

MANDATORY JUSTICE:

The DEATH PENALTY REVISITED

An Initiative of The Constitution Project

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The Constitution Project, based in Washington, D.C., develops bipartisan solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education.

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PREFACE

In 2000, the Constitution Project created a blue-ribbon committee to guide its new Death Penalty Initiative. The Committee's members were supporters and opponents of the death penalty. They were Democrats and Republicans, conservatives and liberals. Collectively, they had experience with nearly every facet of the criminal justice system, as judges, prosecutors, policymakers, victim advocates, defense lawyers, journalists, and scholars. What originally motivated these individuals, and what continues to do so, is 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. Their commitment was to an effort to overcome the political and philosophical divisions that have long plagued this country's debate over the death penalty.

In 2001, the Committee released *Mandatory Justice: Eighteen Reforms to the Death Penalty*, which contains the consensus recommendations of this remarkable, and remarkably diverse, group. Since then, courts and state legislatures around the country have instituted changes that, for the most part, improve the accuracy of their capital punishment systems. Many of these changes have had bipartisan support. It appears that the divisions between "liberals" and "conservatives," and between death penalty proponents and opponents, are disappearing. This is surely because, no matter what their political perspectives or views about capital punishment itself, all Americans share a common interest in justice for victims of crimes and for those accused of those crimes.

Ultimately, however, committee members' own experiences continue to support their conclusion that the current system is a disservice to those most closely connected with it. Delays and mistakes prevent victims from experiencing finality, and unjustly accused or

convicted individuals lose years of their lives. Equally as important, when we convict the innocent, the actual perpetrators remain at large, and in some cases continue to inflict immeasurable harm on others. A second trial if the perpetrator is apprehended means that victims and their families must endure additional suffering. This country's commitment to protecting the interests of all of these individuals and to a secure society mandates urgent, dramatic, and system-wide changes.

Committee members, many of whom have worked within the system, well know of the conscientious, diligent, and often heroic efforts of those who are judges, prosecutors, defense lawyers, and law enforcement officers, and who must often serve under the most demanding of circumstances. They know that it is extraordinarily difficult, if not impossible, for these public servants to carry out their responsibilities and that, as a result, those the system is designed to protect instead frequently feel victimized by it.

When it released *Mandatory Justice* in 2001, the Committee predicted that additional experience, study, and reflection might require further recommendations. The new recommendations contained in *Mandatory Justice: The Death Penalty Revisited* demonstrate the prescience of that statement. These new recommendations fall into three categories. First are recommendations that address changes in the law since *Mandatory Justice* was issued in 2001. Second are those that address new areas that committee members identified as contributing to errors and injustices. And third are those recommendations that remain unchanged because, unfortunately, the problems they were meant to address continue to afflict our system, engendering the grave injustices that have diminished confidence in it.

In 2000 and 2002, Columbia University legal and social science scholars released a landmark two-part report, entitled "A Broken System: Error Rates in Capital Cases 1973-1995," that galvanized nationwide public debate with its findings that federal courts overturned two-thirds of state capital convictions and sentences for serious constitutional errors, and that these errors were primarily due to egregiously inadequate defense lawyering and prosecutorial misconduct. The report examined capital cases before the 1996 enactment of the Anti-Terrorism and Effective Death Penalty Act, which dramatically reduced the federal courts' ability to review these cases.

The Committee's conclusions in the original *Mandatory Justice* were consistent with the Columbia University study's findings. Since *Mandatory Justice* was released, innocent people have continued to be exonerated and released from death row. According to the Death Penalty Information Center, 119 innocent people around the country have been freed from death row since the 1970's, 28 of them from 2001 to the present. Poor people accused of capital crimes are still represented by lawyers who are intoxicated, sleep during trial, and, no matter how well-meaning, lack the knowledge, skills and resources to defend

a capital case. Individuals with compelling claims of innocence are still confronted with obstacles to the testing of DNA and other potentially exculpatory evidence, and they continue to face procedural barriers to presenting exculpatory evidence to any court. It is still the law that if a lawyer fails to raise an issue in the state courts, a federal court is except in the rarest of circumstances prevented from ruling on it, no matter how valid it may be.

Ironically, as these new recommendations are being sent to press, Congress is considering the Streamlined Procedures Act (SPA), which would create even more barriers to redress by stripping the federal courts of their jurisdiction to hear the vast majority of *habeas corpus* petitions in state capital and non-capital cases. The SPA makes an exception for cases of “actual innocence,” but many experts have expressed serious concerns about the proposal, arguing that it would in fact preclude valid claims from wrongly convicted and sentenced individuals and that the exception would not provide sufficient protection.

