is, in the overwhelming number of cases, excessive retribution. Here, too, the American Bar Association language articulates this point well: “[S]uch irreversible giving up upon a person even before they emerge from childhood is squarely in opposition to the fundamental premises of juvenile justice and comparable socio-legal systems.” Id. The risks of executing those undeserving of death, and of cutting short a life that could hold promise, are simply too great, and outweigh the possibility that some juveniles may be among the most heinous and depraved murderers.

In addition, the risk of error in cases involving juveniles is high. Juveniles are likely to have difficulty participating in their defense and are less able to understand and assert their rights. In Illinois, for example, the recent widely-publicized false confessions of Ryan Harris and several other juveniles illustrate the pitfalls of assuming that juveniles can understand or assert their rights. As discussed above in regard to persons with mental retardation, allowing juries to weigh age as a mitigating factor against aggravating factors such as the seriousness of the crime does not adequately address the risk of an erroneous sentence.

Persons Convicted of Felony Murder but Who Have Not Killed, Intended to Kill, or Intended for a Killing to Occur

“Support for the death penalty apparently rests on the assumption that the worst murderers are the ones selected to be executed. However, the capital punishment system does not necessarily execute the worst killers. In fact, people who never killed at all are sometimes sentenced to death and executed.” Tabak & Lane, 23 Loyola of Los Angeles Law Review at 96. The felony murder rule provides that any participant in a specified felony that results in a death shall be punished as a murderer, no matter how accidental or unforeseeable the death, or how attenuated the defendant’s connection to the death. Therefore, it permits defendants to be convicted of murder though they did not kill, did not intend to kill, and did not intend for a killing to occur.

This rule, when applied in capital cases, means that the punishment of death will not be limited to the most deserving defendants. Because the rule allows a conviction for murder without necessarily inquiring into the intent or blameworthiness of the defendant, it permits the imposition of a death sentence on a defendant who did not in fact kill, attempt to kill,
or intend that a killing take place. For example, Beauford White was executed in Florida in 1987, though he did not kill or intend to kill, and had objected to any killing before his accomplices started shooting. See White v. Wainwright, 809 F.2d 1478 (11th Cir. 1987).

Although at one time the Supreme Court prohibited the execution of a defendant who did not possess the requisite intent, see Enmund v. Florida, 458 U.S. 782 (1982), it has since abandoned this categorical prohibition in favor of a case-by-case analysis of whether a particular result is disproportionate. See Tison v. Arizona, 481 U.S. 137 (1987). Unfortunately, the standards set for this case-by-case analysis (reckless indifference to the value of human life, which may be inferred from participation in the felony) permit the execution of defendants based on vague, highly subjective judgments about culpability. The vagueness of the standard is a special problem in the capital context. “It tells the states that some felony murder accomplices should not be executed, but it provides little meaningful guidance in identifying these accomplices.” Richard A. Rosen, Felony Murder and the Eighth Amendment Jurisprudence of Death, 31 BOSTON COLLEGE LAW REVIEW 1103, 1163 (1990). It therefore does not provide reliable guidance for the constitutionally mandated effort to reserve the death penalty for the most heinous crimes. See Gregg, 428 U.S. 153. Such guidance is best provided by a categorical rule excluding felony murder defendants from eligibility for capital punishment. Anything less than categorical exclusion provides too great an opportunity for the unconstitutionally overbroad, random, arbitrary, and capricious application of the death penalty.
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_Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides_

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III. EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)

Summary

• Life without the possibility of parole should be a sentencing option in all death penalty cases in every jurisdiction that imposes capital punishment.

• The judge should inform the jury in a capital sentencing proceeding about all statutorily authorized sentencing options, including the true length of a sentence of life without parole. This is commonly known as “truth in sentencing.”

A. Availability of Life Sentence without Parole

RECOMMENDATION

In all capital cases, the sentencer should be provided with the option of a life sentence without the possibility of parole.

COMMENTARY

At sentencing in a capital case, whether the sentence is to be determined by the jury or the court, the option of a sentence of life in prison without the possibility of parole (LWOP) should be available. Although a minority of jurisdictions permit the court to decide the sentence, this recommendation will focus on the jury as the sentencing authority. The points made should be generally applicable to judicial sentencing, although the empirical research has involved jurors.

Many legislatures have recognized the merits of providing this appropriate sentencing option. Over the last decade, most jurisdictions have authorized a sentence of LWOP in capital cases. Indeed, today only three of the thirty-eight states that authorize the death penalty fail to provide the LWOP option. It should be available in all states and for all offenses for which a death sentence may be imposed.

Because it acts on behalf of the community and makes the difficult judgment about the appropriate sentence to satisfy the goals of retribution, incapacitation, and deterrence, the jury should have the LWOP option available. Without that option, a sentence of death by the jury may be the consequence of a “false and forced choice” that is both an irrational and an erroneous response to its judgment about what justice demands and what constitutes an appropriate sentence in the case. The jury’s reasoned judgment may be that death is not appropriate, but absent the LWOP option, it may be the best of several bad alternatives. William J. Bowers & Benjamin D. Steiner, Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing, 77 Texas Law Review 605 (1999).

Empirical evidence demonstrates that the absence of the LWOP option produces pernicious results because juries fear that the availability of parole will subvert any non-death sentence they recommend. In the absence of the LWOP option, a desire to incapacitate the defendant can result in a death sentence to protect society from future potential dangerousness upon release, particularly for youthful defendants, even though LWOP would have better fit the jury’s reasoned judgment as to the correct sentence in the case. Indeed, when incapacitation is the jury’s goal, not having the option of LWOP pushes the jury into a
decision to sentence the defendant to death by default because the sentence that the jury finds appropriate cannot be imposed.

While the impact of the absence of LWOP is less stark when retribution is the issue, jurors’ judgments about appropriate retribution may also require imprisonment for the perpetrator’s entire life. Here, too, the absence of LWOP requires that they impose a death sentence that, in their judgment, would otherwise be unnecessary and inappropriate. Artificially increasing the number of death sentences should not be a goal of any statutory system, but requiring jurors to make this “false and forced choice” can have that effect. It effectively takes from the jury the opportunity to speak accurately and effectively as the conscience of the community and improperly tilts the balance in favor of a sentence that the jury may believe to be excessive.

Imposing death sentences is not an independent goal of our system, and coercing juries into imposing such a sentence should not be the design of any legislative scheme. Instead, appropriate sentences that meet the facts of the case and the demands of society, as determined by jury or judge, are the goal. In this light, it is notable that when Indiana, Georgia, and Virginia introduced LWOP during the past decade, the number of death sentences imposed declined sharply in each state. Peter Finn, Given Choice, Va. Juries Vote for Life: Death Sentences Fall Sharply When Parole Is Not an Option, WASHINGTON POST, Feb. 3, 1997, at A1.

LWOP will also give the survivors finality at an earlier point than will a death sentence. Sentences of death are overturned with substantial frequency, and even when affirmed on appeal, they are not carried out for some years. Any reasonably foreseeable change in death penalty law, no matter how restrictive it is, will in all likelihood not eliminate delays and reversals because of errors in imposition of the death sentence. By contrast, except in the relatively rare situation that the conviction itself is reversed, LWOP sentences are virtually immune from attack on appeal, and therefore become final with greater certainty and speed than do sentences of death.

In enacting legislation that permits imposition of LWOP, the legislature should be attentive to a large body of empirical research that reveals societal skepticism that murderers, even capital murderers, will in fact serve long prison sentences. Actual sentencing practices demonstrate that such skepticism is unfounded, but we must confront this attitude, which seeps into juror expectations. To the extent possible, legislatures should remove all possible avenues for early release from the LWOP alternative. The executive’s authority to pardon or commute sentences is generally constitutionally based, and typically may not be eliminated by legislation. However, all other possible avenues of early release should be eliminated so that juror skepticism can be reduced to the greatest extent possible.

Even more important, because juries operate under deeply ingrained misapprehensions that the time served on any non-death sentence will be relatively short, they should be provided with authoritative data on the time served by death-eligible murderers not sentenced to death, and by persons sentenced to life without parole. (Such data, when provided to the jury, should help to dispel pernicious and powerful myths surrounding the true length of a life in prison sentence.) Speaking to and correcting these attitudes is at the base of our separate truth in sentencing recommendation.
B. Meaning of Life Sentence without Parole (Truth in Sentencing)

RECOMMENDATION

At the sentencing phase of any capital case in which the jury has a role in determining the sentence imposed on the defendant, the court shall inform the jury of the minimum length of time those convicted of murder must serve before being eligible for parole. However, the trial court should not make statements or give instructions suggesting that the jury's verdict will or may be reviewed or reconsidered by anyone else, or that any sentence it imposes will or may be overturned or commuted.

COMMENTARY

By far one of the most powerful influences on a capital sentencing jury's decision about whether the defendant should be sentenced to death or imprisonment is its perception of whether, if imprisonment is chosen, the defendant will be released from prison, and if so, how soon. Empirical data demonstrate that, in the absence of information on this issue, juries exhibit significant confusion about whether a sentence of life imprisonment without parole really means that the defendant will never be released. This confusion operates against the defendant. In both “life without parole” situations and all other sentencing situations, jurors significantly underestimate the amount of time defendants will remain in prison. Their mistaken beliefs about how long defendants will remain in prison lead them to impose death sentences in many cases in which they would opt for life sentences if they were better informed. Bowers and Steiner; Theodore Eisenberg & Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 CORNELL LAW REVIEW 1 (1993).

