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*223 DEATH ROW IN OHIO, 2003: THE CASE FOR A STUDY COMMISSION

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I. Introduction

A number of legislative, executive, and judicial decisions reflect growing concerns about the fairness and accuracy of America's system of capital punishment. The most dramatic developments occurred in Illinois where Governor George Ryan issued a blanket commutation for all 156 death row inmates in Illinois from death to life imprisonment after the Illinois General Assembly failed to enact reforms to the system. Previously, Governor Ryan had issued a moratorium on executions after the release of thirteen inmates who were found to be innocent. [FN1] The U.S. Supreme Court recently struck down imposition of the death penalty on the mentally retarded, reiterating that capital punishment must be reserved for the most extreme cases. [FN2] Many states are debating moratoria and high-level commissions to study the fairness and accuracy of death penalty regimes around the country, including Ohio. [FN3] Three recent death penalty studies, the Report of the Governor's Commission on Capital Punishment (Commission) [FN4] and A Broken System I & II, conducted at Columbia University, (Columbia Studies), [FN5] have identified common ***224** factors and practices in death penalty systems that strongly correlate to the likelihood of convictions of innocent people, high-rates of reversible error, and an arbitrariness in application of the death penalty that does not comport with affording criminal defendants equal protection of the laws.

Spurred by these developments, the Center for Law and Justice (CLJ) of the University of Cincinnati College of Law conducted The Ohio Death Row Case Study (Ohio Case Study) to examine whether the same factors and practices identified in these studies were present in Ohio's death row cases. This report presents the preliminary findings of this study. In short, the Ohio Case Study demonstrates that many of the Ohio death row cases reflect the factors and practices that suggest that the imposition of the death sentence in Ohio may be arbitrary, may not be reserved for the most extreme cases, fails to provide all defendants with the equal protection of the laws, and is likely to result in the execution of innocent people. Therefore, this report concludes that the results of its study warrant a statewide moratorium and a high level commission to study the death penalty in Ohio.

As law students, the members of the CLJ hope this work can help improve the system of justice in the state of Ohio. The goal of any capital punishment system is to achieve justice and to the extent possible, avoid errors. Obviously, errors in the imposition of the death penalty are particularly disturbing. Illinois released more death row inmates than they executed since re-instituting the death penalty in 1977, and the CLJ wanted to determine on a preliminary basis whether the Ohio death row cases manifested characteristics similar to those in Illinois. Spurred in part by this report, the University of Cincinnati College of Law will be starting an Innocence Project, which should be operational by summer 2003.

A. The Supreme Court and Restrictions on Imposition of the Death Penalty

In Furman v. Georgia, decided in 1972, the United States Supreme Court temporarily suspended executions nationwide, ruling that death penalty regimes violated due process rights because of their arbitrary and capricious application. [FN6] In 1976, however, the Court determined ***225** in Gregg v. Georgia that a state could execute convicted murders as long as the state had a noncapricious, nonarbitrary death penalty system that contained "a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." [FN7] While reaffirming the basic constitutionality of the death penalty, Justice Stewart, writing for the majority in Gregg, observed that the death penalty occupies a unique position in criminal punishment because of "the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases." [FN8] Expanding on that idea, Justice Stewart stated that the death penalty is "an extreme sanction, suitable to the most extreme of crimes." [FN9] Between 1976and 2002, the Court gave great deference to state death penalty systems. For example, the Court stated in 1989 that "a heavy burden rests on those who would attack the judgment of the representatives of the people," [FN10] and that state legislatures were "the clearest and most reliable objective evidence of contemporary values." [FN11]

The Supreme Court has invalidated aspects of state death penalty systems when it determined that a particular class of death sentence eligible factors is either "cruel and unusual" or does not reserve the death sentence for the most extreme cases. The Court has held that the death penalty is excessive for the rape of an adult [FN12] and for any crime ***226** that did not involve either the taking of a life, an attempt to take a life, or an intent to take life. [FN13] If the practice of issuing a death sentence "has become truly unusual, and it is fair to say that a national consensus has developed against it," then the Court will strike it down. [FN14] For example, in Atkins v. Virginia, the Court ruled that executing the mentally retarded was cruel and unusual punishment. [FN15] Atkins reaffirms that state legislatures must reserve the death penalty for extreme cases.

B. Research Regarding Accuracy in Imposition of the Death Penalty

1. Formation of the Illinois Commission

On January 31, 2000, Illinois Governor George Ryan declared a moratorium on executions in the state when, within forty-eight hours of his scheduled execution date, death row inmate Anthony Porter was released on the grounds of innocence. [FN16] Mr. Porter's release raised the number of men released from death row to thirteen in a period of little more than ten years. [FN17] Since 1990, when the death penalty was reinstated, more individuals have been freed from death row in Illinois (17) than have been executed (12). [FN18] Since capital sentencing has been imposed at the trial level in Illinois, more than half of the 250 cases in which the death penalty was originally handed down were ultimately reversed. [FN19] Only twenty-five percent were again sentenced to death and only thirty-eight percent were sentenced to prison terms exceeding sixty years. [FN20]

***227** Five weeks after issuing the moratorium, Governor Ryan appointed the Commission on Capital Punishment to determine what reforms, if any, would ensure that the Illinois capital punishment system is fair, just, and accurate. [FN21] The bi-partisan Commission was made up of respected individuals including judges, prosecutors, criminal defense attorneys, a former senator, a deputy governor, and other attorneys and community members. [FN22] The imposition of the moratorium in Illinois renewed and heightened the national debate on the death penalty and a number of states created commissions to study issues regarding sentencing in capital cases. [FN23]

The Commission was charged with four duties in its examination of the death penalty:

> 1. To study and review the administration of the capital punishment process in Illinois to determine why that process has failed in the past, resulting in the imposition of death sentences upon innocent people.
> 2. To examine ways of providing safeguards and making improvements in the way law enforcement and the criminal justice system carry out their responsibilities in the death penalty process-from investigation

through trial, judicial appeal, and executive review.

3. To consider, among other things, the ultimate findings and final recommendations of the House Death Penalty Task Force and the Special Supreme Court Committee on Capital Cases and determine the effect these recommendations may have on the capital punishment process.

4. To make any recommendations and proposals designed to further ensure the application and administration of the death penalty in Illinois is just, fair, and accurate. [FN24]

To perform its duties, the Commission took several steps to research the death penalty in Illinois, including:

1. An intensive examination of the cases involving the 13 men released from death row.

2. A broader review of the more than 250 cases in which the death penalty has been imposed in Illinois since 1977, special studies by researchers on victim issues in the death penalty process, and a separate study on the impact of various factors on the sentencing process.

***228** 3. A review of death penalty laws in the other thirty-seven states that use the death penalty.

4. Solicitation of views from various experts in particular areas of concern, such as police practices and eyewitness testimony.

5. An analysis of efforts in other jurisdictions to address problems relating to death penalty prosecutions. [FN25]

In making its recommendations, the Commission assumed that the political will of Illinois was to keep the death penalty legal as long as it was accurate and reserved for the most heinous crimes. [FN26] Thus, the deliberations concentrated on the reform and improvement of the death penalty, rather than the merits of the death penalty. [FN27]

2. Conclusions of the Commission

The Commission issued eighty-five recommendations for the State of Illinois to follow if it plans to continue to use the death penalty. [FN28] The Commission believed its recommendations would provide a higher level of protection to suspects and increase the reliability of prosecutions in Illinois. [FN29] Beyond prosecutorial reforms, the Commission recommended a substantial reduction in factors that justify the imposition of the death penalty. [FN30]

a. Five Eligibility Factors

To ensure a death penalty system that is fair in its application and less likely to execute the innocent, the Commission recommended that the list of twenty aggravating factors in Illinois for the imposition of the death penalty be reduced to five aggravating factors (five eligibility factors):

1. The murder of a peace officer or firefighter.
2. The murder of any person at a correctional institution.
3. Crimes in which multiple murders are committed.
4. The torture of someone before a murder.