The exonerations of people in prison and on death row have taught Americans a hard lesson — that our criminal justice system is fallible, and that courts may convict the wrong person. Public opinion is shifting as a result. Death sentences in all states that allow capital punishment have dropped by 54 percent and executions by 40 percent since 1999.

Many Americans believe that as the technology advances, DNA will act as a “fail-safe” mechanism because it exists in most, if not all, criminal cases. This belief is, however, based on a fundamental misunderstanding. In the vast majority of criminal cases, there is no biological evidence to test. Even if such evidence does exist, in some cases it is destroyed after trial; thus it is unavailable for examination through ever-more sophisticated techniques. DNA is not, and never will be, the “fail-safe” that the public desires.

With the release of *Mandatory Justice* in 2001, members of the Committee joined with a myriad of other individuals and groups expressing their concerns about the death penalty and working tirelessly for change. *Mandatory Justice* has been distributed widely, by both the Constitution Project and allied organizations. State legislators considering reforms to their death penalty systems have relied on its recommendations, and committee members have spoken out on a host of issues related to capital punishment in the media, speeches, and articles in a variety of publications.

As the examples set forth below demonstrate, committee members were committed to the Constitution Project’s mission of using the recommendations as a basis for practical efforts, in a variety of forums, to educate policymakers, the courts, the media, and the public.

- The Committee’s co-chairs testified before Congress on three occasions in support of provisions in the Innocence Protection Act aimed at improving the quality of counsel in capital cases and to make DNA testing more readily available. The co-chairs and members also testified before a variety of state legislatures and other policy-making bodies. Most recently, co-chair Gerald Kogan testified before the New York State legislature in opposition to a bill to reinstate the death penalty that lacked sufficient safeguards. In a written statement, member Scott Turow also urged rejection of the bill. He also sent copies of his book, *Ultimate Punishment: A Lawyer’s Reflections on Dealing with the Death Penalty*, along with a personal letter, to key legislators. Member Paula Kurland testified before the Texas state legislature in support of allowing juries to consider the option of life without possibility of parole. All of these efforts were successful.
- Members William S. Sessions and John Gibbons joined Illinois Death Penalty Commission co-chair Thomas Sullivan and Timothy Lewis, a member of the Constitution Project’s Right to Counsel Initiative blue-ribbon committee, in two influential *amicus curiae* briefs before the Supreme Court. In *Banks v. Cockrell*, these former federal judges and prosecutors urged the Court to hear Mr. Banks’ case, and in a dramatic act, the Court stopped Mr. Banks’ execution 10 minutes before it was to occur and agreed to consider his appeal. The same group then argued in a second brief that his conviction and death sentence were tainted by prosecutorial withholding of critical exculpatory evidence. Ultimately, in *Banks v. Dretke*, the Court ordered that the sentence be vacated and that the lower court review his conviction. The Committee and its members submitted amicus briefs in a host of other landmark cases, such as *Wiggins v. Smith*, in which the Supreme Court ordered a new sentencing hearing based on the failure of the defense lawyer to present mitigating evidence at sentencing, *Miller-El v. Cockrell*, in which the Court ordered a new hearing on a claim of racial bias, *Miller-El v. Dretke*, in which the Court granted Mr. Miller-El’s *habeas* petition because of that racial bias, and *Roper v. Simmons*, in which the Court struck down the juvenile death penalty.
- Several committee members serve on the Honorary Board of the Mid-Atlantic Innocence Project, and on the Advisory Board for the Innocence Commission for Virginia (ICVA), which is a joint project of the Constitution Project, the Mid-Atlantic Innocence Project, and the Accuracy Project at George Mason University. While *Mandatory Justice* presents a broad nationwide view, it does not examine specific cases and specific state practices. By contrast, the ICVA examined 11 acknowledged cases of wrongful conviction in Virginia in making recommendations for reforms. The experience of the Constitution Project and its committee members lent considerable expertise to the ICVA’s work.