Not only does confusion about sentencing options tend to increase the number of death sentences, it also exacerbates an already existing tilt toward imposition of death. Empirical evidence documents that jurors at the beginning of the penalty phase, and before hearing any penalty phase evidence at all, show a significant imbalance in favor of imposing a death sentence. See William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 INDIANA LAW JOURNAL 1043, 1100-01 (1995).

Capital defendants must be permitted to counteract misconceptions that further exacerbate the tilt toward imposition of death. See Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (noting that the Eighth Amendment gives more latitude to the capital defendant than to the government, in that it permits the defendant to introduce unlimited mitigation evidence so that a jury can choose to be merciful for any reason or no reason at all).

The jury's concern with the issue of sentencing options is entirely appropriate under current law. The Supreme Court has approved the jury's consideration, during the penalty phase, of the defendant's future dangerousness to society. See Jurek v. Texas, 428 U.S. 262, 275 (1976). In addition, the question of the length or nature of a defendant's sentence is highly relevant to the jury's consideration of which punishment provides sufficient retribution under the particular circumstances before it. See California v. Brown, 479 U.S. 538, 545 (1987). In Simmons v. South Carolina, 512 U.S. 154, 161 (1994), the Supreme Court recognized that a jury that incorrectly believed that a defendant could be released on parole if not executed might premise its sentencing decision on a false choice. The majority opinion addressed this problem only in the limited circumstances in which the prosecutor argued for a death sentence based on future dangerousness, holding that the due process clause
required the jury to be informed of a defendant's parole ineligibility in such circumstances. See also Shafer v. South Carolina, 121 S. Ct. 1263 (2001), reaffirming Simmons.

In circumstances not covered by Simmons (those in which the prosecutor does not explicitly rest an argument on the defendant's future dangerousness), some states continue to bar jury instructions regarding parole in capital cases. California v. Ramos, 463 U.S. 992, 1026-27 (1983). Even those that permit such instructions do not mandate them, and generally do not ensure that juries are provided with full and understandable information. Yet jurors are greatly concerned about and influenced by parole issues even in cases in which the prosecutor does not explicitly argue the defendant's dangerousness. Without accurate information on the issue, jurors simply tend to make unsupported and inaccurate assumptions, often based on misleading media portrayals or other unreliable sources.

There is no good reason to deny jurors accurate information on this germane and crucial issue. In the past, refusals to tell juries about parole have often been justified as a way of protecting defendants (on the assumption that juries may give greater sentences if they know about the possibility of parole). In the capital context, ignorance of parole not only generally does not protect defendants, but it also increases their chances of being sentenced to death based on a false choice. Many states provide such information in non-capital cases, and there is no evidence that the task is unduly difficult. Capital juries have a constitutional duty to make a reasoned moral decision on whether a death sentence is appropriate; this decision must be unencumbered by ignorance and supported by information sufficient and relevant for reliable and rational decision-making. Penry v. Lynaugh, 492 U.S. 302, 319 (1989). Full disclosure on the available parole options will help them discharge this duty. However, statements that tend to relieve jurors of their sense of responsibility for their verdict will instead deflect the jury from its duty. See James S. Liebman, The Overproduction of Death, 100 Columbia Law Review 2030 (2000).

Similarly, statements involving speculative or highly unlikely sentencing outcomes, such as grants of clemency, will defeat the purpose of properly and accurately educating the jury.
MANDATORY JUSTICE: Eighteen Reforms to the Death Penalty

SOURCES

Availability of Life Sentence without Parole (LWOP)

Articles


Meaning of Life Sentence without Parole (Truth in Sentencing)

Articles


Cases

Shafer v. South Carolina, 121 S.Ct. 1263 (2001)
IV. SAFEGUARDING RACIAL FAIRNESS

Summary

All jurisdictions that impose the death penalty should create mechanisms to help ensure that the death penalty is not imposed in a racially discriminatory manner.

Safeguarding Racial Fairness

RECOMMENDATION

Each jurisdiction should undertake a comprehensive program to help ensure that racial discrimination plays no role in its capital punishment system, and to thereby enhance public confidence in the system. Because these issues are so complex and difficult, two approaches are appropriate. One very important component—perhaps the most important—is the rigorous gathering of data on the operation of the capital punishment system and the role of race in it. A second component is to bring members of all races into every level of the decision-making process.

COMMENTARY

While the precise facts are in dispute, what cannot be disputed is that racial disparities and the potential for racial discrimination hang over our nation’s capital punishment system and raise questions about its fairness. On the one hand, we have the 1990 report of the independent General Accounting Office that consistently found racial disparities in study after study of the death penalty in various jurisdictions. On the other hand, we have the Supreme Court’s decision in McCleskey v. Kemp, 481 U.S. 279 (1987), that found statistics from a study conducted by Professor David Baldus (used to demonstrate the operation of racial discrimination in Georgia’s system) insufficient to prove a constitutional claim of intentional discrimination against McCleskey. Yet the Baldus study did show that statewide racial disparities in sentencing could not plausibly be explained by any of more than 200 legally relevant variables, and that systemic racial bias cannot be addressed adequately on a case-by-case basis. To some, the certainty of racial discrimination is the most obvious reason that our nation’s capital punishment system is inherently flawed, indeed, illegitimate. To others, racial discrimination is either an unproven feature of the capital punishment system or a feature that could be corrected by the odd remedy, that no one supports, of executing more defendants who killed African Americans.

We believe the problem is both serious and obvious from the point of view of the public and its growing lack of confidence in the fairness of the death penalty system, as indicated by numerous recent polls. For example, a September 2000 poll showed that sixty-four percent of Americans supported a moratorium on executions until the issue of the fairness of capital punishment could be resolved, while a June 2000 poll indicated that eighty percent of the public believed that an innocent person has been executed in the United States in the past five years.

See Poll, America’s Views on the Death Penalty, Peter D. Hart/American Viewpoints, Sept. 14, 2000; see also Poll Analysis, Slim Majority of Americans Think Death Penalty Applied Fairly in the Country, Gallup Organization, June 30, 2000. If executions are to be part of our justice system, they must be undertaken in an even-handed fashion. Moreover,
the public must be assured that race is never the deciding factor in who will live and who will die.

While we believe the problem is of unmistakable importance, we acknowledge that a recommendation that sets forth a single remedy to this complex problem is not in view. Instead, we recommend vigilance and experimentation. Specifically, we recommend two general approaches to guide this experimentation in combating the possibility of racial discrimination. Our federal system, with its often-noted “laboratory” aspects, holds promise for developing and confirming effective solutions.

The first, and we believe the most important, of these remedial steps is the rigorous gathering of data on the operation of the jurisdiction’s capital punishment system and the role or potential role of racial discrimination in it. The country, led by Attorney General John Ashcroft and a number of state governments, is engaged in a similar process with regard to the racial profiling of motorists. We do not wish to dictate what data each jurisdiction should gather; many of the required elements of data-gathering are clear. How one gets at and ferrets out racial discrimination takes skill, judgment, and know-how. Each jurisdiction should assemble its best team of experts, to include prosecutors, defense counsel, and neutral experts. The goal is the best and most complete data possible, and, ultimately, the elimination of the specter of possible racial discrimination. Thus, breadth of expertise and neutrality should be guides to developing research teams and their protocols. The work of such teams in New York and New Jersey are promising guides to how such data-gathering systems should be developed.

For those untutored in criminal justice studies, the call for the gathering of data may seem unnecessary. However, issues of race often are not obvious and are outside the record. The race of a motorist stopped on a highway is not part of the police report if no arrest was made. The race of the jurors dismissed by prosecutors and defense counsel are not shown on the record unless a specific effort is made. The race of defendants whose cases are chosen or not chosen for capital punishment throughout a state and across jurisdictions does not pop up on a computer screen upon a simple request for information. All of this information will exist only because of a call that it be collected, and, in most situations, it will be unavailable unless specific steps are taken for its collection. We cannot eliminate racial discrimination unless we have detailed data, particularly in the modern day when it most likely operates at an unconscious rather than a purposeful level.

Once the data are gathered, jurisdictions should carefully consider and act on the results. If the data show no evidence of racial disparities, then the public can place greater confidence in the fairness and integrity of the jurisdiction’s death penalty mechanisms. Conversely, if that data support a conclusion or demonstrate a high likelihood that racial discrimination is affecting the operation of the death penalty system, the legislature should consider enacting appropriate remedial measures. See McCleskey v. Kemp, 481 U.S. 279, 319 (1987) (“Legislatures ... are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts’...”)

Our second general recommendation is that jurisdictions seek to ensure that racial minorities are part of every decision-making process within the criminal justice system. For example, efforts should be redoubled, through vigorously enforcing Batson v. Kentucky, 476 U.S. 79 (1986), and through effective application of fair cross-section requirements to ensure that members of all races are part of grand juries (where grand juries exist) that indict and petit juries that decide guilt and punishment. Racially mixed defense teams are likely to
appreciate aspects of the case that single-race teams will not, as are racially mixed prosecutorial teams. Those who decide which cases are to be prosecuted capitally should be racially diverse. Finally, although this cure is generally beyond the scope of any particular entity, a racially diverse judiciary is an important component of the public’s perception of racial fairness in the death penalty system.