***229** 5. The murder of a witness in order to obstruct the justice system. [FN31]

Reducing eligibility for the death penalty would focus the enormous expense of death penalty prosecutions on a smaller class of murders, which would minimize the likelihood of reversible errors and the execution of the innocent. [FN32]

In deciding upon these five factors, the Commission reconciled the Supreme Court's command that the death penalty be reserved for the most heinous crimes with the moral difficulty of deciding that some murders are more heinous than others. To do this, the Commission articulated moral goals to guide its selection of circumstances that justify the imposition of the death penalty:

1. Certain crimes, even when compared to other murders, are so heinous that any response other than

death minimizes the magnitude of the offense.

2. There is a public interest in incapacitating persons with a propensity to murder again.

3. There is a need for further punishment for those to whom capital punishment is the only meaningful punishment (i.e., murder in a prison).

4. Certain circumstances exist wherein state interests are of paramount importance, such as the murder of police officers or fire fighters. [FN33]

b. Exclusion of the Mentally Retarded

The Commission also recommended a categorical exclusion from the death penalty for the mentally retarded. [FN34]

c. Exclusion of the Death Sentence in Certain Error-Prone Scenarios

The Commission identified common flaws within the prosecution of the thirteen innocent people released from Illinois' death row. [FN35] In those cases, the use of the testimony of in-custody informants, single eyewitnesses, and accomplices were pivotal to putting innocent men on death row. [FN36] To reduce the likelihood of sentencing innocent people to death ***230** row, the Commission recommended not allowing the death sentence in the following situations:

1. The defendant's conviction is based solely on the testimony of an in-custody informant, absent other significant evidence.

2. The defendant's conviction is based solely on the testimony of a single eyewitness, absent other significant evidence.

3. The defendant's conviction is based solely on the testimony of an accomplice, absent other significant evidence. [FN37]

C. The Columbia Studies

In December 2000, Professors James Liebman and Jeffrey Fagan released the results of their study of death sentences in twenty-eight states in which at least one capital direct appeal was completed between 1973 and1995. [FN38] The goal of the report was to address the reliability and the rationality of the death penalty system as a whole by using the data from the twenty-eight states in which a death penalty case had exhausted its appeals at all court levels. [FN39]

The Columbia studies concluded that over the 1973-1995 period, the rate of cases containing “serious errors” (errors that substantially undermined the reliability of the guilt finding or death sentence at trial) was sixty-eight percent. [FN40] Additionally, despite the 5,760 death sentences that were issued between 1973 and 1995, only 313 (5.4%) of those resulted in an execution. [FN41] The authors concluded that the capital sentences took too long to impose because the number of appealable errors is alarmingly high in such cases. [FN42]

Frighteningly, when so many failures are known to occur, and when mistakes are so difficult to catch, it is likely that some are not caught. Some executions counted as successes are actually undiscovered failures-executions of innocent defendants whom the courts inadvertently allowed to be executed. [FN43] There have been several innocent men ***231** released from death row that were not discovered among those cases with serious reversible error. [FN44]

The second part of the study, Broken System II, extensively researched the states and counties that had accounted for sixty-eight percent of cases that were later reversed, and identified the common factors and practices amongst them. [FN45] The authors drew three main conclusions:

1. The higher the rate at which a state or county imposes death verdicts, the greater the probability that each death verdict will have to be reversed because of serious error.

2. The more often states impose death sentences in cases that are not highly aggravated, the higher the risk of serious error.

3. Comparisons of particular counties and states' capital-sentencing and capital-error rates illustrate the strong relationship between frequent death sentencing and error. [FN46]

All three conclusions relate to the frequency of imposing the death penalty. Similar to the conclusions of the Illinois Commission, Broken System II found that the less frequently a state imposes the death penalty, the less likely their convictions will be subject to a high error rate. The inescapable conclusion of the three studies is that reserving the death penalty for the most extreme cases is directly related to insuring that innocent people are not put on death row.

II. The Ohio Death Row Case Study

In order to assess whether Ohio is reserving the death penalty for the most heinous crimes and prosecuting cases in a way to minimize the likelihood of executing innocent people, the CLJ tested how the nine recommendations of the Illinois Commission regarding eligibility for the death penalty would affect Ohio's death row population. The CLJ selected these nine recommendations because they reached the ***232** substance of the alleged crimes, rather than the process used to reach a conviction. Presumably, if Ohio's death row population generally meets the recommended eligibility factors of Illinois, then Ohio may have little reason to worry about its death penalty system. Conversely, if many death row inmates do not meet one of those eligibility factors, then the Ohio death penalty system may result in the execution of innocent people.

A. Methodology

This study was based on an examination of Ohio Supreme Court decisions in death penalty cases performed by eight University of Cincinnati Law School students. [FN47] The CLJ analyzed only those cases in which death row inmates had completed their guaranteed Ohio Supreme Court appeal. While this decision reduced the number of available cases from 204 [FN48] to 173, and limited the scope of the review to those facts contained in the court's opinion, [FN49] it ensured the most consistent and unbiased review of the cases. Since the Ohio Supreme Court affirmed the imposition of the death sentence in every one of the cases examined, the CLJ is confident that the facts, as set forth by the supreme court, are not likely to include unwarranted assertions favorable to the defendants.

The data collection process began with the 173 cases being divided equally among all of the researchers. After analyzing each case, the researcher then entered information about the case into a data collection instrument. [FN50] This instrument required researchers to briefly summarize the facts, identify whether the case met one of the five eligibility factors recommended by the Illinois Commission, identify whether the defendant was mentally retarded, [FN51] and identify if there was testimony of an in-custody informant, a single-eyewitness, or an accomplice. To ensure that the data collected during this process was ***233** accurate, two researchers examined every case and data collection for consistency. After all the cases were examined and the data collection instruments completed, the information was then compiled in a Microsoft Access database. [FN52] By recording the information in a database, the CLJ conclusions are subject to critical review.

B. Eligibility/Ineligibility Factors for Imposition of the Death Penalty

First, all the cases were examined to see if the alleged murder qualified for one of the five eligibility factors recommended by the Illinois Commission.

1. The Murder of a Peace Officer or Firefighter

The Illinois Commission recommended that the death penalty remain an eligible punishment for anyone who "murders a peace officer or firefighter killed in the performance of his/her official duties, or to prevent the performance of his/her official duties, or in retaliation for performing his/her official duties." [FN53] The Commission argued that for public policy reasons, including but not limited to the fact that police and firefighters are placed in the most violent situations on a daily basis and that making the death penalty available for these kinds of murders has always been part of American law, the killing of police and firefighters should remain death-sentence eligible. [FN54]

Among the 173 Ohio cases examined, three inmates are on death row for the killing of a peace officer or firefighter. [FN55]

***234** 2. The Murder of Any Person at a Correctional Institution

The Illinois Commission recommended that the death penalty remain an eligible punishment for anyone who kills any person in a correctional institute. [FN56] The argument that incarceration will keep people from violating the rights of others is undermined when an inmate kills a person at a correctional institute. Like police officers and firefighters, correctional officers place themselves in dangerous situations on a daily basis, with populations that are significantly more violent than the rest of society. [FN57]

Among the 173 Ohio cases examined, eight inmates are on death row for the killing of a correctional employee or inmate. [FN58]

3. Multiple Murders

The Illinois Commission recommended the death penalty in cases where the defendant is guilty of multiple murders. [FN59] The Commission qualified this eligibility factor simply by requiring that the mens rea exist for both murders, whether occurring at the same time or in totally unrelated circumstances. [FN60]

This factor raised a question for the CLJ in some cases. Specifically, how should a case be classified in which the defendant takes substantial steps to intentionally kill more than one person, but is only successful in killing one individual? For example, in State v. Sowell, the defendant killed one person and shot a second person multiple times. [FN61] In fact, the defendant placed a handgun directly against the second person's temple and pulled the trigger; fortunately, the defendant was out of bullets. [FN62] The CLJ decided to include this attempt to kill two or more people scenario, (similar to the facts in Sowell,) [FN63] as enough reason to qualify for the death sentence under this recommendation.

***235** Among the 173 Ohio cases examined, sixty-three inmates are on death row for multiple murders. [FN64]

4. The Torture of Someone Before a Murder

The Commission defined torture as:

> the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means 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. [FN65]

This eligibility factor also raised several issues for the CLJ. First, researchers worried that the analysis required to determine whether a fact pattern satisfied the above definition was subjective and impaired the consistency and

credibility of the overall findings. While judgments about particular cases vary, the CLJ reviewed torture cases with extreme ***236** caution and ensured that a high level of scrutiny was used when a fact pattern was classified as torture.