The Committee's efforts, and those of a host of other organizations and individuals across the country, have had dramatic results. In the states, Democrats and Republicans alike have addressed systemic inaccuracies and injustices. Most prominently, in April 2002, the Illinois Commission on Capital Punishment released a comprehensive report and 85 recommendations for reform. The Commission was appointed by the then-governor, Republican George Ryan, after he found that the state had cleared more death row inmates than it had executed. He imposed a moratorium on the state's use of capital punishment while awaiting the report. The Illinois Legislature has passed several reform measures, but current Governor Rod Blagojevich, a Democrat, has refused to lift the moratorium, declaring that the system is far from "fixed." In New Jersey, where the Supreme Court ordered state corrections officials to change the way lethal injections are administered, Acting Democratic Governor Richard Codey has called on the state legislature to pass a moratorium against executions. There have been commissions to study the death penalty in 14 states, and others are considering proposals for a moratorium and a variety of reforms. As noted above, Texas — one of only two states refusing to allow jurors to consider a sentence of life without possibility of parole instead of the death penalty — has just given them that option.

Death penalty statutes in New York and Kansas were ruled unconstitutional by those states' high courts in 2004. In New York, the Democratic controlled State Assembly defeated an attempt to reinstate the law. Many legislators who had voted for the death penalty when it became law just 10 years ago opposed its reinstatement because of the risk of error.

At the same time, however, there are efforts to create or expand death penalty laws. In Massachusetts, which has no death penalty, Republican Governor Mitt Romney has proposed a statute, based on the recommendations of a task force of forensic and legal experts, that would replace the traditional "reasonable doubt" standard for conviction with a "no doubt" standard. Prospects for the legislation are uncertain, largely because of doubts that this standard could be met.

It is remarkable, given their extraordinarily busy schedules, that committee members have given so much of their time, experience, and effort to this work and it was inevitable that some would be unable to continue. Thus Kurt Schmoke, Timothy Lynch, Mario Cuomo, Rosalyn Carter, Sam Millsap, LeRoy Riddick, and Vin Weber left the Committee at various points over the past few years. Committee members Charles Ruff and Ann Landers passed away. Our original reporters, Duke Law Professor Robert Mosteller and DePaul Law Professor Susan Bandes, who so ably drafted the original recommendations and guided the Committee to consensus, were no longer able to put aside other demands on their time. They, along with George Washington University Law Professor Stephen Saltzburg and Dr. William J. Bowers, of the College of Criminal Justice at Northeastern

University, no longer serve as reporters. The Constitution Project is grateful for the enormous contributions made by the Committee’s former members and reporters, and for their continued willingness to speak out and provide more informal advice.

At the same time, we are fortunate that other equally influential and expert individuals have joined the Committee. Scott Turow, the best-selling author and member of Governor Ryan’s Commission; Charles Blackmar, the former chief justice of the Missouri Supreme Court; and Frank Stokes, a retired FBI Special Agent, have made noteworthy contributions to the Committee’s work. Mr. Turow’s book about his experience with the death penalty, *Ultimate Punishment: A Lawyer’s Reflections on Dealing with the Death Penalty*, is a riveting and pragmatic reflection on the inequities in the imposition of capital punishment, the “condemning of the innocent or the undeserving,” and the reluctance of policymakers and the public to support essential reforms.

Our new reporters, Andrew Taslitz and Margaret Paris, professors of law at Howard University and The University of Oregon, respectively, carried on seamlessly and with great authority and expertise. We have received first-rate guidance from others as well. Dr. Richard Bonnie, Professor of Law and of Psychiatric Medicine, and Director of the Institute of Law, Psychiatry and Public Policy, at the University of Virginia, advised the Committee on its new recommendations on mental illness and implementation of the Supreme Court’s decision in *Atkins v. Virginia*, which prohibits the execution of individuals with mental retardation. We consulted with our colleagues at the Innocence Project at Cardozo School of Law, who blazed the DNA trail, on our new recommendations on that subject. The Constitution Project’s wonderful interns, Sophia Smith-Savedoff and Jennifer Reid, have deftly managed the final editing process, to which Adam Ortiz, a Soros Fellow, also contributed.

Despite the shifting membership, the Committee’s mission has not changed, and it deserves restatement here. Committee members believe 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 2003, Governor Ryan commuted to life the sentences of all of Illinois’ death row inmates, except for four who received outright pardons. Explaining this dramatic action, he said “Our capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die.” Because of his actions, and the efforts of the Constitution Project’s committee members and countless others, there has been a profound transformation in our nation’s understanding of the inaccuracies and

injustices that haunt our capital punishment system and the corresponding risk of wrongful convictions and executions. The recommendations that follow reflect the Committee's belief that, despite this deeper public understanding and the progress that has been made, this risk remains all too real and much more remains urgently to be done.