The process of safeguarding racial fairness in the application of the death penalty and assuring the public that the system operates without racial discrimination is admittedly very challenging. We do not claim that our proposals will accomplish these critical tasks, but we believe they are a reasonable place to begin. Moreover, we believe that it is critical to address the issues of racial neutrality, fairness, and public confidence that racial discrimination plays no role in the decisions on who should live and who should die through capital punishment. These issues are among the most important confronting the death penalty system, and any set of meaningful reform efforts must confront these questions as forthrightly as possible.*

*See appendix for dissent of Timothy Lynch.
SOURCES

Safeguarding Racial Fairness

Books, Articles, and Opinion Polls


Ky. Rev. Stats. § 532.300 (Racial Justice Act)


Cases

V. PROPORTIONALITY REVIEW

Summary

Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed fashion, to provide a check on broad prosecutorial discretion, and to prevent discrimination from playing a role in the capital decision-making process.

Adopting Procedures for Ensuring Proportionality in Sentencing

RECOMMENDATION

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner.

COMMENTARY

The central concerns that inspired the Supreme Court to embark, in Furman v. Georgia, 408 U.S. 238 (1972), on its effort to regulate capital cases were concerns about the arbitrary and unequal application of the death penalty, arising in part from vesting broad discretion in decision-makers without providing sufficient guidelines. In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld an amended Georgia death penalty statute in large part because it provided for mandatory proportionality review. That is, it provided that the Supreme Court of Georgia should compare each death sentence with sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. It emphasized the positive effect an appellate review containing a mandatory proportionality check would have on the faulty system, finding that it “serves as a check against the random or arbitrary imposition of the death penalty and substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.”

Unfortunately, the Court, in its 1984 decision in Pulley v. Harris, 465 U.S. 37 (1984), backed away from requiring proportionality review under the Eighth Amendment (although it emphasized that capital sentencing systems are still constitutionally required to provide checks on arbitrariness), and most states have ceased to perform it. We are now faced with state systems that vary vastly from one another, but most of which pose almost as great a risk of arbitrary, capricious, and discriminatory application as three decades ago, when the Court called for reform in Furman v. Georgia. Adopting some form of proportionality review would go a long way toward addressing this problem, which goes to the heart of the death penalty’s fairness and efficacy.

Proposing a system to ensure proportional sentencing is fraught with problems, as this committee well recognizes. Such proposals may raise concerns about impeding the exercise of prosecutorial discretion, or about intruding on state prerogatives to shape and enforce local law enforcement priorities and values. The more basic problem is simply in finding the difficult balance between treating like cases alike and also treating each case individually.
These are two often-conflicting goals of the Supreme Court’s death penalty jurisprudence. Even in the face of these problems, the goal of eradicating arbitrary death sentencing is critically important to the constitutionality and the basic fairness of the death penalty, and should be undertaken in every state with a death penalty.

There are a number of possible ways to institute proportionality review, several of them currently in use in various states.

- One method is for the state supreme court to perform a review that compares the case to other cases in which the death penalty was imposed. For example, the New Jersey Supreme Court addresses the question of whether the penalty is unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the same crime.

- Another way, which some commentators, including the National Center for State Courts, have argued is more effective, is for the state supreme court to compare each case, not just with other cases in which the death penalty has been imposed, but with the entire pool of death-eligible cases, including those in which the death penalty was not sought. New York, for example, has directed its highest court to develop a comprehensive database of information for all cases involving indictment for first-degree murder and has directed the clerk of the trial court to fill out a capital case data report in each first-degree murder case, to facilitate such comparisons. Comparison of each case to the pool of all death-eligible cases is also the method employed in Georgia and Washington.

- A third approach, advocated by Ninth Circuit Court of Appeals judge Alex Kozinski, among others, would be for states to make a concerted effort to narrow by statute the universe of death-eligible cases to those that are especially heinous, premeditated, and unmitigated. Too often, it has been politically expedient for states to keep adding to the list of categories of cases in which the death penalty may be imposed, arguably well beyond those sorts of cases for which the penalty was originally intended. The wide availability of a death-sentencing option leaves too much opportunity for arbitrariness in charging and sentencing.

States may well develop additional approaches, suited to their own particular priorities, circumstances, and resources. What is crucial is that each state develop an effective method, designed to address and, in the best of circumstances, eradicate arbitrary and discriminatory imposition of death sentences.*

* See appendix for additional statement of William G. Broaddus, Esq.
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SOURCES

Adopting Procedures for Ensuring Proportionality in Sentencing

Articles and Manuals


Statutes
N.Y. Crim. Proc. Law § 470.30(3)(b)
N.Y. Jud. Law 211-a (McKinney 1995)
N.Y. R. Unif. Trial Cts. Part 218 (Uniform Rules for Trial Courts in Capital Cases)

Cases
Furman v. Georgia, 408 U.S. 238 (1972)
Horton v. State, 295 S.E. 2d 281 (Ga. 1982)
In the Matter of the Proportionality Review Project, 585 A.2d 358 (1990)
State v. Pirtle, 904 P.2d 245 (Wash. 1995)
VI. PROTECTION AGAINST WRONGFUL CONVICTION AND SENTENCE

Summary

- DNA evidence should be preserved and it should be tested and introduced in cases where it may help to establish that an execution would be unjust.

- All jurisdictions that impose capital punishment should ensure adequate mechanisms for introducing newly discovered evidence that would more likely than not produce a different outcome at trial or that would undermine confidence that the sentence is reliable, even though the defense would otherwise be prevented from introducing the evidence because of procedural barriers.

A. Preservation and Use of DNA Evidence to Establish Innocence or Avoid Unjust Execution

RECOMMENDATION

In cases where the defendant has been sentenced to death, states and the federal government should enact legislation that requires the preservation and permits the testing of biological materials not previously subjected to effective DNA testing, where such preservation or testing that may produce evidence favorable to the defendant and relevant to the claim that he or she was wrongfully convicted or sentenced. These laws should provide that biological materials must be generally preserved and that, as to convicted defendants, existing biological materials must be preserved until defendants can be notified and provided an opportunity to request testing under the jurisdiction’s DNA testing requirements. These laws should provide for the use of public funds to conduct the testing and to appoint counsel where the convicted defendant is indigent. If exculpatory evidence is produced by such testing, notwithstanding other procedural bars or time limitations, legislation should provide that the evidence may be presented at a hearing to determine whether the conviction or sentence was wrongful. If the conviction or sentence is shown to be erroneous, the legislation should require that the conviction or sentence be vacated.

COMMENTARY

Over the past two decades, DNA testing has been developed and substantial advances in its sophistication and effectiveness have occurred. This technology now frequently makes possible the effective testing of biological materials that were left at crime scenes, as well as comparison with the accused or convicted defendant’s DNA. The evidence produced can be extraordinarily powerful in either incriminating or exculpating the suspected or convicted defendant. Sometimes the results of such testing are decisive. The effort to use DNA evidence effectively to prove guilt and to establish innocence should be continued along lines set out in the DNA Identification Act of 1994 and related legislation.

Prior to the mid-1990s, DNA testing was not widely available, and, as a result, biological materials relevant to guilt or innocence were not tested for use at trial. Subsequent examination of cases using this new forensic technique has resulted in the exoneration of
more than eighty innocent men and women of the crimes for which they had been convicted. In at least ten of these cases, the defendant had been sentenced to death but had not yet been executed. In approximately a dozen of the cases, the tests resulted in the identification of another individual as the true perpetrator of the offense. In addition, recent advances in DNA testing technology may now produce usable evidence where no results could be obtained with earlier methods. Even in those instances where earlier technology provided some results, new technology may generate substantially more powerful and probative evidence.

In most jurisdictions, the legal structure is not adequate to take proper advantage of the advances in scientific testing of evidence. Legislation should be enacted to cure a number of deficiencies in the legal structure.

First, legislation should require the preservation of biological samples in all pending death penalty cases, and should require testing upon defense request in cases that have not yet been tried. In some instances, the failure of current law to mandate preservation has resulted in the tragic destruction of potentially critical evidence, typically without any meaningful remedy. To help ensure access to justice, jurisdictions should immediately enact legislation requiring the preservation of all existing biological samples until affected defendants can be notified and given an opportunity to exercise their statutory rights.

Second, the legislation should, in appropriate circumstances, grant a convicted defendant the right to secure testing. A showing by the defendant that the results of the test would be relevant to the correctness of the determination of guilt or the sentence of death should be sufficient to secure testing. Testing should be available where the results would bear only on the correctness of the death sentence and should not be restricted to circumstances where actual innocence is alleged. Similarly, testing should not be restricted to cases where exclusion of the evidence would necessarily exonerate the defendant; a showing that the results would be relevant or helpful to establishing an erroneous conviction or sentence should be sufficient.

DNA testing should be made available if testing was not conducted or not available at the time of trial. Moreover, if DNA testing has previously been conducted, new testing should be ordered if advances in DNA technology present a reasonable possibility that new exculpatory evidence may now be produced.

Jurisdictions have a legitimate interest in ensuring the fairness of testing and the integrity and, to the extent possible, the preservation of biological samples. They can accordingly impose restrictions and requirements on the laboratories used and the testing mechanisms employed to satisfy these legitimate concerns.

Third, because the vast majority of those sentenced to death are indigent, legislation should provide for public financing of testing when such testing is shown to be appropriate. Likewise, it should provide for appointment of counsel for defendants seeking testing, if the defendant is not already represented by counsel and is indigent.