Second, and more specifically, the CLJ considered whether rape should qualify for torture per se. The CLJ noted all cases in which rape occurred, but only considered rape to be torture when it met the kind of mendacity described in the definition above.

Among the 173 Ohio cases examined, fourteen inmates are on death row for murders involving torture. [FN66] The CLJ identified twenty-three inmates who raped their victims. [FN67] The CLJ identified nine cases in which the rape occurred in addition to torture or when sufficient reason to believe that the victim had been tortured existed. [FN68]

5. Murder in order to Obstruct the Justice System

The Illinois Commission recommends the death penalty for:

> the murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under Illinois law, of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors and investigators. [FN69]

This eligibility factor, similar to killing a peace officer, is aimed at maintaining the integrity of the judicial system.

***237** Among the 173 Ohio cases examined, four inmates are on death row for murders obstructing justice. [FN70]

C. The Case of the Mentally Retarded

Just last year, in Atkins v. Virginia, [FN71] the United States Supreme Court held that the execution of the mentally retarded is unconstitutional because it violates the Eighth Amendment prohibition against cruel and unusual punishment. [FN72]

The majority of the court refused to adopt a categorical definition of mental retardation, explicitly leaving the implementation of the exclusion of the mentally retarded to the states. [FN73] However, the Court suggests that each state must, at a minimum, have a definition that "generally" comports with the American Association on Mental Retardation (AAMR) definition for determining mental retardation. [FN74] This standard is used by both the Federal government and Ohio. [FN75]

Among the 173 Ohio cases examined, three death row inmates in Ohio have IQ's below 75. [FN76] These cases would otherwise be eligible for the death penalty under the five eligibility factors of the Illinois Commission. Therefore, the CLJ included these three cases with those cases that would be ineligible under the Illinois Commission. In addition, two inmates have IQ's close to the minimum requirement of ***238** 75. [FN77] In twelve cases in which no IQ was identified in the fact pattern, the supreme court recognized that the defendant was known to have a low IQ. [FN78] Of these fourteen cases, four would otherwise be eligible for the death penalty under the five eligibility factors of the Illinois Commission.

D. Use of Error-Prone Evidence

1. In-custody Informants

The Illinois Commission recommends the exclusion of the death penalty when the sole evidence against the defendant is the uncorroborated testimony of an in-custody informant. [FN79] An in-custody informant, often referred to as a "jailhouse snitch," is an incarcerated person who alleges that, while in custody, the defendant confessed to him important details of the crime. In exchange for this testimony, prosecutors confer a benefit on the informant, often a reduced sentence. The Illinois Commission recommended many modifications to trial practice that it believed would significantly reduce the likelihood of questionable testimony by in-custody informants. [FN80] However, the Commission believed that, despite these improvements, in-custody informant testimony would often be of "questionable reliability." [FN81]

***239** Among the 173 Ohio cases examined, there were twenty-four cases where the testimony of an in-custody informant was noted in the case. [FN82] The CLJ decided it was unable to determine whether the in-custody informant's testimony was the primary basis for the conviction. Therefore, the CLJ decided not to add any of these cases to cases that would be ineligible for the death penalty under the five eligibility factors of the Illinois Commission. Since there are compelling reasons to be concerned about convictions based on this type of evidence, the CLJ decided merely to note the incidents of this type of testimony, and to identify the defendants among those cases who consistently maintained their innocence throughout the appellate process. While the CLJ determination of a defendant's consistency is subjective, the CLJ believes that any re-examination of cases with this type of testimony should begin with the cases where the defendants claim actual innocence. [FN83] Of the twenty-four cases, nineteen defendants consistently maintained their innocence. [FN84]

2. Accomplice Testimony

The Illinois Commission recommends the exclusion of the death penalty when the primary evidence against the defendant was provided through accomplice testimony. Like in-custody informants, the testimony of accomplices is highly suspect due to the risk of falsification of testimony in exchange for a reduced or suspended sentence. Since ***240** accomplices are often the only eyewitnesses to a crime, they are in a unique position to offer specific details that may provide the only direct link between the defendant and the crime. Of the thirteen men released from death row in Illinois, evidence that led to the initial convictions in a number of those cases included an accomplice's statements. [FN85]

Among the 173 Ohio cases examined, an accomplice's testimony was used to obtain a conviction in forty-four cases. [FN86] The CLJ decided it was unable to determine whether the accomplice's testimony was the primary basis for the conviction. Therefore, the CLJ decided not to add any of these cases to the total number of cases that would be ineligible for the death penalty under the five eligibility factors. Since there are compelling reasons to be concerned about convictions based on this type of evidence, the CLJ decided merely to note the incidents of this type of testimony, and to identify the defendants among those cases who consistently maintained their innocence throughout the appellate process. While the CLJ's determination of a defendant's consistency is subjective, the CLJ believes that any re-examination of cases with this type of testimony should begin with the cases where the defendants ***241** claim actual innocence. [FN87] Of the forty-four "accomplice cases," twenty-four defendants maintained their innocence. [FN88]

3. Single Eyewitness Testimony

The Illinois Commission recommends the exclusion of the death penalty when the primary evidence against the defendant is based on a single eyewitness identification. Studies have shown that eyewitness identification error is responsible for more cases of wrongful conviction than all other causes combined. [FN89] Although eyewitness testimony is one of the most persuasive forms of evidence to juries, it is commonly introduced without accompanying expert testimony regarding accuracy. [FN90] Courts prefer to let the jury decide issues of eyewitness credibility, even though its judgments and those of the witnesses may be clouded by unconscious psychological bias. [FN91]

Among the 173 Ohio cases examined, there are thirty cases in which eyewitness testimony was used as evidence against the defendant. [FN92] ***242** Thirteen defendants maintain their innocence. [FN93] The CLJ decided it was unable to determine whether the eyewitness testimony was the primary basis for the conviction. Therefore, the CLJ decided not to add any of these cases to cases that would be ineligible for the death penalty under the five eligibility factors of the Illinois Commission. Since there are compelling reasons to be concerned about convictions based on this type of evidence, the CLJ decided to merely note the incidents of this type of testimony, and to identify the defendants who consistently maintained their innocence throughout the appellate process. While the CLJ's determination of a defendant's consistency is subjective, the CLJ believes that any re-examination of cases with this type of testimony should begin with the cases where the defendants claim actual innocence. [FN94]

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***243** III. Overall Results

Overall, eighty-eight death row inmates out of 173 would not be eligible for the death penalty, after applying the five eligibility factors of the Illinois Commission and excluding the three cases in which the defendants are mentally retarded. This means only eighty-five of the 173 individuals currently on death row would still be eligible for the death penalty. [FN95] In addition, there are fourteen cases that raise serious questions regarding whether the death row inmate is mentally retarded. Of those cases, ten are already part of the eighty-eight that would be ineligible under the five factors of the Illinois Commission. Accordingly, four additional inmates might not be eligible for the death penalty under this analysis. In sum, using the Illinois Commission's recommendations as a gauge of whether Ohio is reserving the death penalty for the most extreme cases (which also reduces likelihood of errors), more than half of Ohio's death row population would not be eligible for the death penalty.

There are additional reasons for concern. Seventy-five cases of death row inmates rely in some part on the testimony of in-custody informants, eyewitnesses, and accomplices. Forty-three of these inmates maintain their innocence. As noted above, the Illinois Commission believes that convictions based on these types of evidence are prone to errors.

Of these seventy-five cases, thirty-eight would not be eligible for the death penalty based on the application of the five eligibility factors. Twenty-four of the defendants in the thirty-eight cases maintain their innocence. Thus, in the thirty-eight cases in which the prosecution relied upon suspicious evidence, the Illinois Commission suggests that the death penalty should not have been sought in the first place because the defendant allegedly committed a crime that may not be heinous enough to justify the death sentence. Of the thirty-seven that would remain eligible for the death penalty under the five eligibility factors of the Illinois Commission, nineteen maintain their innocence. This figure is disconcerting because the Columbia Studies found several cases of innocent men released from death row that were not discovered among ***244** those cases with serious reversible error. [FN96] The CLJ identified thirty-six cases of inmates who would remain eligible for the death penalty under the five eligibility factors but who maintain their innocence.