Virginia E. Sloan
President and Founder
The Constitution Project
July 2005

HOW TO READ MANDATORY JUSTICE: THE DEATH PENALTY REVISITED

For ease of transition, the updated recommendations are incorporated into the text of the original *Mandatory Justice*. In many cases, the original recommendations are as relevant as when they were first issued. In others, changes in the law mean that the recommendations are no longer needed. Thus, for example, the original recommendation in Chapter II that the execution of individuals with mental retardation and of juveniles be prohibited has been included as new Recommendation 4, but its original commentary has been deleted and additional recommendations addressing new limits on death penalty eligibility have been added. In all other chapters, the original language has been maintained and Editors' Notes highlight updates in the law or certain other relevant information. Recommendations and commentary that are new in this publication are designated by the words "2005 Update" following each mention of the new recommendation.

All recommendations continue to be 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. As in the Committee's original recommendations, the new recommendations are intended to create safeguards against the endemic tendency of decision makers in the criminal justice system to "pass the buck." They emphasize that each, individually, has the responsibility to ensure, to the best of his or her ability, that justice is done.

SUMMARY OF RECOMMENDATIONS

CHAPTER I: ENSURING EFFECTIVE COUNSEL

1. 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.
2. Capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators.
3. 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.

CHAPTER II: RESERVING CAPITAL PUNISHMENT FOR THE MOST HEINOUS OFFENSES AND MOST CULPABLE OFFENDERS

- 4-7. There should be only five factors rendering a murderer eligible for capital punishment. Jurisdictions should exclude from death eligibility those cases in which eligibility is based solely upon felony murder and should not use felony murder as an aggravating circumstance. Individuals with severe mental disorders should not be eligible for the death penalty, and states should establish reliable procedures to determine the issue of mental retardation. (2005 Update.)

CHAPTER III: EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)

8. Life without the possibility of parole should be a sentencing option in all death penalty cases in every jurisdiction that imposes capital punishment.
9. 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.”

CHAPTER IV: SAFEGUARDING RACIAL FAIRNESS

10. 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.

CHAPTER V: ENSURING SYSTEMS FOR PROPORTIONALITY REVIEW

11. 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.

CHAPTER VI: PROTECTING AGAINST WRONGFUL CONVICTIONS AND SENTENCES

EXCULPATORY AND NEWLY DISCOVERED EVIDENCE; CREDIBLE CLAIMS OF INNOCENCE

12. Legislation should provide that, notwithstanding any procedural bars or time limitations, exculpatory DNA evidence may be presented at a hearing to determine whether a conviction or death sentence was wrongful, and if so, that any erroneous conviction or sentence be vacated.
13. Where the results of post-conviction DNA testing exclude the defendant or are inconsistent with the prosecution’s theory, prosecutors should promptly consent to vacate the conviction, and should not retry (or threaten to retry) the defendant unless convinced that compelling evidence remains of the defendant’s guilt beyond a reasonable doubt. (2005 Update.)

14. 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.
15. Capital defendants who establish a credible claim of innocence should have access to post-conviction relief, even after all avenues for relief have been exhausted and regardless of whether there is any other legal bar to the claim of factual error. (2005 Update.)

LEARNING FROM WRONGFUL CONVICTIONS AND SENTENCES AND AVOIDING FUTURE WRONGFUL CONVICTIONS AND SENTENCES

16. All jurisdictions should (a) review capital cases in which defendants were exonerated to identify the causes of the error and to correct systemic flaws; (b) adequately fund Capital Case Innocence Projects; (c) establish a Capital Case Early Warning Coordinating Council to identify systemic flaws in an effort to avert mistaken convictions *before* they happen; and d) fund efforts to increase sensitivity to innocence issues in capital cases among students, the police, judges, and the American public. (2005 Update.)

DNA EVIDENCE

17. 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.
18. Government officials should promptly and readily consent to DNA testing on biological evidence from criminal investigations that remains in their custody. The state should also make evidence available for DNA testing in cases in which defendants convicted of capital crimes have already been executed and post-mortem DNA testing may be probative of guilt or innocence. (2005 Update.)
19. If the government fails to submit DNA profiles from the defendant's or a related case to DNA databanks, the defendant should have the right to petition a court for, and that court should have the power to issue, an order that the government submit the profiles to those databanks. (2005 Update.)

FORENSIC LABORATORIES

20. The testimony of a prosecution forensic examiner not associated with an accredited forensics laboratory should be excluded from evidence. (2005 Update.)