Fourth, ordinary rules regarding time limitations on introduction of newly discovered evidence and for the treatment of evidence showing a wrongful conviction or death sentence are inadequate to deal with this new type of evidence of innocence, which is based on analysis or re-analysis of evidence that has long been known to exist. To be effective, statutes must create clear exceptions within existing procedural frameworks for newly developed DNA evidence. The statutes must permit the introduction of the new evidence despite otherwise disqualifying time limitations and other procedural bars. Specifically, such a proceeding should not be considered as a petition under 28 U.S.C. §§ 2254-55, or under
the Antiterrorism and Effective Death Penalty Act. Considering it as such a petition would raise the problem that, ordinarily, successor petitions are barred from being considered, or, if the petition were allowed despite being considered a successor petition, would create the potential problem of fostering new exceptions to the general rule barring such petitions.

Current law does not readily allow admissions of new discoveries of exculpatory evidence long after trial because of the development of new scientific tests. It also does not easily accommodate showings of innocence unless the failure to make such proof at trial was the result of some procedural restriction. Existing law is perhaps attuned to the fear that human witnesses can invent new stories and that their lies are difficult to detect or to distinguish from long-delayed disclosures of the truth. A new scientific examination of existing evidence that can be conclusive is highly unusual, if not entirely unprecedented, in modern law. Not only must the law permit the introduction of new DNA evidence showing innocence, but it must also authorize the court to order a new trial or new sentencing if the defendant shows that the conviction or sentence was erroneous.

Details about the operation of these statutes should be left to individual jurisdictions. Despite the advances of science, certainty in the outcome sometimes will be unclear because the interpretation of the relationship between the biological evidence and the crime is problematic. However, the development of DNA testing has given us a unique view into the inaccuracies of the determinations of guilt in a sizeable number of cases that have moved through our criminal justice system and have passed reviews by juries and appellate judges. The easiest part of the lesson of DNA should be creating procedures to right the wrongs that can be documented.

Moreover, experience with DNA testing technology and its revelations of error should demonstrate to the criminal justice system the imperative to establish systems to preserve physical evidence, where reasonable prospects exist that subsequent scientific advances may draw new evidentiary significance from it. The criminal justice system should also take note of and learn an appropriate level of humility from the large number of cases where innocence has been proven. Criminal trials and the ensuing convictions have unmistakably been shown to be fallible, even when our criminal justice system operates in good faith and apparent good order. Innocence and unjust conviction are real possibilities, and, with due regard to the interest of finality, the system should be open to additional demonstrations of its errors when those errors stem from the most basic denials of justice—substantive errors in the conviction and sentencing of defendants, including errors in cases that, unless corrected, would have resulted in wrongfully taking a human being's life.

Likewise, the experience with DNA has demonstrated the inadequacy of our legal procedures for dealing properly with newly developed evidence of innocence. General reforms should be enacted to expand time limitations to permit introduction of evidence of innocence, and to authorize a new trial and a new sentencing hearing where the evidence establishes that the conviction or death sentence was erroneous. The recommendation immediately following specifically deals with procedural and substantive reforms that apply to newly discovered or developed evidence, outside the field of DNA evidence, that shows innocence or an unjust sentence.
B. Lifting Procedural Barriers to Introduction of Exculpatory Evidence

RECOMMENDATION

State and federal courts should ensure that every capital defendant is provided an adequate mechanism for introducing newly discovered evidence that would otherwise be procedurally barred, where it would more likely than not produce a different outcome at trial, or where it would undermine confidence in the reliability of the sentence.

COMMENTARY

The increasingly convoluted, technical, and time-consuming process of appealing a death sentence understandably concerns members of the public, lawyers, and scholars alike. Ironically, the increasing technicality of habeas corpus and other avenues for reviewing a death sentence has not made it any easier to address the central question our justice system should ask in such cases: whether the defendant was wrongly convicted or wrongly sentenced to death.

The public is becoming increasingly aware of this defect in our current procedures, in light of the growing use of DNA evidence to exonerate death row inmates, the recent series of exonerations of over a dozen death row inmates in Illinois, and rules like Virginia’s “twenty-one-day rule,” barring introduction of newly discovered evidence beyond twenty-one days of the final court decision in a criminal case. This rule was recently amended to lift the time limit for introduction of DNA evidence, but not to address introduction of other forms of potentially exculpatory evidence.

The inability to introduce DNA evidence has prompted introduction of several bills in Congress. It is important to understand, however, that DNA evidence is only one type of newly discovered evidence that can undermine the reliability of a capital verdict. Even under the best of circumstances, new and exculpatory evidence may come to light late in the process. In the Rolando Cruz case in Illinois, for example, it took years before it became clear that another man had confessed to the murder for which Cruz was on death row, and that investigators had perjured themselves when claiming that Cruz himself had confessed. Susan Bandes, Simple Murder: A Comment on the Legality of Executing the Innocent, 44 Buffalo Law Review 501 (1996). Confessions by the actual perpetrator, other physical evidence, new eyewitnesses, and recantations by existing eyewitnesses are just some of the types of evidence that can materialize late in the process, despite the due diligence of the defense.

Some commentators have argued that the law has been developing in exactly the wrong direction, encouraging the proliferation of procedural arguments but failing to provide adequate means of raising the central questions of wrongful conviction and sentence, and thus of the ultimate fairness and justice of the outcome. See, e.g., Joseph L. Hoffman, Substance and Procedure in Capital Cases: Why Federal Habeas Courts Should Review the Merits of Every Death Sentence, 78 Texas Law Review 1771 (2000). In plain English, current law permits a defendant who is innocent of a crime or unworthy of a death sentence to be convicted and sentenced to death, with no opportunity to introduce newly discovered evidence that could change the verdict in the case (See Hoffman; Bandes).

Each state has a different set of rules and procedures regarding time limits for introducing new evidence. Virginia is one of the most stringent, with its requirement that any
new evidence (other than DNA evidence) be introduced within twenty-one days of the final
court decision. Virginia Supreme Court Rules 1.1 recently amended to lift the time limit
for introduction of DNA evidence. Though other states are somewhat less stringent, finding
a forum in which to raise a claim of innocence based on newly discovered evidence is often
difficult or impossible. See Vivian Berger, Herrera v. Collins: The Gateway of Innocence for
does federal habeas corpus provide a reliable forum for defendants who were unable to
raise their claims in state court. Such claims are very difficult to raise unless coupled with an
independent claim of constitutional error.

It is crucial for each capital defendant to have the opportunity to introduce relevant
newly discovered evidence bearing on his or her guilt or sentence. Jurisdictions may certainly impose a requirement that the evidence be introduced within a specified time period after it is discovered, as well as require a showing that it could not have been discovered earlier with due diligence. However, statutes of limitations should not bar introduction of such evidence, whenever it is discovered, if the evidence would more likely than not change the verdict or if it would undermine confidence in the reliability of the sentence. The “more likely than not” standard for introduction of evidence bearing on the verdict strikes an appropriate balance between the interests in preserving the finality of the verdict and in ensuring that convictions are accurate and just. The “undermine confidence in the reliability of the sentence” standard for introduction of evidence bearing on the capital sentence is identical to the standard employed by Strickland v. Washington, 466 U.S. 668 (1984), for determining prejudice arising from ineffective assistance of counsel. It recognizes that due to the many complex variables that affect capital sentencing, it would be unworkable to require a defendant to demonstrate that newly discovered evidence, however relevant and exculpatory, would be likely to change a capital sentence. As current practice under these standards has shown, they are likely to permit introduction of otherwise time-barred evidence only rarely, when the probative value of the evidence clearly outweighs the interest in finality.
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Court Rule

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VII. DUTY OF JUDGE AND ROLE OF JURY

Summary

- If a jury imposes a life sentence, the judge in the case should not be allowed to “over-ride” the jury’s recommendation and replace it with a sentence of death.

- The judge in a death penalty trial should instruct the jury at sentencing that if any juror has a lingering doubt about the defendant’s guilt, that doubt may be considered as a “mitigating” circumstance that weighs against a death sentence.

- The judge in a death penalty trial must ensure that each juror understands his or her individual obligation to consider mitigating factors in deciding whether a death sentence is appropriate under the circumstances.

A. Eliminating Authorization for Judicial Override of a Jury’s Recommendation of a Life Sentence to Impose a Sentence of Death

RECOMMENDATION

Judicial override of a jury’s recommendation of life imprisonment to impose a sentence of death should be prohibited. Where a court determines that a death sentence would be disproportionate, where it believes doubt remains as to the guilt of one sentenced to death, or where the interests of justice require it, the trial court should be granted authority to impose a life sentence despite the jury’s recommendation of death.

COMMENTARY

Although the Supreme Court has determined that judicial override of a jury’s recommendation that the defendant not be sentenced to death is constitutional (see, e.g., Spaziano v. Florida, 468 U.S. 447 (1984)), the jury is uniquely equipped to make the judgments that are understood to be critical to the imposition of the death sentence. The jury, which is comprised of members, and serves as the representative of the community, is best positioned to “express the conscience of the community on the ultimate question of life or death.” Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). It can properly express the community’s outrage, indicating by its sentencing recommendation that the perpetrator has lost his or her moral entitlement to live. Because the decision whether to impose death remains substantially a moral decision despite efforts to impose legal precision on it, a jury determination is particularly appropriate. The jury, as opposed to a single government official, may be most likely to avoid the danger of an excessive response to the always horrible act of intentional homicide. Spaziano, 468 U.S. at 469-70 (Stevens, J., dissenting). Indeed, in states where judges are elected and subjected to tough-on-crime politics that typically equate electoral success with unwavering support for the death penalty, juries may be the voice of reasoned moderation.