The CLJ concludes that 110 death row cases merit substantial review. In addition to the eighty-eight cases already excluded under the five eligibility factors of the Illinois Commission, in nineteen cases defendants who were convicted at least partially because of error-prone testimony maintain their innocence; and serious questions exist regarding the mental retardation of three defendants. In conclusion, 110 of 173 cases (63%) raise serious concerns that should be reexamined prior to the execution of these defendants.

IV. Conclusion

The results of the Ohio Case Study significantly bolster the case for a moratorium and a high-level commission

to study the death penalty in Ohio.

The first reason that Ohio should be concerned about the accuracy and fairness of its death penalty system is that, according to the results of the Ohio Case Study, at least half of all current death row inmates would be ineligible for the death penalty under the five eligibility factors of the Illinois Commission. One of the goals of the Illinois Commission report was to identify common factors and practices that result in inequities in the death penalty system: the likelihood of executing the innocent, the high rate of reversible error, and the arbitrariness in the application of the death penalty. Since the CLJ established that more than half of Ohio's death row population would be ineligible for the death penalty under the five factors of the Illinois Commission, the Ohio Case Study illustrates that the death penalty in Ohio contains a likelihood of executing the innocent, a high rate of reversible error, and an arbitrariness in the application of the death penalty.

The second reason for concern is the unusually high death-sentencingrate in Ohio. The Columbia Studies show that the more readily the death sentence is imposed in a state, the more prone to errors the prosecution of those cases will be. [FN97] According to Broken System II, of the top ten counties in sentencing, the average rate of reversible error is seventy-one percent; and eight counties in the top ten put at least one innocent person on death row. [FN98] In Ohio, Hamilton County raises the ***245** greatest concern. Hamilton County has the seventh highest sentencing rate in the country. [FN99] According to the 2000 census, Hamilton County has just over seven percent of the population of Ohio, but is responsible for twenty-three percent of death row inmates. [FN100] Moreover, the high death-sentencing rate of some Ohio counties suggests that the imposition of the death penalty in Ohio may be linked more to the county in which a murder occurred rather than to the heinousness of the murder itself.

Concerns raised about Hamilton County are not based solely on numbers. The Cincinnati Enquirer published a story regarding the high amounts of prosecutorial error in death penalty cases in Ohio that specifically highlighted problems in Hamilton County. [FN101] Fourteen death penalty cases (one out of every three) from Hamilton County since 1988 have been cited by the Ohio Supreme Court as containing serious errors on the part of prosecutors. [FN102] In the case of State v. Fears, Chief Justice Thomas Moyer noted twenty-four cases, including fourteen from Hamilton County, that contained instances in which prosecutors ignored rules governing the conduct of lawyers in both the guilt and sentencing phases of death penalty cases. [FN103] The errors cited were not deemed to be serious enough to require reversal of the death sentences, but Chief Justice Moyer's concern in his dissent indicates the presence of flaws in the way prosecutors behave during the sentencing phase of trial.

For the reasons stated above, The Ohio Case Study establishes that a moratorium and a high-level commission to study the death penalty is necessary in order to maintain the integrity of the Ohio justice system.

***246** Appendix 1

Name: _____
Case Name and Citation: _____
Defendant Race _____ Sex _____ Age _____
Brief: _____
_____
_____
_____
Does the Case Meet any of the 5 Eligibility Factors:
1. The murder of a peace officer or firefighter killed in the performance of his/her official duties, or to prevent the performance of his/her official duties, or in retaliation for performing his/her official duties.
Yes _____ No _____ Comments: _____
2. The murder of any person (inmate, staff, visitor, etc.), occurring at a correctional facility.
Yes _____ No _____ Comments: _____
3. The (attempted) murder of two or more persons.

Yes _____ No _____ Comments: _____

4. The intentional murder of a person involving the infliction of torture. For the purposes of this section, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means 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.

Yes _____ No _____ Comments: _____

5. The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under Ohio, of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors, and investigators.

Yes _____ No _____ Comments: _____

***247** Does the Case Present a Fact Pattern that should exclude Imposition of Death Penalty:

1. Is the Defendant mentally retarded?

Yes _____ No _____ Comments: _____

2. Was the uncorroborated testimony of an in-custody informant witness concerning the confession or admission of the defendant the sole basis for imposition of a death penalty?

Yes _____ No _____ Comments: _____

3. Was the conviction for murder based upon the testimony of a single eyewitness, without any other corroboration?

Yes _____ No _____ Comments: _____

4. Was the conviction for murder based upon the testimony of an accomplice, without any other corroboration?

Yes _____ No _____ Comments: _____

CONCLUSION:

Defendant should not be eligible for the death penalty because he/she fails to meet any of the eligibility requirements.

Yes _____ No _____ Comments: _____

Defendant should be eligible for the death penalty because he/she meets eligibility requirement(s) _____.

Defendant meets the eligibility requirements for the death penalty but should not be subject to the death penalty because the fact pattern presented raises sufficient concern because _____

Comments: _____

_____

_____

_____

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[FN1]. See Report of the Governor's Commission on Capital Punishment, George H. Ryan, Governor, at 4 (April 2002), available at http:// www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html [hereinafter Illinois

Commission].

[FN2]. See Atkins v. Virginia, 536 U.S. 304 (2002). The Illinois Commission also advocates eliminating the imposition of the death penalty on the mentally retarded, however, with the recent ruling of the United States Supreme Court in Atkins v. Virginia, the execution of the mentally retarded is no longer allowed in the United States.

[FN3]. See H.B. 499, 124th Gen. Assem., Reg. Sess., 2001 Ohio HB 499 (creating a Capital Case Commission to study the imposition and administration of capital punishment in Ohio and to make recommendations for improving Ohio's procedures in capital cases and its capital sentencing procedures).

[FN4]. See Illinois Commission, supra, note 1.

[FN5]. See James S. Liebman, et al., Broken System: Error Rates in Capital Cases: 1973-1995, at 33, at http://justice.policy.net/jpreport/ (June 12, 2000) [hereinafter, Liebman, Broken System]. See also James S. Liebman et al., A Broken System: Why There Is So Much Error in Capital Cases & What Can Be Done About It, (at http://www2.law.columbia.edu/brokensystem2/report.pdf. (February 11, 2002) [hereinafter Liebman, Why There Is So Much Error].

[FN6]. 408 U.S. 238, 256 (1972). Of particular concern to Justice Douglas was the discriminatory result that minority groups may be disproportionately subject to the death penalty: “Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.” Id. at 257 (citation omitted).

[FN7]. 428 U.S. 153, 195 (1976). The Court in Gregg stated,

> The basic concern of Furman centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here.

Id. at 206-207.

[FN8]. Id. at 182 (quoting Furman, 408 U.S. at 388 (Burger, J., dissenting)).

[FN9]. Id. at 187.

[FN10]. Id. at 175.

[FN11]. Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (holding that a mentally retarded man could be given the death penalty because he was found competent to stand trial, understood the charges against him, and was able to assist in his own defense).

[FN12]. See Coker v. Georgia, 433 U.S. 584 (1977) (holding that imposition of death for rape violated the Eighth Amendment).

[FN13]. See Enmund v. Florida, 458 U.S. 782 (1982) (overturning a death sentence for a defendant involved in an armed robbery and murder because he did not kill the victim, attempt to kill the victim, or intend to kill the victim).

[FN14]. Atkins, 536 U.S. at 316.

[FN15]. 536 U.S. 304, 318 (2002). Deterrence is a major factor in the use of the death penalty, and logically, premeditation and deliberation must be necessary if the death penalty is to be used for deterrence. Such a policy is ineffective when the offender does not possess the mental faculties necessary to make such a judgment. Id. A second justification for making mentally retarded offenders ineligible for the death penalty is the risk that "the death penalty will be imposed in spite of factors that may call for a less severe penalty." Id. (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978)) The risk is enhanced by the possibility of a mentally retarded suspect making a false confession, as well as not being able to make a persuasive statement for mitigation. Atkins, 536 U.S. at 320. According to the Court, if the imposition of the death penalty does not "measurably contribute to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering."' Id. at 319 (quoting Enmund, 458 U.S. at 598).

[FN16]. Illinois Commission, supra note 1, at 1.