21. Laboratories should be accredited only when they meet stringent scientific standards. (2005 Update.)
22. Forensics laboratories should audit all death penalty cases when there is reason to believe that an examiner engaged in forensic fraud or an egregious act of forensic negligence in any case (whether capital or not) during the examiner's professional career. (2005 Update.)

VIDEOTAPING AND RECORDING OF CUSTODIAL INTERROGATIONS

23. Custodial interrogations of a suspect in a homicide case should be videotaped or digitally video recorded whenever practicable. Recordings should include the entire custodial interrogation process. Where videotaping or digital video recording is impracticable, an alternative uniform method, such as audiotaping, should be established. Where no recording is practicable, any statements made by the homicide suspect should later be repeated to the suspect and his or her comments recorded. Only a substantial violation of these rules requires suppression at trial of a resulting statement. (2005 Update.)

CHAPTER VII: DUTY OF JUDGE AND ROLE OF JURY

24. Appellate courts reviewing capital convictions for sufficiency of the evidence should reverse if a reasonable jury could not have found guilt beyond a reasonable doubt. (2005 Update.)
25. 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.
26. The judge in a death penalty trial should instruct the jury that if any juror has lingering doubt about the defendant's guilt, that doubt may be considered as a "mitigating" circumstance that weighs against a death sentence.
27. 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.

CHAPTER VIII: ROLE OF PROSECUTORS

28. 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.

29. 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.
30. Prosecutors should engage in a period of reflection and consultation before any decision to seek the death penalty is made or announced. (2005 Update.)
31. All capital jurisdictions should establish a Charging Review Committee to review prosecutorial charging decisions in death eligible cases. Prosecutors in death eligible cases should be required to submit proposed capital and non-capital charges to the committee. The committee should be required to issue binding approvals or disapprovals of proposed capital charges, with an accompanying explanation. Each jurisdiction should forbid prosecutors from filing a capital charge without the committee's approval. (2005 Update.)
32. Foreign nationals who were not afforded rights to consular notification and access under the Vienna Convention on Consular Relations (VCCR) should not be eligible for the death penalty. The chief law enforcement officer for each state with capital punishment and for the federal government should ensure full compliance with the VCCR. An independent authority should report regularly to the chief executive or legislature about compliance with the VCCR. (2005 Update.)

BLACK LETTER RECOMMENDATIONS

CHAPTER I: ENSURING EFFECTIVE COUNSEL

1. Each State Should Create 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.¹ 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.

2. Each Jurisdiction Should Provide Competent and Adequately Compensated Counsel at All Stages of Capital Litigation and Provide 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 of counsel in death penalty litigation.”² 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.

3. The *Strickland v. Washington* Standard for Effective Assistance of Counsel at Capital Sentencing Should be Replaced.

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.³ 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.

CHAPTER II: RESERVING CAPITAL PUNISHMENT FOR THE MOST HEINOUS OFFENSES AND MOST CULPABLE OFFENDERS

4. Individuals with Mental Retardation, Those Who Were Under 18 at the Time of the Offense, and Those Convicted of Felony Murder Should Be Excluded from Death Penalty Eligibility.

Jurisdictions should exclude from eligibility for the death penalty those cases involving persons with mental retardation, persons under the age of eighteen at the time of the crimes for which they are convicted, and those convicted of felony murder who did not kill, intend to kill, or intend that a killing occur should be excluded from eligibility for capital punishment.

5. Death Penalty Eligibility Should be Limited to Five Factors:

- The murder of a peace officer killed in the performance of his or her official duties when done to prevent or retaliate for that performance.
- The murder of any person (including but not limited to inmates, staff, and visitors) occurring at a correctional facility.
- The murder of two or more persons regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts, as long as either (a) the deaths were the result of an intent to kill more than one person, or (b) the

defendant knew the act or acts would cause death or create a strong probability of death or great bodily harm to the murdered individuals or others.

- The intentional murder of a person involving the infliction of torture. In this context, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; and depraved means that the defendant relished the infliction of extreme physical pain upon the victim, evidencing debasement or perversion, or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.
- The murder by a person who is under investigation for, or who has been charged with or has been convicted of, a crime that would be a felony, or the murder of anyone involved in the investigation, prosecution, or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors, and investigators. (2005 Update.)