Of the thirty-eight states that have the death penalty, only four—Alabama, Delaware, Florida, and Indiana—permit judicial override of jury recommendations. Supporters cite two justifications for permitting judicial override of jury recommendations—ensuring
consistency in sentencing and correcting sentence recommendations by juries that are excessively harsh or based on emotion or desires for vengeance. In those states that have employed judicial override extensively, there is no evidence that consistency in results has been achieved. More troubling, the predominant use of jury override, although differing among states, has been for courts to impose death after juries recommend a life sentence. In Florida and Alabama, the vast majority of overrides have been to impose death, an outcome that has occurred over 165 times in Florida, and over sixty-five times in Alabama. In Indiana, although slightly favoring death, judicial overrides have been almost equally split between death and life in prison. Delaware's experience is unique in that overrides have been used only to reduce death sentences to life in prison.

While the reasons that judges have predominantly overridden life sentences to impose death cannot be clearly established, the apparent cause is clear: It is political survival. When judges in states that elect their trial judges have the power to override jury sentences in capital punishment cases to impose either life or death, that discretionary judgment provides a ready focus for political pressures. It appears to result primarily in an inclination to impose death.

Consistent with the practice in Delaware, asymmetry in judicial authority to override a jury determination is appropriate. The American experience with the death penalty demonstrates that no rule of law requires the imposition of the death penalty on any set of facts. Thus, a determination by the jury to impose death will often be appropriate under the facts but will never be required as a matter of law. On the other hand, the imposition of death may, in some instances, not only be inappropriate but also be legally or morally improper, may be disproportionate or excessive, or may simply be contrary to the weight of the evidence. Thus, states may appropriately authorize their trial courts to correct juries' sentencing recommendations of death, when the court judges such a sentence to be excessive, at the same time that they prohibit those same trial courts from overriding a jury recommendation of life imprisonment to impose death.

This recommendation does not speak to states that entrust death penalty sentencing to judges in the first instance. For reasons discussed above, the wisdom of having such a structure may be questioned, given the reality of judicial electoral politics. However, a death sentence that results from a judge overriding a jury determination that the accused should live is far, far more difficult to justify under the values of our system than is an initial determination, entrusted to the judiciary, that the appropriate sentence is death.

### B. Lingering (Residual) Doubt

**RECOMMENDATION**

The trial judge, in each case in which he or she deems such an instruction appropriate, should instruct the jury, at the conclusion of the sentencing phase of a capital case and before the jury retires to deliberate, as follows: "If you have any lingering doubt as to the defendant's guilt of the crime or any element of the crime, even though that doubt did not rise to the level of a reasonable doubt when you found the defendant guilty, you may consider that doubt as a mitigating circumstance weighing against a death sentence for the defendant."
COMMENTARY

In *Lockhart v. McCree*, 476 U.S. 162, 181 (1986), the Supreme Court recognized that jurors who vote to convict may nevertheless entertain “residual doubts” about the defendant’s guilt that would “bend them to decide against the death penalty.” Residual doubt is defined as any remaining or lingering doubt a jury has concerning the defendant’s guilt, despite having been satisfied beyond a reasonable doubt. Jurors who are confident enough of the defendant’s guilt to convict may still conclude that their level of confidence falls short of the complete moral certainty needed to take a person’s life. The reasonable doubt standard permits a conviction despite the presence of genuine doubts, or the absence of absolute certainty, about the defendant’s guilt of the crime. Given the irrevocable nature of the penalty of death, a decision to impose the penalty requires a greater degree of reliability than is required for imposition of other penalties. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Jurors should not vote for the death penalty if they entertain doubts as to the defendant’s factual guilt. Yet many jurors will be unaware of the continuing relevance of their doubts about guilt, in the absence of a jury instruction informing them.

In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), a plurality of the Supreme Court ruled that the Eighth Amendment does not mandate the giving of a residual doubt instruction. As one commentator observed, however, a majority of the members of the Court found that “regardless of whether residual doubt is an Eighth Amendment right, there was no violation in [the particular] case because Texas had not interfered with the defendant’s ability to argue the issue to the jury.” Jennifer R. Treadway, Note, “Residual Doubt” in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor, 43 Case Western Reserve Law Review 215, 222 (1992). In the wake of the decision, several states have barred, through judicial decision, the giving of a residual doubt instruction, and in other states the issue is dealt with inconsistently. (See Treadway). This recommendation addresses the issue left open in *Franklin v. Lynaugh* by making it clear that states should not bar the giving of residual doubt instructions. It also goes further and, as a matter of common sense and fundamental fairness, encourages states to adopt rules mandating the giving of such instructions in cases in which the presiding judge deems them appropriate. The recommendation contemplates that the universe of such cases will be quite small, since in most cases that proceed to the capital sentencing phase, jurors will not maintain any doubt of the defendant’s guilt of the crime charged.

C. Ensuring That Capital Sentencing Juries Understand Their Obligation to Consider Mitigating Factors

RECOMMENDATION

Every judge presiding at a capital sentencing hearing has an affirmative obligation to ensure that the jury fully and accurately understands the nature of its duty. The judge must clearly communicate to the jury that it retains the ultimate moral decision-making power over whether the defendant lives or dies, and must also communicate that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in the individual juror’s sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror’s
sentencing decision. In light of empirical evidence documenting serious juror confusion on the nature of the jury's obligation, judges must ensure that jurors understand, for example, that this decision rests in the jury's hands, that it is not a mechanical decision to be discharged by a numerical tally of aggravating and mitigating factors, that it requires the jury to consider the defendant's mitigating evidence, and that it permits the jury to decline to sentence the defendant to death even if sufficient aggravating factors exist.

The judge's obligation to ensure that jurors understand the scope of their moral authority and duty is affirmative in nature. Judges should not consider it discharged simply because they have given standard jury instructions. If judges have reason to think such instructions may be misleading, they should instruct the jury in more accessible and less ambiguous language. In addition, if the jury asks for clarification on these difficult and crucial issues, judges should offer clarification and not simply direct the jury to reread the instructions.

**COMMENTARY**

Empirical evidence shows that capital sentencing juries often labor under significant misapprehensions about the nature and scope of their obligation at the penalty phase. Research indicates that many jurors wrongly approach the sentencing decision in the same manner as they do the guilt decision, that is, without fully understanding that (1) mitigating factors do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision, and (2) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror's sentencing decision. This confusion can make it significantly more likely that these juries will sentence a defendant to death than it would have been had they understood their obligations more clearly. Standard (pattern) jury instructions that give jurors complex criteria, including lists of aggravating and mitigating factors, often leave jurors with the erroneous impression that their moral duty will be discharged if they simply tally up the number of aggravating and mitigating factors and weigh them against each other. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 *Indiana Law Journal* 1043, 1090-93 (1995); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 *Indiana Law Journal* 1161, 1164-67 (1995); Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 *Michigan Law Review* 2590, 2596-99 (1996).

Juries often do not understand that they are not confined to considering enumerated aggravating factors, but may also consider non-enumerated and non-statutory mitigating factors. Indeed, juries are often seriously confused about what mitigation is and how it must be proved. See Steiker; see also Craig Haney, *Taking Capital Jurors Seriously*, 70 *Indiana Law Journal* 1223 (1995). Moreover, they often believe that the factors can be weighed or tallied according to a pre-existing formula (Bowers), whereas in fact they must be considered in light of each juror's ultimate duty to decide whether the particular defendant, in light of all the circumstances before the jury, deserves to die. *Woodson v. North Carolina*, 428 U.S. 280 (1976). These erroneous beliefs tend to tilt juries toward a death sentence for a variety of reasons. First, enumerated aggravating factors tend numerically to outnumber enumerated mitigating factors. Secondly, any attempt to weigh these factors is difficult and mis-
guided because the factors are not comparable, and because such an attempt obscures the true issue: whether the jurors conclude in light of all the evidence that the defendant deserves to die. Finally, the statutes encourage jurors to rely on the appearance of mathematical certainty rather than exercise their own judgment and take responsibility for its consequences (Steiker).

The Supreme Court has upheld standard (pattern) jury instructions that, as has been empirically demonstrated, are apt to give jurors incorrect impressions about their duties. See, e.g., Weeks v. Angelone, 528 U.S. 225 (2000) (upholding an instruction that arguably left the jury with the impression that it was required to sentence the defendant to death if it found the requisite aggravating factors existed). See also Weeks, 528 U.S. at 237-39 (Stevens, J., dissenting); Stephen Garvey, Sheri Lynn Johnson, & Paul Marcus, Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases, 85 Cornell Law Review 627 (2000); see also Bowers. Such decisions should not relieve capital sentencing judges of their duty to ensure that the instructions given in their courts are as clear and accurate as possible. For example, Professor Jordan Steiker suggests the following instruction:

"The death penalty, as opposed to other serious punishments such as life imprisonment, is reserved only for those defendants who deserve the penalty, and the moral judgment of whether death is deserved remains entirely with you. The determination whether death is deserved involves consideration of any factors that suggest whether the defendant is or is not among the small group of "worst" offenders; and in deciding whether the defendant deserves the death penalty, you are required to consider not only the circumstances surrounding the crime, but also aspects of the defendant's character, background, and capabilities that bear on his culpability for the crime."

Steiker, 94 Michigan Law Review at 2622 n.134.