[FN17]. Id. at 4.

[FN18]. Id. at 4-5.

[FN19]. Id. at 9.

[FN20]. Id.

[FN21]. Id. at i.

[FN22]. Id. at v-vii.

[FN23]. Id. at 15 n.1.

[FN24]. Id. at 1.

[FN25]. Id. at 2-3.

[FN26]. Id. at iii.

[FN27]. Id.

[FN28]. Id. at 20-192.

[FN29]. Id. at 19-51.

[FN30]. Id. at 65-75.

[FN31]. Id.

[FN32]. Id. at 11.

[FN33]. Id. at 69.

[FN34]. Id. at 156.

[FN35]. See id. at 7-9.

[FN36]. Id. at 8-10.

[FN37]. Id. at 158-160.

[FN38]. See Liebman, Broken System, supra note 5, at 33. Ohio was not one of the twenty-eight states because capital cases had not advanced far, or at all, into the state's post-conviction stage of review, and no case from Ohio had completed federal habeas review.

[FN39]. Id. at 2.

[FN40]. Id. at 6.

[FN41]. Id. at 5. The combination of these two statistics revealed that the death penalty process moves too slowly from imposition to execution, undermining deterrence and retribution, subjecting criminal laws and courts to ridicule, and increasing the agony of victims' families. Id. at 4 (quoting George F. Will, Innocent on Death Row, Washington Post, April 6, 2000, at A23).

[FN42]. Liebman, Broken System, supra note 5, at 4.

[FN43]. See Liebman, Why There Is So Much Error, supra note 5. (quoting Jim Yardley, Flaws in Chemist's Findings Free Man at Center of Inquiry, N.Y. Times, May 8, 2001, at A1).

[FN44]. Liebman, Broken System, supra note 5. See also State v. Porter, 647 N.E.2d 972 (1995).

[FN45]. Liebman, Why There Is So Much Error, supra note 5.

[FN46]. Id. In addition to the three troubling conditions just named, the study associates four conditions with high rates of serious capital errors:

1. The closer the homicide risk to whites in a state comes to equaling or surpassing the risk to blacks, the higher the error rate.

2. The higher the proportion of African-Americans in a state-and in one analysis, the more welfare recipients in a state-the higher the rate of serious capital error.

3. The lower the rate at which states apprehend, convict and imprison serious criminals, the higher their capital error rates.

4. The more often and directly state trial judges are subject to popular election, and the more partisan those elections are, the higher the state's rate of serious capital error.

Id.

[FN47]. The students were Kellie Brennan, Christopher Brown, Daniel Dodd, Michael Greenwell, Kevin James, Rebecca Klein, Nancy Ludwig, and Peder Nestingen.

[FN48]. Of the 204 total death row inmates, 100 are identified as black, 94 white, 3 Latino, and 7 other/unknown. The average age when sentenced is 29.725 years. The race of the victims the inmates are accused of killing is about 190 white, 89 black, 2 Latino and 13 other/ unknown.

[FN49]. Many of the factors that the CLJ examined may not have been mentioned in the Supreme Court fact pattern.

[FN50]. See Appendix 1.

[FN51]. See Atkins v. Virginia, 536 U.S. 304 (2002). The Illinois Commission also advocated eliminating the imposition of the death penalty on the mentally retarded; however, with the recent ruling of the United States Supreme Court in Atkins, the execution of the mentally retarded is no longer allowed in the United States.

[FN52]. The database contained the following columns: the name and case citation of each defendant, the eligibility of the defendant for the death penalty under the 5 factors recommended by the Illinois Commission, whether the defendant murdered a peace officer or firefighter, whether the inmate murdered any person at a correctional facility, whether the inmate committed crimes in which there were multiple murders, whether the inmate tortured someone before their murder, whether the defendant raped someone before their murder, whether the defendant murdered a witness to obstruct the justice system, whether the defendant was mentally retarded, whether a jailhouse informant testified against the defendant, whether there was only a single eyewitness in the defendant's trial, whether the defendant had an accomplice, whether the defendant admitted to the crime, whether the defendant claimed actual innocence, the race of the defendant, the gender and the age of the defendant. See Appendix 1.

[FN53]. Illinois Commission, supra note 1, at 67.

[FN54]. Id. at 69.

[FN55]. The three cases in which the inmate killed a peace officer: State v. Jones, 744 N.E.2d 1163 (Ohio 2001); State v. Mitts, 690 N.E.2d 522 (Ohio 1998); and State v. White, 693 N.E.2d 772 (Ohio 1998).

[FN56]. See Illinois Commission, supra note 1, at 67.

[FN57]. Id. at 70.

[FN58]. The eight cases in which the inmate killed a person at a correctional institute: State v. Bradley, 538 N.E.2d 373 (Ohio 1989); State v. Carter, 594 N.E.2d 595 (Ohio 1992); State v. Hanna, 767 N.E.2d 678 (Ohio 2002); State v. LaMar, 767 N.E.2d 166 (Ohio 2002); State v. Robb, 723 N.E.2d 1019 (Ohio 2000); State v. Sanders, 750 N.E.2d 90 (Ohio 2001); State v. Stojetz, 705 N.E.2d 329 (Ohio 1999); and State v. Zuern, 512 N.E.2d 585 (Ohio 1987).

[FN59]. Illinois Commission, supra note 1, at 70.

[FN60]. Id.

[FN61]. 530 N.E.2d 1294 (Ohio 1988).

[FN62]. Id.

[FN63]. Id.

[FN64]. The sixty-three cases in which the inmate killed multiple people are State v. Dennis, 683 N.E.2d 1096 (Ohio

1997); State v. Ashworth, 706 N.E.2d 1231 (Ohio 1999); State v. Awkal, 667 N.E.2d 960 (Ohio 1996); State v. Bedford, 529 N.E.2d 913 (Ohio 1988); State v. Benner 533 N.E.2d 701 (Ohio 1988); State v. Beuke, 526 N.E.2d 274 (Ohio 1988); State v. Brooks, 495 N.E.2d 407 (Ohio 1986); State v. Campbell, 765 N.E.2d 334 (Ohio 2002); State v. Clemons, 696 N.E.2d 1009 (Ohio 1998); State v. Coley, 754 N.E.2d 1129 (Ohio 2001); State v. Cooey, 544 N.E.2d 895 (Ohio 1989); State v. Cornwell, 715 N.E.2d 1144 (Ohio 1999); State v. Davie, 686 N.E.2d 245 (Ohio 1997); State v. DePew 528 N.E.2d 542 (Ohio 1988); State v. Dickerson, 543 N.E.2d 1250 (Ohio 1989); State v. Dunlap, 652 N.E.2d 988 (Ohio 1995); State v. Evans, 586 N.E.2d 1042 (Ohio 1991); State v. Fautenberry, 650 N.E.2d 878 (Ohio 1995); State v. Filiaggi, 718 N.E.2d 441 (Ohio 1999); State v. Franklin, 776 N.E.2d 26 (Ohio 2002); State v. Frazier, 574 N.E.2d 483 (Ohio 1991); State v. Garner, 656 N.E.2d 623 (Ohio 1995); State v. Getsy, 702 N.E.2d 866 (Ohio 1998); State v. Gillard, 533 N.E.2d 272 (Ohio 1988); State v. Green, 689 N.E.2d 556 (Ohio 1998); State v. Hawkins, 612 N.E.2d 1227 (Ohio 1993); State v. Herring, 762 N.E.2d 940 (Ohio 2002); State v. Hessler, 734 N.E.2d 1237 (Ohio 2000); State v. Hicks, 538 N.E.2d 1030 (Ohio 1989); State v. Hooks, 529 N.E.2d 429 (Ohio 1988); State v. Hutton, 559 N.E.2d 432 (Ohio 1990); State v. Issa, 752 N.E.2d 904 (Ohio 2001); State v. Jackson, 751 N.E.2d 946 (Ohio 2001); State v. Keene, 693 N.E.2d 246 (Ohio 1998); State v. Keith, 684 N.E.2d 47 (Ohio 1997); State v. Kinley, 651 N.E.2d 419 (Ohio 1995); State v. LaMar, 767 N.E.2d 166 (Ohio 2002); State v. Lorraine, 613 N.E.2d 212 (Ohio 1993); State v. Loza, 641 N.E.2d 1082 (Ohio 1994); State v. Lundgren, 653 N.E.2d 304 (Ohio 1995); State v. Mapes, 484 N.E.2d 140 (Ohio 1985); State v. Mills, 582 N.E.2d 972 (Ohio 1992); State v. Mitts, 690 N.E.2d 522 (Ohio 1998); State v. Montgomery, 575 N.E.2d 167 (Ohio 1991); State v. Moreland, 552 N.E.2d 894 (Ohio 1990); State v. Noling, 717 N.E.2d 345 (Ohio 1999); State v. O'Neal, 721 N.E.2d 73 (Ohio 2000); State v. Otte, 660 N.E.2d 711 (Ohio 1996); State v. Palmer, 687 N.E.2d 685 (Ohio 1997); State v. Poindexter, 520 N.E.2d 568 (Ohio 1988); State v. Robb, 723 N.E.2d 1019 (Ohio 2000); State v. Sowell, 530 N.E.2d 1294 (Ohio 1988); State v. Spisak, 521 N.E.2d 800 (Ohio 1988); State v. Stumpf, 512 N.E.2d 598 (Ohio 1987); State v. Taylor, 781 N.E.2d 72 (Ohio 2002); State v. Tibbetts, 749 N.E.2d 226 (Ohio 2001); State v. Treesh, 739 N.E.2d 749 (Ohio 2001); State v. Webb, 638 N.E.2d 1023 (Ohio 1994); State v. White, 709 N.E.2d 140 (Ohio 1999); State v. Wickline, 552 N.E.2d 913 (Ohio 1990); State v. Williams, 660 N.E.2d 724 (Ohio 1996); State v. Williams, 652 N.E.2d 721 (Ohio 1995); State v. Williams, 679 N.E.2d 646 (Ohio 1997).