6. Felony Murder Should be Excluded as the Basis for Death Penalty Eligibility.

The five eligibility factors in Recommendation 5, which are intended to be an exhaustive list of the only factors that may render a murderer eligible for capital punishment, do not include felony murder as a basis for imposing the death penalty. To ensure that the death penalty is reserved for the most culpable offenders and to make the imposition of the death penalty more proportional, jurisdictions that nevertheless choose to go beyond these five eligibility factors should still exclude from death eligibility those cases in which eligibility is based solely upon felony murder. Any jurisdiction that chooses to retain felony murder as a death penalty eligibility criterion should not permit using felony murder as an aggravating circumstance. (2005 Update.)

7. Persons with Severe Mental Disorders Should be Excluded from Death Penalty Eligibility.

Persons with severe mental disorders whose capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to the conduct, or to conform their conduct to the requirements of law was significantly impaired at the time of the offense should be excluded from death eligibility. (2005 Update.)

CHAPTER III: EXPANDING AND EXPLAINING LIFE WITHOUT PAROLE (LWOP)

8. Each Jurisdiction Should Ensure the Availability of a 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.

9. The Court Should Explain the Meaning of a 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 should 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.

CHAPTER IV: SAFEGUARDING RACIAL FAIRNESS

10. Each Jurisdiction Should Implement Comprehensive Programs to Safeguard 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.

CHAPTER V: ENSURING SYSTEMS FOR PROPORTIONALITY REVIEW

11. Each State Should Implement Procedures to Ensure Proportionate Death Sentences.

In order to (a) ensure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, (b) provide a check on broad prosecutorial discretion, and (c) 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.

CHAPTER VI: PROTECTING AGAINST WRONGFUL CONVICTIONS AND SENTENCES

EXCULPATORY DNA EVIDENCE AND NEWLY DISCOVERED EVIDENCE; CREDIBLE CLAIMS OF INNOCENCE

12. The Presentation of Exculpatory DNA Evidence Should Be Allowed Notwithstanding Procedural Bars.

If exculpatory evidence is produced by DNA 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.

13. Prosecutors Should Consent to Vacating a Conviction and/or a Sentence When DNA Testing Excludes the Defendant or When the Result is Inconsistent with the Government’s Prosecution Theory.

Where post-conviction DNA testing is performed and excludes the defendant, or otherwise yields a result that is inconsistent with the theory under which he or she was prosecuted, convicted, or sentenced, prosecutors should promptly and readily consent to vacate the conviction and/or sentence. In such cases, prosecutors should neither threaten to retry nor commence retrial proceedings against the defendant, unless, notwithstanding the exculpatory DNA test results, there remains highly credible evidence of the defendant’s guilt beyond a reasonable doubt. (2005 Update.)

14. Procedural Barriers to the Introduction of Newly Discovered Exculpatory Evidence Should Be Lifted.

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.

15. Post-Conviction Review in Cases of Credible Claims of Innocence Should Be Provided.

Post-conviction relief should be available to review, and correct causes of error in, the cases of all capital defendants who establish a credible claim of innocence, even after all traditional appellate and post-conviction avenues for relief have been exhausted and regardless of whether there is any other legal bar to the claim of factual error. (2005 Update.)

LEARNING FROM WRONGFUL CONVICTIONS AND SENTENCES AND AVOIDING FUTURE WRONGFUL CONVICTIONS AND SENTENCES

16. Procedures for Systemic Review of Exonerations and for Avoiding Future Errors Should Be Established.

- Jurisdictions should provide mechanisms for the review of capital cases in which defendants were exonerated, for the purpose of identifying the causes of the error and for correcting systemic flaws affecting the accuracy, fairness, and integrity of the capital punishment system.

- Jurisdictions should adequately fund the creation (where they do not exist) and operation of Capital Case Innocence Projects.
- Each jurisdiction should establish a Capital Case Early Warning Coordinating Council to identify on an ongoing basis systemic flaws that, once corrected, should help in an effort to avert mistaken convictions before they happen.
- Jurisdictions should also adequately fund efforts to increase sensitivity to innocence issues in capital cases in high schools, colleges, law schools, police academies, judicial training programs, and among the broader American public. (2005 Update.)

DNA EVIDENCE

17. The Government Should Preserve and Use DNA Evidence to Establish Innocence or Avoid an 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.