Furthermore, judges often respond to jury requests for clarification of their obligations simply by referring the jurors back to reread the instructions. This practice, not surprisingly, is ineffective at clearing up juror confusion. Indeed, one study concluded that this practice increased the already strong likelihood that jurors would sentence the defendant to death based on misapprehension about their duties. Garvey, et al., 85 Cornell Law Review at 635. A judge confronted with juror confusion should take affirmative steps to dispel that confusion. Simple answers to jury questions, in plain English, can significantly improve the odds that jurors will decide on a sentence based on accurate understandings of the law. For example, Professors Steven Garvey, Sheri Lynn Johnson, and Paul Marcus found the following simple clarification to significantly improve juror comprehension:

Even if you find that the State has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison. Id.

As to both the original instructions and the means of clarifying juror confusion, no one formula can ensure that juries understand their duties. The important point is that the judge should not assume, particularly in light of all the evidence to the contrary, that reliance on pattern jury instructions and refusal to clarify will be sufficient. Judges must stay constantly vigilant to ensure that they have adequately discharged their duty to guide jurors properly in the applicable law.


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Eliminating Authorization for Judicial Override of a Jury's Recommendation of a Life Sentence to Impose a Sentence of Death

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Ensuring That Capital Sentencing Juries Understand Their Obligation to Consider Mitigating Factors

Articles


VIII. ROLE OF PROSECUTORS

Summary

• Prosecutors should provide “open-file discovery” to the defense in death penalty cases. Prosecutors’ offices in jurisdictions with the death penalty must develop effective systems for gathering all relevant information from law enforcement and investigative agencies. Even if a jurisdiction does not adopt open-file discovery, it is especially critical in capital cases that the defense be given all favorable evidence (Brady material), and that the jurisdiction create systems to gather and review all potentially favorable information from law enforcement and investigative agencies.

• Prosecutors should establish internal guidelines on seeking the death penalty in cases that are built exclusively on types of evidence (stranger eyewitness identifications and statements of informants and co-defendants) particularly subject to human error.

• Prosecutors should engage in a period of reflection and consultation before any decision to seek the death penalty is made or announced.

A. Providing Expanded Discovery in Death Penalty Cases and Ensuring That in Death Penalty Prosecutions Exculpatory Information Is Provided to the Defense

RECOMMENDATION

Because of the paramount interest in avoiding the execution of an innocent person, special discovery provisions should be established to govern death penalty cases. These provisions should provide for discovery from the prosecution that is as full and complete as possible, consistent with the requirements of public safety.

Full “open-file” discovery should be required in capital cases. However, discovery of the prosecutor’s files means nothing if the relevant information is not contained in those files. Thus, to make discovery effective in death penalty cases, the prosecution must obtain all relevant information from all agencies involved in investigating the case or analyzing evidence. Disclosure should be withheld only when the prosecution clearly demonstrates that restrictions are required to protect witnesses’ safety or shows similarly substantial threats to public safety.

If a jurisdiction fails to adopt full open-file discovery for its capital cases, it must ensure that it provides all exculpatory evidence to the defense. See Brady v. Maryland, 373 U.S. 83 (1963). In order to ensure compliance with this obligation, the prosecution should be required to certify that (1) it has requested that all investigative agencies involved in the investigation of the case and examination of evidence deliver to it all documents, information, and materials relevant to the case and that the agencies have indicated their compliance; (2) a named prosecutor or prosecutors have inspected all these materials to determine if they contain any evidence favorable to the defense as to either guilt or sentencing; and (3) all arguably favorable information has been either provided to the defense or submitted to the trial judge for in
camera review to determine whether such evidence meets the Brady standards of helpfulness to the defense and materiality to outcome. When willful violations of Brady duties are found, meaningful sanctions should be imposed.

COMMENTARY

Requiring Full Open-File Discovery in Death Cases

Because, as the Supreme Court noted in Gregg v. Georgia, 428 U.S. 153 (1976), “death is different,” discovery from the prosecution in death penalty cases should not be conducted as business-as-usual, which in criminal litigation typically means quite limited disclosure of information. The extreme nature and finality of death provides a strong basis for treating discovery in death penalty cases differently than in ordinary criminal litigation. Restricting discovery effectively withholds disclosure of relevant information, creating the real risk that the truth will be hidden, and, as a result, increasing the likelihood of executing an innocent person. These considerations strongly support broad discovery in capital cases.

Criminal trials may be a competitive process filled with sharp practices and gamesmanship. Whether such practices are consistent with justice in ordinary cases may be debated; certainly, however, such practices should cease when the imposition of a death sentence is at stake. Society may feel justified in authorizing its representatives to skirt the line between playing the game rough and playing it fair when it comes to convicting those who are apparently guilty and making certain that they are confined and society is protected. Whether such practices are ever warranted, skirting the line with the potential of denying fair play cannot easily be justified when the issue is whether to execute rather than to imprison.

Expanding discovery in criminal cases has long been advocated by the American Bar Association and other groups supporting reform. Whatever the merits of such proposals across the full range of criminal litigation, the case for broad discovery is very strong—indeed imperative—in capital cases. In capital cases, avoiding the ultimate horror of executing an innocent person makes expanded discovery essential. The availability of more information will help the jury perform its task more accurately, and, undeniably, it will reduce the chances that the truth will be hidden and an innocent person will be executed. Full disclosure by the prosecution should be understood to be an aspect of the openness that we increasingly associate with good government. Moreover, such disclosures should not be feared, since jurisdictions such as Florida continue to be able to prosecute death penalty cases effectively while providing disclosures that are extraordinary by the standards employed in criminal prosecutions in many jurisdictions. See Fla. Rev. Crim. Proc. 3.220.

Although involving unfamiliar practices that, in some jurisdictions, challenge accepted norms, we believe that the provision of full open-file discovery will be of great benefit to the prosecution in assuring the public of the fairness both of the process and of finality. It will eliminate most questions about whether all favorable information has been supplied, thus vastly decreasing the opportunity for litigation with the frequent resulting delays and reversals.

Accordingly, regardless of whether a particular jurisdiction provides open-file discovery in ordinary criminal litigation, discovery should be full and open in capital cases. If necessary, separate discovery statutes should be enacted to cover death penalty cases. In all jurisdictions, the rule in capital cases should be full, open-file discovery under which, at an early stage, all documents, information, and materials available to the prosecution are automatically and routinely made available to the defense.
Allowing the defense to examine a prosecutor’s file is of little benefit, however, if the information in the file is incomplete, either through inadvertence or intentional practice. Indeed, the fact that information available to investigative sources is not in the file may mislead and deceive the defense in an ostensibly open-file system. Accordingly, to make any open-file system meaningful and effective, investigators should be given the express duty to retain and organize all information and materials obtained during the investigation. The prosecutor should have the express responsibility of assembling all relevant information by requesting all agencies that participated in investigating the case or examining evidence to provide all relevant documents, information, and materials to the prosecutor for inclusion in the file. Practices of investigators and investigative agencies that encourage reports not to be prepared in written form to avoid disclosure should be explicitly prohibited, and instead, requirements that significant results and facts be made in writing and preserved should be enacted.

Limitations may be placed upon discovery from the prosecution for compelling interests, such as threats to witness safety. Consequently, even an open-file discovery system should provide opportunities for the granting of protective orders. However, to avoid routine erosion of the completeness of discovery, withholding information should require specific judicial approval. An exacting standard should be required before a protective order is granted. Such an order should not be granted unless withholding discovery is necessary to protect the safety of the witness, to protect other specified individuals, or to achieve similarly specific and compelling justifications in support of public safety.

We acknowledge that emergency situations and the unique problems of national security and protecting witnesses from threats of death or serious physical harm, which are most frequently encountered in terrorism and organized crime prosecutions, may require limited, tightly drawn exceptions to the ordinary practices of automatic required disclosure. Relief from those requirements should be solely by court order. These special situations are largely confined to federal prosecutions and will be very rarely encountered in typical death penalty litigation. Even in special situations, jurisdictions must have in place procedures that require contemporaneous recording of the prosecution’s justification for departure from standard practice.

The reforms described above will constitute a major change in discovery practices in many jurisdictions. They will also require special efforts and procedures that entail costs to the system. Where general application of this new system would constitute the greatest change from the existing practice in criminal cases, the impact and costs can be drastically limited by creating a separate discovery system that applies only to death penalty cases. The number of capital cases is relatively small in every jurisdiction, and they are already a special focus for the courts. As discussed above, creating a new system in death penalty cases is both manageable and clearly justifiable.

**Disclosure Exculpatory (Brady) Evidence**

Under long-standing Supreme Court authority, the Due Process Clauses of the Fifth and Fourteenth Amendments require the prosecution to provide the defense with all information helpful to the defense that is material to the determination of guilt or punishment. This information has come to be referred to as “Brady” material, after the Supreme Court case called *Brady v. Maryland*, 373 U.S. 83 (1963). The Constitution is violated if the information is not disclosed, regardless of the bad or good faith of the prosecutor. Moreover,
a violation occurs even where failure to disclose is not the direct responsibility of the pros-
secutor, and the information or evidence remains in the hands of police officials and never
makes its way to the prosecutor.

Although causation is often difficult to determine, many—perhaps the majority—of
the failures of the prosecution to provide Brady material are the result either of the
prosecutor’s never seeing the exculpatory information or of the prosecutor’s seeing it but not
recognizing its exculpatory nature. Moreover, these inadvertent failures to disclose are likely
to be remedied more easily than are purposeful decisions to hide or destroy information that
has been recognized to be exculpatory.