[FN65]. Illinois Commission, supra note 1, at 71.

[FN66]. The fourteen cases in which the inmate murdered someone and tortured them are State v. Bies, 658 N.E.2d 754 (Ohio 1996); State v. Biros, 678 N.E.2d 891 (Ohio 1997); State v. Buell, 489 N.E.2d 795 (Ohio 1986); State v. Cooey, 544 N.E.2d 895 (Ohio 1989); State v. Gumm, 653 N.E.2d 253 (Ohio 1995); State v. Hicks, 538 N.E.2d 1030 (Ohio 1989); State v. Hill, 595 N.E.2d 884 (Ohio 1992); State v. Lawson, 595 N.E.2d 902 (Ohio 1992); State v. Lott, 555 N.E.2d 293 (Ohio 1990); State v. Morales, 513 N.E.2d 267 (Ohio 1987); State v. Myers, 780 N.E.2d 186 (Ohio 2002); State v. Phillips, 656 N.E.2d 643 (Ohio 1995); State v. Van Hook, 530 N.E.2d 883 (Ohio 1988); and State v. Wogenstahl, 662 N.E.2d 311 (Ohio 1996).

[FN67]. The twenty-three cases in which the defendant raped the victim are State v. Apanovitch, 514 N.E.2d 394 (Ohio 1987); State v. Benner, 533 N.E.2d 701 (Ohio 1988); State v. Bies, 658 N.E.2d 754 (Ohio 1996); State v. Biros, 678 N.E.2d 891 (Ohio 1997); State v. Broom, 533 N.E.2d 682 (Ohio 1988); State v. Buell, 489 N.E.2d 795 (Ohio 1986); State v. Carter, 734 N.E.2d 345 (Ohio 1992); State v. Cooey, 544 N.E.2d 895 (Ohio 1989); State v. Durr, 568 N.E.2d 674 (Ohio 1991); State v. Gumm, 653 N.E.2d 253 (Ohio 1995); State v. Henderson, 528 N.E.2d 1237 (Ohio 1988); State v. Hill, 595 N.E.2d 884 (Ohio 1992); State v. Mason, 694 N.E.2d 932 Ohio (Ohio 1998); State v. McGuire, 686 N.E.2d 1112 (Ohio 1997); State v. Myers, 780 N.E.2d 186 (Ohio 2002); State v. Phillips, 656 N.E.2d 643 (Ohio 1995); State v. Powell, 552 N.E.2d 191 (Ohio 1990); State v. Rojas, 592 N.E.2d 1376 (Ohio 1992); State v. Scudder, 643 N.E.2d 524 (Ohio 1994); State v. Smith, 574 N.E.2d 510 (Ohio 1991); State v. Steffen, 619 N.E.2d 688 (Ohio 1993); State v. Waddy, 588 N.E.2d 819 (Ohio 1992); and State v. Wogenstahl, 662 N.E.2d 311 (Ohio 1996).

[FN68]. See State v. Bies, 658 N.E.2d 754 (Ohio 1996); State v. Biros, 678 N.E.2d 891 (Ohio 1997); State v. Buell, 489 N.E.2d 795 (Ohio 1986); State v. Cooey, 544 N.E.2d 895 (Ohio 1989); State v. Gumm, 653 N.E.2d 253 (Ohio

1995); State v. Hill, 595 N.E.2d 884 (Ohio 1992); State v. Myers, 780 N.E.2d 186 (Ohio 2002); State v. Phillips, 656 N.E.2d 643 (Ohio 1995); and State v. Wogenstahl, 662 N.E.2d 311 (Ohio 1996).

[FN69]. Illinois Commission, supra note 1, at 71.

[FN70]. The four cases in which the inmate murdered someone to obstruct justice: State v. Coleman, 707 N.E.2d 476 (Ohio 1999); State v. Frazier, 652 N.E.2d 1000 (Ohio 1995); State v. Lawson, 595 N.E.2d 902 (Ohio 1992); and State v. Smith, 721 N.E.2d 93 (Ohio 2002).

[FN71]. 536 U.S. 304 (2002).

[FN72]. The majority decided that the U.S. justice system serves one of two objectives, retribution or deterrence. Killing the mentally retarded, who lack the capacity to appreciate the punishment or to be deterred, serves neither purpose. Moreover, calculating potential murderers who might otherwise be deterred by the possibility of the death penalty will not be deterred by the exclusion of the mentally retarded from execution because they will know that they will not qualify for such an exemption. Therefore, the Supreme Court ruled that if the punishment fails to serve one or both of these penological objectives it is a "purposeless and needless imposition of pain and suffering, and hence an unconstitutional punishment." Id. at 319 (citation omitted).

[FN73]. Id. at 317 n.22.

[FN74]. Id. AAMR defines mental retardation as substantial limitation in present functioning. It is characterized by significantly sub-average intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18. See American Association on Mental Retardation, Mental Retardation Definition, Classification, and Systems of Supports 5 (9th ed. 1992).

[FN75]. Ohio Admin. Code § 5101:3-3-151(B)(7)(a) (2002).

[FN76]. State v. Evans, 586 N.E.2d 1042, 1053 (Ohio 1991) (recognizing defendant to have an IQ of 64); State v. Hill, 595 N.E.2d 884, 901 (Ohio 1992) (recognizing defendant to have tested to have an IQ of 55, 68, and 64); State v. Hooks, 529 N.E.2d 429, 432 (Ohio 1988) (recognizing that defendant has an IQ of 74).

[FN77]. See State v. Angelo, 715 N.E.2d 136, 154, 155 (Ohio 1999) (recognizing defendant to have an IQ of 80); State v. Lott, 779 N.E.2d 1011, 1013 (Ohio 2002) (stay of execution granted) (recognizing that defendant's IQ had been tested at various times at 72, 77-81, 83-91, and 87-97).