18. The Government Should Consent to Preserve, Inspect, and Test Biological Evidence.

All government officials should promptly and readily consent to preservation, inspection, and testing of biological evidence in their custody that is reasonably likely to aid in identifying the true perpetrator(s) of a criminal offense. Such consent should be freely given, without requiring the individual seeking DNA testing to engage in protracted litigation, in the pre-trial, trial, and post-conviction phases of criminal proceedings. This obligation should also extend to cases in which capital defendants have been executed, given the public’s strong and continued interest in ensuring the accuracy of the criminal justice system, and the lack of any interest by the state in barring DNA testing once a death sentence has been meted out. (2005 Update.)

19. The Government Should Be Required to Submit DNA Profiles to DNA Databanks in Certain Cases.

If law enforcement agencies fail to submit to a state or federal DNA databank (a) unidentified DNA profiles obtained from evidence in a defendant’s case, and/or

(b) unidentified DNA profiles from cases that reasonably appear to be related to the offense for which another defendant was convicted, the defendant should have the right to petition a court for, and the court shall have the right to issue, an order requiring the state to submit such profiles to state and federal DNA databanks for comparison purposes. (2005 Update.)

FORENSIC LABORATORIES

20. The Testimony of Forensic Examiners Not Associated with Accredited Laboratories Should Be Excluded.

Testimony from a forensic examiner offered by the prosecution in capital cases should be excluded from evidence when the examiner is not associated with an accredited forensic laboratory. (2005 Update.)

21. Accreditation of Laboratories Should Be Limited.

Accreditation should be permitted only for laboratories that:

- employ certified technicians;
- do not release results based on insufficiently validated techniques;
- articulate and enforce written standard protocols; and
- require examiner proficiency testing in the particular technique in question. (2005 Update.)

22. Forensic Laboratories Should Be Audited in Cases of Egregious Negligence or Fraud.

Every forensic laboratory should have in place a procedure for triggering an audit of all death penalty cases handled by any of its examiners when there is reason to believe that the examiner has engaged in an egregious act of forensic negligence or in any act of forensic fraud in any case (whether capital or not) that he or she has handled during his or her professional career. (2005 Update.)

VIDEOTAPING AND RECORDING OF CUSTODIAL INTERROGATIONS

23. Interrogations of Homicide Suspects Should Be Videotaped or Digitally Recorded Whenever Practicable.

- When a recording is made of a custodial interrogation, the original recording should promptly be downloaded and maintained by procedures adequate to prevent tampering and to maintain a proper chain of custody.
- Only in the unusual case should it be considered impracticable to videotape or digitally video record a custodial interrogation when it occurs at a police facility or other place of detention.
- Recording should include not merely the statement made by the suspect after custodial interrogation, but the entire custodial interrogation process.

- Where videotaping or digital video recording is impracticable, some alternative uniform method for accurately recording the entire custodial interrogation process, such as by audio taping, should be established.
- Police investigators should carry audiotape recorders for use when conducting custodial interrogations of suspects in homicide cases outside the police station or in other locations where video recording is impracticable, and all such interviews should be audio taped.
- Where neither visual nor audio recording is practicable, any statements made by the homicide suspect should at a later time be repeated to the suspect on videotape or by digital video recording and his or her comments recorded.
- Whenever only an audio recording is made, the state should bear the burden of proving by a preponderance of the evidence, at any pre-trial hearing or at trial, that videotaping or digital video recording of the entire custodial interrogation process was impracticable; if there has not even been an audio recording made, the state should further bear the burden of proving by a preponderance of the evidence that audio recording or some other uniform method of complete and accurate recording was impracticable.
- Video or audio recording of the entire custodial interrogation process should not require the suspect's permission.
- Only a substantial violation of these rules should require suppression of a resulting suspect statement at trial. Any violation of these rules should be presumed substantial unless the state proves the opposite by a preponderance of the evidence. A violation in all cases should be deemed substantial if one or more of the following paragraphs is applicable:
 - ▶ The violation was gross, willful, and prejudicial to the accused. A violation should be deemed willful regardless of the good faith of the individual officer if it appears to be part of the practice of the law enforcement agency or was authorized by a high authority within it. A violation should also be deemed willful if it was caused by a police department's failure adequately to train its officers and other relevant personnel or by its failure adequately to provide officers and other relevant personnel with properly maintained and adequate equipment to comply with this rule.
 - ▶ The violation was of a kind likely to lead accused persons to misunderstand their position or legal rights and to have influenced the accused's decision to make the statement, such as where the accused person waives his or her right to videotaping because police contributed to the person's belief that an untaped oral statement could not be used at trial.
 - ▶ The violation created a significant risk that an incriminating statement may have been untrue, such as may happen where the secrecy of the interrogation process encourages police to use interrogation methods that create a significant risk of false confessions in a department with a proven record of using such flawed methods.