We suspect that a large number of the breakdowns in the system occur because of the
failure of investigators outside the prosecutor’s office who have not been educated in, or pay
insufficient attention to, their institutional duties to provide all potentially exculpatory
information to the prosecution for its assessment under Brady. We believe that because of
prosecutors’ legal and ethical training, they are uniquely equipped to assist investigative
agencies in appreciating their responsibilities under Brady, and we encourage prosecutors to
assume that role.

A program of public and institutional instruction has an important role in the success
of this effort. Instruction will cover the benefits of full disclosure and the components and
requirements of Brady. The message must be received by all law enforcement and investiga-
tive agencies of the importance of full and candid disclosure to the prosecution of all
information potentially helpful to the defense.

Because of the paramount importance of fairness in death penalty cases, systems
should be established to help minimize inadvertent failures to disclose. Such systems would
have three components. First, the prosecutor should have an obligation to request delivery of
all documents, information, and materials relevant to the case from every agency that was
involved in investigating the case or analyzing materials, and to require a response from
these agencies. Failures to seek information, as well as failures to respond, would thus be
eliminated or vastly reduced. Under such a system, information not secured would be more
likely to be the result of purposeful misconduct, which we believe is rare.

Second, an accountable and named prosecutor or prosecutors should be charged with
reviewing all the information received to determine whether it is exculpatory. Again, the
opportunity for inadvertent failures to produce would be reduced since some responsible
officer would be charged with conducting the review and would know that he or she may be
held accountable for failures to disclose.

Third, if arguably exculpatory evidence is unearthed, it should be delivered either to
the defense or to a neutral judicial officer, who would inspect it to determine whether
disclosure is required. Prosecutors, who have determined on the basis of all available evi-
dence that the defendant is guilty, are likely to have a difficult time viewing information as
exculpatory. From the prosecutor’s perspective, any exculpatory evidence must not be truly
exculpatory, for otherwise the prosecution would be dismissed. In the prosecutor’s mind,
each piece of arguably exculpatory information must have some explanation consistent with
guilt. Even a judicial officer may not understand the significance of evidence in the same
way that an advocate for the defense would. However, the judge’s neutral position should
make somewhat easier any recognition that the information may be helpful to the defense.

While disclosure of all Brady information is important, a special responsibility exists
where the prosecution creates such evidence through plea bargains and other inducements
offered to accomplices or informants to secure their testimony. Jurisdictions should consider
prohibiting vague and uncertain inducements, which are sometimes made in that apparently weaker form so that disclosure arguably can be avoided because not clearly required by the Constitution. In any case, all such inducements should be disclosed to the defense and should be admissible regardless of whether the inducement was offered directly by the prosecutor, by officials in other jurisdictions, or by law enforcement officials. See Jackson v. State, 770 A.2d 506, 514 (Del. 2001) (requiring disclosure of an implicit promise of leniency, which the court labeled a “troubling practice,” and which was used by the state in an effort to avoid disclosure and the undermining of a witness’s credibility). The prosecutor in charge of the case should be charged with a duty to gather information about possible deals with witnesses from all officials who have been in a position to offer such inducements.

Willful failures to disclose Brady material in death penalty cases are always wrong. While we trust such failures are relatively rare, they threaten the execution of the innocent. Jurisdictions should enact meaningful punishments that are effective and enforced when a court determines that a willful violation has occurred. The penalties should include monetary sanctions, demotions, and sanctions affecting professional licenses, where appropriate. Based on past experience, it is very likely that courts will be reticent to find willful violations, and so the possibility of sanction should not concern prosecutors and law enforcement officials who fight very hard but fairly. The existence of the penalty is, however, potentially important to deter those who purposefully cross clear lines, particularly in capital cases where the consequence of a violation may be death.

B. Establishing Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed

RECOMMENDATION

Because eyewitness identifications by strangers are fallible, co-defendants are prone to lie and blame other participants in order to reduce their own guilt or sentence, and jailhouse informants frequently have the opportunity and the clear motivation to fabricate evidence to benefit their status at the expense of justice, prosecutors should establish guidelines limiting reliance on such questionable evidence in death penalty cases. The guidelines should put that penalty off limits where the guilt of the defendant or the likelihood of receiving a capital sentence depends upon these types of evidence and where independent corroborating evidence is unavailable.

COMMENTARY

Throughout time and without regard to political ideology, those knowledgeable about criminal prosecutions have worried about certain types of evidence that, due to human frailties, predictably will produce evidence of questionable validity.

One area of concern is with eyewitness identification, specifically stranger identification. History is replete with injustices that were the result of sincere but mistaken identifications. See United States v. Wade, 388 U.S. 218 (1967). Human perception and memory are fallible.

Another source of concern that has been recognized throughout our judicial history is the testimony of co-defendants, who frequently will shift blame in the self-interested quest to avoid the consequences of their own actions. Human nature often discourages individuals
from acknowledging their unique responsibility for taking another’s life when that acknowledgment might lead to their own execution. The normal human instinct in support of self-preservation is to shift blame and to name another as the truly reprehensible individual. And even where clear lies are not told, subtle shifts of role are extraordinarily likely among those facing the possibility of execution.

A third clear category of evidence that has a particularly high chance of being an outright lie, exaggerated, or otherwise erroneous is the testimony of jailhouse informants. Their confinement provides evidence of their questionable character, motivates them to lie in order to improve the conditions of their confinement or even secure their release, and often affords access to information that can be used to manufacture credible testimony.

In noting serious questions about the value of these three classes of evidence, we break no new ground. As noted earlier, their inherent weaknesses have been long recognized and the injustices caused by their use have been frequently documented. The real difficulty is in limiting the abuses without excessively hampering law enforcement in protecting society.

Categorically prohibiting prosecutors from using all such questionable evidence in criminal prosecutions is not justifiable. A single eyewitness may be correct; the co-defendant who first cooperates may, in fact, be the least guilty; and a jailhouse informant trusted by the defendant may have heard an accurate admission of guilt. The particularly high probability of erroneous evidence in these three circumstances is not sufficient reason to produce a rule excluding all such evidence in any criminal case.

Indeed, the difficulty of policing the evidence without excluding it is probably the major reason that reforms have not progressed in any of these three categories. The decision whether to seek the death penalty, with its awesome impact and finality, provides a unique mechanism for imposing a limited but necessary control on questionable evidence.

A prosecutor should never seek a conviction unless he or she is convinced by all the evidence that the defendant is guilty. If, after careful inspection and critical examination of all the evidence in the case, the prosecutor is morally certain of guilt, it would be a dereliction of duty to fail to prosecute. Such a decision to prosecute can, conceivably, depend critically on one of these classes of particularly questionable evidence. If the prosecutor still believes guilt is established to a moral certainty despite informed skepticism, the prosecutor should move forward to convict the defendant for the good of society. However, seeking the death penalty is and should be different.

In making this recommendation, we assume that jurisdictions will make the option of life without parole available. See Recommendation at Section III A supra. With that sentencing option, community safety can be protected without seeking the death penalty. Not seeking death allows for the possibility that an error in the eyewitness's identification or the co-defendant's or jailhouse informant's testimony will ultimately be recognized. This correction of error may be admitted by the witness; may be established by independent evidence; or may result from the operation of human conscience, the progress of science, or pure luck. Execution needlessly prevents such errors from being corrected.

The committee therefore recommends that prosecutors, employing appropriate skepticism, have the discretion to seek convictions based on any or all of these classes of questionable evidence, but that they create protocols or guidelines that constrain when to seek the death penalty. Unless independent evidence establishes the guilt or, where appropriate, the critical role of the defendant in the taking of human life, prosecutors should not seek the death penalty. What is sufficient independent corroboration will frequently be debatable. However, it is clear that corroboration should not be a pro forma requirement or
structured to be too easily found. The reason a rigorous demand for corroboration can and should be imposed is that its absence will still mean that the defendant may be confined for the remainder of his or her life. By contrast, an easy decision that corroboration exists, when in fact independent proof is lacking, may mean that errors will only be unearthed after the defendant has been executed.

C. Requiring Mandatory Period of Consultation before Commencing Death Penalty Prosecution

RECOMMENDATION

Before the decision to prosecute a case capitally is announced or commenced, a specified time period should be set aside during which the prosecution is to examine the propriety of seeking the death penalty and to consult with appropriate officials and parties.

COMMENTARY

All murders are horrible crimes. As a result, a decision by the prosecution to seek the ultimate penalty—death—may very frequently appear the right response in the immediate aftermath of any murder. However, death penalty prosecutions should be undertaken only in the worst of murder cases. Moreover, the decision to prosecute capitally should, insofar as possible, be free of the pressure of media attention and political considerations.

Because of the horror and notoriety of many murders, a local prosecutor's public commitment that the case will be prosecuted capitally may seem to be the humane and correct response for the victim's family and friends and for a concerned public, particularly when the apparent perpetrator is quickly apprehended. Unfortunately, unwarranted commitments to seek the death penalty made during the immediate aftermath of the crime will be exceedingly difficult to retract unless the decision was entirely unwarranted.

The immediate reaction may, however, not be the appropriate one if significant factors are left out of the initial analysis and if important facts are not yet known. Haste to make and announce decisions to prosecute capitally can contribute to an erroneous decision on the question of guilt by limiting the scope of the investigation and putting pressure on investigative authorities to build a case rather than to investigate it. Samuel R. Gross, Lost Lives: Miscarriages of Justice in Capital Cases, 61 LAW & CONTEMPORARY PROBLEMS (1998).