[FN78]. See State v. Burke, 653 NE 2d 242, 250 (Ohio 1995) (recognizing defendant to be borderline mentally retarded); State v. Bays, 716 N.E.2d 1126, 1144 (Ohio 1999); State v. Garner, 656 N.E2d 623, 631 (Ohio 1995) (stating defendant has a mild brain impairment); State v. Powell, 552 N.E.2d 191, 194 (Ohio 1990) (recognizing defendant to be mildly to borderline retarded); State v. Williams, 660 N.E.2d 724, 735 (Ohio 1995) (recognizing that defendant has a "low IQ"); State v. Rojas, 592 N.E.2d 1376, 1380-81 (Ohio 1992); State v. Stallings, 731 N.E.2d 159, 178 (Ohio 2000) (recognizing that defendant has mild retardation); State v. Sneed, 584 N.E.2d 1160, 1174 (Ohio 1992) (describing defendant's intellect as borderline); State v. Holloway, 527 N.E.2d 831, 839 (Ohio 1988) (describing defendant as mildly retarded); State v. Clark, 527 N.E.2d 844, 856-57 (Ohio 1988) (recognizing defendant as having low intelligence); State v. Thomas, 779 N.E.2d 1017, 1033 (Ohio 2002) (describing defendant as having low intelligence); State v. White, 709 N.E.2d 140, 160, 161 (Ohio 1999) (recognizing that defendant's IQ score of 63 is disputed).

[FN79]. Illinois Commission, supra note 1, at 158 (“The uncorroborated testimony of an in-custody informant witness concerning the confession or admission of the defendant may not be the sole basis for imposition of a death penalty.”).

[FN80]. Id. at 158-159. These recommendations included the disclosure of the in-custody informant's background, disclosure of the benefits conferred to the in-custody informant, a pre-trial credibility hearing to assess the reliability of the testimony, and a special curative instruction. Id. at 120-24.

[FN81]. Id. at 159.

[FN82]. See State v. Bays, 716 N.E.2d 1126 (Ohio 1999); State v. Bradley 538 N.E.2d 373 (Ohio 1989); State v. Broom, 533 N.E.2d 682 (Ohio 1988); State v. Campbell, 630 N.E.2d 339 (Ohio 1994); State v. Chinn, 709 N.E.2d 1166 (Ohio 1999); State v. Coleman, 707 N.E.2d 476 (Ohio 1999); State v. Coley, 754 N.E.2d 1129 (Ohio 2001);) State v. Franklin, 580 N.E.2d 1 (Ohio 1991); State v. Goff, 694 N.E.2d 916 (Ohio 1998); State v. Goodwin, 703 N.E.2d 1251 (Ohio 1999); State v. Hanna, 767 N.E.2d 678 (Ohio 2002); State v. Hartman, 754 N.E.2d 1150 (Ohio 2001); State v. Jackson, 751 N.E.2d 946 (Ohio 2001); State v. Mack, 653 N.E.2d 329 (Ohio 1995); State v. McGuire, 686 N.E.2d 1112 Ohio (Ohio 1997); State v. Myers, 780 N.E.2d 186 (Ohio 2002); State v. Noling, 717 N.E.2d 345 (Ohio 1999); State v. Robb, 723 N.E.2d 1019 (Ohio 2000); State v. Roe, 535 N.E.2d 1351 (Ohio 1989); State v. Sanders, 750 N.E.2d 90 (Ohio 2001); State v. Smith, 721 N.E.2d 93 Ohio (Ohio 2000); State v. Spirko, 570 N.E.2d 229 (Ohio 1991); State v. Williams, 490 N.E.2d 906 (Ohio 1986); State v. Wogenstahl, 662 N.E.2d 311 (Ohio 1996).

[FN83]. For purposes of this study, the CLJ determined that a defendant consistently claimed innocence when the Ohio Supreme Court noted their claim in the text of the decision.

[FN84]. See State v. Broom, 533 N.E.2d 682 (Ohio 1988); State v. Campbell, 630 N.E.2d 339 (Ohio 1994); State v. Chinn, 709 N.E.2d 1166 (Ohio 1999); State v. Coleman, 707 N.E.2d 476 (Ohio 1999); State v. Franklin, 580 N.E.2d 1 (Ohio 1991); State v. Goff, 694 N.E.2d 916 (Ohio 1998); State v. Goodwin, 703 N.E.2d 1251 (Ohio 1999); State v. Hartman, 754 N.E.2d 1150 (Ohio 2001); State v. Jackson, 751 N.E.2d 946 (Ohio 2001); State v. Mack, 653 N.E.2d 329 (Ohio 1995); State v. McGuire, 686 N.E.2d 1112 (Ohio 1997); State v. Myers, 780 N.E.2d 186 (Ohio 2002); State v. Noling, 717 N.E.2d 345 (Ohio 1999); State v. Robb, 723 N.E.2d 1019 (Ohio 2000); State v. Sanders, 750 N.E.2d 90 (Ohio 2001); State v. Smith 721 N.E.2d 93 (Ohio 2000); State v. Spirko, 570 N.E.2d 229 (Ohio 1991); State v. Williams, 490 N.E.2d 906 (Ohio 1986); and State v. Wogenstahl, 662 N.E.2d 311 (Ohio 1996).

[FN85]. Illinois Commission, supra note 1, at 40-41. In the case of the Ford Heights Four, accomplice testimony sent four Chicago men to prison for 18 years. They were exonerated by DNA evidence and a confession by the alleged accomplice that she had been coerced into testifying against the men by the police. Another Illinois death row inmate, Joseph Burrows, was convicted of the murder of an elderly farmer based on testimony from his alleged accomplice. Although there was no physical evidence linking him to the crime and he provided alibi witnesses, testimony of his alleged accomplice won a conviction. Burrows was eventually exonerated when the accomplice admitted that she was the sole killer. Id. at 48-49 n.53.

[FN86]. See State v. Ballew, 667 N.E.2d 369 (Ohio 1996); State v. Baston, 709 N.E.2d 128 (Ohio 1999); State v. Bies, 658 N.E.2d 754 (Ohio 1996); State v. Carter, 651 N.E.2d 965 (Ohio 1995); State v. Chinn, 709 N.E.2d 1166 (Ohio 1999); State v. Cooey, 544 N.E.2d 895 (Ohio 1989); State v. D'Ambrosio, 616 N.E.2d 909 (Ohio 1993); State v. Durr, 568 N.E.2d 674 (Ohio 1991); State v. Eley, 672 N.E.2d 640 (Ohio 1996); State v. Evans, 586 N.E.2d 1042 (Ohio 1991); State v. Frazier, 574 N.E.2d 483 (Ohio 1991); State v. Goodwin, 703 N.E.2d 1251 (Ohio 1999); State v. Gumm, 653 N.E.2d 253 (Ohio 1995); State v. Hill, 595 N.E.2d 884 (Ohio 1992); State v. Jamison, 552 N.E.2d 180 (Ohio 1990); State v. Keenan, 613 N.E.2d 203 (Ohio 1993); State v. Keene, 693 N.E.2d 246 (Ohio 1998); State v. LaMar, 767 N.E.2d 166 (Ohio 2002); State v. Landrum, 559 N.E.2d 710 (Ohio 1990); State v. Lawson, 595

N.E.2d 902 (Ohio 1992); State v. Lewis, 616 N.E.2d 921 (Ohio 1993); State v. Lorraine, 613 N.E.2d 212 (Ohio 1993); State v. Loza, 641 N.E.2d 1082 (Ohio 1994); State v. Lundgren, 653 N.E.2d 304 (Ohio 1995); State v. Martin, 483 N.E.2d 1157 (Ohio 1985); State v. Moore, 689 N.E.2d 1 (Ohio 1998); State v. Noling, 717 N.E.2d 345 (Ohio 1999); State v. Post, 513 N.E.2d 754 (Ohio 1987); State v. Robb, 723 N.E.2d 1019 (Ohio 2000); State v. Sanders, 750 N.E.2d 90 (Ohio 2001); State v. Sheppard, 703 N.E.2d 286 (Ohio 1998); State v. Smith, 684 N.E.2d 668 (Ohio 1997); State v. Smith, 721 N.E.2d 93 (Ohio 2000); State v. Smith, 731 N.E.2d 645 (Ohio 2000); State v. Sneed, 584 N.E.2d 1160 (Ohio 1992); State v. Spirko, 570 N.E.2d 229 (Ohio 1991); State v. Stumpf, 512 N.E.2d 598 (Ohio 1987); State v. Taylor, 676 N.E.2d 82 (Ohio 1997); State v. Treesh, 739 N.E.2d 749 (Ohio 2001); State v. Tyler, 553 N.E.2d 576 (Ohio 1990); State v. Wickline, 552 N.E.2d 913 (Ohio 1990); State v. Williams, 528 N.E.2d 910 (Ohio 1988); State v. Williams, 679 N.E.2d 646 (Ohio 1997); State v. Woodward, 623 N.E.2d 75 (Ohio 1993).