- In determining whether a violation not covered by the previous conditions is substantial, the court should consider all the circumstances including:
 - ▶ the extent of deviation from lawful conduct, for example, by videotaping only a small portion of the interrogation process (major deviation) versus videotaping most, but not all, of the process (minor deviation);
 - ▶ the extent to which the violation was willful;
 - ▶ the extent to which exclusion would tend to prevent violations of this recommendation;
 - ▶ whether there is a generally effective system of administrative or other sanctions that makes it less important that exclusion be used to deter such violations in the future;
 - ▶ the extent to which the violation prejudiced the defendant's ability to support a motion to exclude a confession, or to defend him or herself in the proceeding in which the statement is sought to be offered in evidence against the defendant; and
 - ▶ whether the violation made it particularly difficult to prove the use of coercive investigation techniques where adequate alternative forms of corroborating evidence are unavailable and a defendant has made out a *prima facie* case of coercion.
- Whenever there is a failure for any reason to videotape, record or audiotape any portion of, or all of, the custodial interrogation process, and the statement was not otherwise suppressed, a defendant should be entitled, upon request, to a cautionary jury instruction, appropriately tailored to the individual case, noting that failure; permitting the jury to give it such weight as the jury feels that it deserves; and further permitting the jury to use it as the basis for finding that the statement was either not made or was made involuntarily. (2005 Update.)

CHAPTER VII: DUTY OF JUDGE AND ROLE OF JURY

24. Courts Should Apply a More Stringent Standard for Appellate Review of Evidentiary Sufficiency.

The current standard for appellate review of evidentiary sufficiency in criminal cases is inappropriate in capital cases. It should be replaced with a standard requiring reversal if a reasonable jury could not have found guilt beyond a reasonable doubt. (2005 Update.)

25. Judges Should be Prohibited from Overriding a Jury's Recommendation of a Life Sentence to Impose a Sentence of Death.

Judicial override for 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.

26. Trial Judges Should Instruct Juries on 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 mitigating circumstance weighing against a death sentence for the defendant."

27. Judges Should Ensure That Capital Sentencing Juries Understand Their Obligations to Consider Mitigating Factors.

- 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 (a) 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 (b) mitigating circumstance 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 about 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.

CHAPTER VIII: ROLE OF PROSECUTORS

28. Prosecutors Should Provide Expanded Discovery and Ensure that 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 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 (*Brady*) evidence to the defense. In order to ensure compliance with this obligation, the prosecution should be required to certify that (a) 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; (b) 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 (c) 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.

29. Prosecutors Should Establish 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.

30. There Should be a Mandatory Period of Consultation Before Prosecutors Decide Whether to Commence a 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.

31. Jurisdictions Should Require a Mandatory Review of Prosecutorial Charging Decisions in Death Eligible Cases.

- To ensure fairness in the application of the death penalty, each jurisdiction should establish a Charging Review Committee responsible for reviewing prosecutorial charging decisions in death eligible cases. The committee should be composed of elected prosecutors and retired judges.
- The following procedures should be implemented with respect to each jurisdiction's Charging Review Committee:
 - ▶ Prosecutors in all cases involving alleged death eligible conduct should be required to submit proposed charges, capital or non-capital, to the Charging Review Committee, accompanied by written statements explaining their charging rationales.
 - ▶ The committee should be required to review these proposed charges and supporting statements of rationale, and to respond with appropriate comments and/or recommendations.
 - ▶ In addition, in the subcategory of death eligible cases in which the prosecution proposes capital charges, the committee should be required to issue binding approvals or disapprovals of those capital charges and should expressly state its reasons for its decisions.
 - ▶ Each jurisdiction should expressly forbid prosecutors from filing capital charges without the approval of its Charging Review Committee. (2005 Update.)

32. The Vienna Convention on Consular Relations Should Be Enforced.

- Every capital defendant who is a foreign national should be ineligible for the death penalty if not provided with consular rights under the Vienna Convention on Consular Relations (VCCR).
- Each entity with authority to impose or carry out the death penalty should impose on its attorney general (or another central law enforcement officer) the duty of ensuring full compliance with the VCCR.
- This duty should include training law enforcement actors about consular rights and monitoring adherence to those rights.
- An independent authority, such as an inspector general, should report regularly about compliance to the entity's chief executive or legislative body. (2005 Update.)

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