Rushing to judgment may even more frequently have a negative impact on making the appropriate decision whether to seek death, skewing a decision to prosecute capitally. Determining how a particular murder relates to others in the jurisdiction that were and were not prosecuted as death penalty cases requires careful analysis that is typically not possible on the basis of the factual details and other types of information available in the immediate aftermath of the crime. The decision to seek the death penalty should also be based on the characteristics of the offender as well as the crime, and information relating to the offender—particularly the salient features that might render the defendant's execution unwarranted—are often neither obvious nor quickly discovered. Moreover, the strength of the case and the certainty that the perpetrator is guilty should be a critical part of the analysis. However, many critical pieces of evidence, such as scientific analysis, will become available only over a period of weeks, not days. Such results may be critical to determining whether a
realistic possibility of innocence is present. Evidence of guilt that is good enough to warrant
prosecution may not be certain enough to justify the irrevocable act of executing the appar-
ent offender. If made without careful consideration and full information, the decision to
seek the death penalty may be unwise, and, once made, it may lead to a jury imposing a
death sentence that is disproportionate.

For all these reasons, a period of time should be built into the charging process when
analysis and consultation can take place. Obviously, there is nothing magic in any particular
period of time. However, the 120-day period specified in the death penalty law of New York
appears both reasonable and workable. See N.Y. C RIM. P ROC. L AW § 250.40.

This period when reflection and analysis takes place provides an opportunity for
jurisdictions to develop consultative systems that will help to ensure that the most accurate
and reasonable decision possible is made. As an important method of guaranteeing that the
death penalty is reserved for the most heinous offenders, each jurisdiction should mandate
or encourage a system of consultation to help ensure equal application of the laws across
jurisdictions. For example, in New Jersey, the supreme court established a very promising
proportionality review project, which supplements judicial precedent with a comprehensive
database to determine how each death-eligible case compares to all other cases in the rel-
vant pool. David Baldus & George Woodworth, Proportionality: The View of the Special
Master, 6 C HANCE M AGAZINE 1 (1993).

Criminal cases are generally handled by locally elected officials who are given broad
legal authority to determine who is to be prosecuted and for what offenses. Within the
limits of the death penalty statutes and constitutional constraints, these officials also are
invested with authority to determine when to seek the death penalty. We do not challenge
existing legal structures that give such authority to local prosecutors. What we do recom-
 mend is that a consultation system be mandated for the decision to prosecute capitally
where existing legal structures make such a requirement feasible, and that a system of
consultation be encouraged where not mandated.

In either situation, local officials should consult with prosecutors in other locations
and with other knowledgeable officials, such as the staff of the attorney general’s office.
Model procedures are available in a number of jurisdictions, including the federal system,
where United States Attorneys are required to receive approval from the Attorney General
before seeking a death sentence. Comparisons made in this consultation process regarding
charging practices in other jurisdictions and the analysis of the facts of the case at hand by
multiple prosecutors may provide important benefits in reducing disparities between regions
and political divisions in seeking the death penalty. We recognize that this may be difficult
in some jurisdictions, but there is value in not having greatly disparate approaches in
different parts of the same state when dealing with the same set of facts. Alternatively, a
body of retired prosecutors could be established to provide such consultation; such a body
might do much to remove political concerns and competition from the process.
SOURCES

_ProvidingExpandedDiscoveryinDeathPenaltyCasesandEnsuringThatinDeathPenaltyProsecutionsExculpatoryInformationIsProvidedtotheDefense_

**Articles and Reports**


**Statutes**

Fla. Rev. Crim. Pro. 3.220
N.C. Gen. Stats. § 15A-1415(f)

**Cases**

Brady v. Maryland, 373 U.S. 83 (1963)
Giglio v. United States, 405 U.S. 150 (1972)
Jackson v. State, 770 A.2d 506 (Del. 2001)
Napue v. Illinois, 360 U.S. 264 (1959)

_Establishing Internal Prosecutorial Guidelines or Protocols on Seeking the Death Penalty Where Questionable Evidence Increases the Likelihood That the Innocent Will Be Executed_

**Testimony**

Testimony of Professor Lawrence C. Marshall before the Ryan Commission (Sept. 15, 1999) (on file with the Constitution Project)

**Case**

Requiring Mandatory Period of Consultation before Commencing Death Penalty Prosecution

Articles and Web Sites

David Baldus & George Woodworth, Proportionality: The View of the Special Master, 6 Chance Magazine 1 (1993)


Statute

N.Y. Crim. Proc. Law. § 250.40
II. Prohibiting Execution in Cases Involving Questionable Categories of Defendants and Homicides

Additional Statement of Cardinal William H. Keeler

I congratulate the work of the blue-ribbon committee and staff for the Death Penalty Initiative. These recommendations contribute to the current national debate about the death penalty and, if implemented, will go a long way toward preventing wrongful convictions and the execution of innocent persons—a laudable goal irrespective of one's position on the death penalty.

I respectfully submit one additional comment on the report. While I agree with the Project’s recommendation that persons with mental retardation not be subject to the death penalty, my reasons differ somewhat from those given by the Project. Recently the United States Conference of Catholic Bishops, joined by nearly a dozen other religious organizations, asked our nation’s highest court in *McCarver v. North Carolina* to end the practice of executing persons with mental retardation. We believe, as stated in our amicus brief, that such executions violate contemporary standards of decency of American society and cannot be reconciled with the Eighth Amendment guarantee against cruel and unusual punishment. It is our hope that the Court will act to end this practice.

IV. Safeguarding Racial Fairness

Dissenting Statement of Timothy Lynch

I dissent from this recommendation because I believe it is misguided. There is an important difference between racial prejudice and racial disparities. Racial prejudice is wrong and has no place in the American criminal justice system. Under our law, any capital defendant that can present evidence specific to his or her own case that would support an inference that racial considerations played a part in his or her sentence will have that sentence set aside. See *McCleskey v. Kemp*, 481 U.S. 279 (1987). This is a proper and just principle.

Statistical racial disparities among capital defendants are another matter. The population of murderers (detected and undetected) in our multiracial society is not proportionately distributed across the various demographic groups. And there are a host of factors other than race that can influence the outcome of a trial and the defendant’s ultimate sentence. Some of those other factors may be correlated with race thereby creating the misleading impression that racial discrimination is at work when it isn’t. Indeed, the most notable study to be introduced into evidence, the “Baldus” study, tried to take into account more than 200 variables that could have explained disparities in capital case sentencing. Collecting racial statistics and other initiatives designed to “correct” disparities will only produce work for lawyers and statisticians. The debate over the “proper” statistical methodology and “proper” legal remedies and procedures will be unending.
V. Proportionality Review

Additional Statement of William G. Broaddus, Esq.

I fully concur in the recommendation set forth in bold type pertaining to proportionality. While the Supreme Court of the United States has declined to include a proportionality review as a constitutional mandate, such a review is essential to obtain the objectives articulated in the recommendation.

My disagreement is with that portion of the comment which suggests, in the first bullet point, that a proportionality review may be adequately carried out by comparing the case under review with other cases in which the death penalty was imposed. Such a limited review is inadequate and, in all likelihood, of little utility.

For example, in Virginia, the state Supreme Court, until recently, compared the case under review with the records of all capital murder convictions appealed to that Court. Because a very small number of the capital murder convictions in which life sentences were imposed were appealed to the Supreme Court, the pool for comparison was heavily weighted to cases in which the death penalty was handed down. Because there is such a wide range of factual circumstances in which the death penalty has been meted out in Virginia, such a comparison was of little utility. Conversely, there are a number of cases resulting in a conviction of capital murder in which a life sentence was given in which the facts show that the murder was more “vile” and the defendant more likely to “future dangerousness” than in those cases in which the death penalty was handed down. In other words, a review of all capital murder convictions demonstrates that there is no rational way to distinguish between those cases in which the death penalty is deemed appropriate from those in which a life sentence is given.

As an example, several years ago in Chesterfield County four women were charged with capital murder of a fifth woman. The facts surrounding the murder were vile. Because several of the victim's personal effects were taken, thereby constituting a robbery, the prosecution sought convictions of capital murder. The four women were tried separately. The first three were convicted of capital murder, but given life sentences. The fourth, the only African American in the group, was convicted of capital murder and sentenced to death. All trials went to a jury. In the fourth case, the judge set aside the death penalty, noting that he could not fairly impose the death penalty in one case when three co-defendants were given life. Hypothetically, change the order of trial. If the African American had been tried first, under Virginia's stringent twenty-one day rule, the trial court would have lost jurisdiction and not have been able to set aside the death penalty. If the Supreme Court had limited its proportionality review only to cases in which the death penalty was imposed, there would be no basis for setting aside the death penalty for the African American because there are other cases in which robbery of a person and murder have resulted in the death penalty.

The only way to accomplish the objectives set forth in the recommendation is to follow the suggestion of the National Center for State Courts that the pool of comparison be that of all death-eligible cases.

On a second, perhaps more personal note, I observed that on a number of occasions the text makes reference to “those who deserve the death penalty.” If that phraseology could be changed to something along the lines of “those who meet the requirements imposed for the death penalty,” I would certainly appreciate such a change. Personally, and I suspect that
there are others on the Committee who share this view, I do not believe that anyone deserves the death penalty. That is born of a moral viewpoint and not of the law. I have enjoyed my opportunity to participate on this Project and applaud the staff and other members of the Committee who have worked long and hard on this important undertaking.
The Constitution Project is a bipartisan, nonprofit organization dedicated to achieving consensus on controversial legal, governance and citizenship issues.

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