[FN87]. For purposes of this study, the CLJ determined a defendant consistently claimed innocence when the Ohio Supreme Court noted their claim in the text of the decision.

[FN88]. See State v. Ballew, 667 N.E.2d 369 (Ohio 1996); State v. Baston, 709 N.E.2d 128 (Ohio 1999); State v. Chinn, 709 N.E.2d 1166 (Ohio 1999); State v. D'Ambrosio, 616 N.E.2d 909 (Ohio 1993); State v. Durr, 568 N.E.2d 674 (Ohio 1991); State v. Eley, 672 N.E.2d 640 (Ohio 1996); State v. Evans, 586 N.E.2d 1042 (Ohio 1991); State v. Frazier, 574 N.E.2d 483 (Ohio 1991); State v. Goodwin, 703 N.E.2d 1251 (Ohio 1999); State v. Keenan, 613 N.E.2d 203 (Ohio 1993); State v. LaMar, 767 N.E.2d 166 (Ohio 2002); State v. Lawson, 595 N.E2d 902 (Ohio 1992); State v. Lorraine, 613 N.E.2d 212 (Ohio 1993); State v. Martin, 483 N.E.2d 1157 (Ohio 1985); State v. Noling, 717 N.E.2d 345 (Ohio 1999); State v. Robb, 723 N.E.2d 1019 (Ohio 2000); State v. Sanders, 750 N.E.2d 90 (Ohio 2001); State v. Smith, 721 N.E.2d 93 (Ohio 2000); State v. Spirko, 570 N.E.2d 229 (Ohio 1991); State v. Stumpf, 512 N.E.2d 598 (Ohio 1987); State v. Taylor, 676 N.E.2d 82 (Ohio 1997); State v. Wickline, 552 N.E.2d 913 (Ohio 1990); State v. Williams, 528 N.E.2d 910 (Ohio 1988); State v. Woodward, 623 N.E.2d 75 (Ohio 1993).

[FN89]. See Gary L. Wells et al., Eyewitness Identification Procedures: Recommendations for Lineups and Photo Spreads, 22 Law & Hum. Behav. 603, 605 (Ohio 1998).

[FN90]. Id. at 609.

[FN91]. See John C. Brigham & Robert K. Bothwell, The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications, 7 Law & Hum. Behav. 19 (Ohio 1983). See also Brian L. Cutler & Steven D. Penrod, Mistaken Identification: The Eyewitness, Psychology, and the Law, (1995), and Brian L. Cutler et al., Juror Sensitivity to Eyewitness Identification Evidence, 14 Law and Hum. Behav. 185 (1990).

[FN92]. State v. Ballew, 667 N.E.2d 369 (Ohio 1996); State v. Bies, 658 N.E.2d 754 (Ohio 1996); State v. Bradley, 538 N.E.2d 373 (Ohio 1989); State v. Burke, 653 N.E.2d 242 (Ohio 1995); State v. Campbell, 630 N.E.2d 339 (Ohio 1994); State v. Cooey, 544 N.E.2d 895 (Ohio 1989); State v. Cook, 605 N.E.2d 70 (Ohio 1992); State v. Dennis, 683 N.E.2d 1096 (Ohio 1997); State v. Garner, 656 N.E.2d 623 (Ohio 1995); State v. Gumm, 653 N.E.2d 253 (Ohio 1995); State v. Hawkins, 612 N.E.2d 1227 (Ohio 1993); State v. Jackson, 751 N.E.2d 946 (Ohio 2001); State v. Jamison, 552 N.E.2d 180 (Ohio 1990); State v. Jells, 559 N.E.2d 464 (Ohio 1990); State v. Keene, 693 N.E.2d 246 (Ohio 1998); State v. Keith, 684 N.E.2d 47 (Ohio 1997); State v. Kinley, 651 N.E.2d 419 (Ohio 1995); State v. Landrum, 559 N.E.2d 710 (Ohio 1990); State v. Lorraine, 613 N.E.2d 212 (Ohio 1993); State v. Mills, 582 N.E.2d 972 (Ohio 1992); State v. Montgomery, 575 N.E.2d 167 (Ohio 1991); State v. Moreland, 552 N.E.2d 894 (Ohio 1990); State v. Murphy, 747 N.E.2d 765 (Ohio 2001); State v. Otte, 660 N.E.2d 711 (Ohio 1996); State v. Smith, 684 N.E.2d 668 (Ohio 1997); State v. Smith, 731 N.E.2d 645 (Ohio 2000); State v. Sneed, 584 N.E.2d 1160 (Ohio 1992); State v. Taylor, 676 N.E.2d 82 (Ohio 1997); State v. Wickline, 552 N.E.2d 913 (Ohio 1990); State v. Williams, 652 N.E.2d 721 (Ohio 1995).

[FN93]. See State v. Ballew, 667 N.E.2d 369 (Ohio 1996); State v. Burke, 653 N.E.2d 242 (Ohio 1995); State v.

Campbell, 630 N.E.2d 339 (Ohio 1994); State v. Cook, 605 N.E.2d 70 (Ohio 1992); State v. Hawkins, 612 N.E.2d 1227 (Ohio 1993); State v. Jackson, 751 N.E.2d 946 (Ohio 2001); State v. Kinley, 651 N.E.2d 419 (Ohio 1995); State v. Lorraine, 613 N.E.2d 212 (Ohio 1993); State v. Mills, 582 N.E.2d 972 (Ohio 1992); State v. Murphy, 747 N.E.2d 765 (Ohio 2001); State v. Taylor, 676 N.E.2d 82 (Ohio 1997); State v. Wickline, 552 N.E.2d 913 (Ohio 1990); State v. Williams, 652 N.E.2d 721 (Ohio 1995).

[FN94]. For purposes of this study, the CLJ determined that a defendant consistently claimed innocence when the Ohio Supreme Court noted their claim in the text of the decision.

[FN95]. There are seven cases in which the defendant qualifies under two or more eligibility factors: State v. Cooey, 544 N.E.2d 895 (Ohio 1989) (torture and killed multiple people); State v. Hicks, 538 N.E.2d 1030 (Ohio 1989) (torture and killed multiple people); State v. LaMar, 767 N.E.2d 166 (Ohio 2002) (killed correctional and multiple people); State v. Lawson, 595 N.E.2d 902 (Ohio 1992) (tortured and killed judicial officer); State v. Mitts, 690 N.E.2d 522 (Ohio 1998) (killed cop and correctional person); State v. Robb, 723 N.E.2d 1019 (Ohio 2000) (killed multiple people and correctional person); State v. Webb, 638 N.E.2d 1023 (Ohio 1994) (killed judicial person and multiple people).

[FN96]. Liebman, Why There Is So Much Error, supra note 5, at 2.

[FN97]. Id.

[FN98]. Id.

[FN99]. Id.

[FN100]. See www.census.gov.

[FN101]. Spencer Hunt, Criticized Cases, Clouded Cases, Death Penalty Process Remains Slow and Unsteady, Cincinnati Enquirer, Sept. 10, 2000, at A1.

[FN102]. Id.

[FN103]. State v. Fears, 715 N.E.2d 136, 156 (Ohio 1999) (Moyer, C.J., concurring in part and dissenting in part). The glaring differences between discovery rules in Illinois and Ohio also provide cause for concern. Consider Illinois Supreme Court Rule 412, which provides essentially open-file discovery in criminal proceedings. See also Kyles v. Whitney, 514 U.S. 419, 438 (1995) (“The prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.”); 134 Ill. 2d R. 412(f), Committee Comments, at 349 (“In discharging its duties [the prosecution] should know, or seek to know, of the existence of material or information at least equal to that which it should disclose to defense counsel.”). Under these liberal discovery rules, Illinois put at least 13 innocent defendants on death row. Ohio defendants, without the aid of such liberal rules, are obviously at a disadvantage in presenting their defense. See Ohio R. Crim. P. 16 (evidence suppressed by the prosecution shall be deemed material only if it is reasonably probable that disclosure to the defendant would have led to a different result at trial.). See also State v. Johnston, 529 N.E.2d 898 (Ohio 1988). Given these differences, it is very likely that Ohio has an even greater degree of sentencing error than Illinois.

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