

# **ASSESSMENT GUIDE**

## **PART I: THE COLLECTION OF INFORMATION ON OHIO'S DEATH PENALTY SYSTEM**

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## INTRODUCTION

### A. The Death Penalty Moratorium Implementation Project

On February 3, 1997, the American Bar Association (“ABA”), while taking no position on the death penalty *per se*, adopted a death penalty moratorium resolution, calling for capital jurisdictions to impose a moratorium on all executions until they can (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed. Following the adoption of the resolution, the Section of Individual Rights and Responsibilities, as the original sponsor of the resolution, carried out much of the ABA’s moratorium implementation work.

In Fall 2001, the ABA created the Death Penalty Moratorium Implementation Project (“the Project”) to take over its moratorium efforts. The Project encourages other bar associations to press for moratoriums in their jurisdictions and encourages state government leaders to establish moratoriums and undertake detailed examinations of capital punishment laws and processes in their jurisdictions. The Project also collects and monitors data on domestic and international moratorium developments; conducts analyses of governmental and judicial responses to death penalty administration issues; and publishes periodic reports on moratorium developments.

The Project is staffed by Deborah T. Fleischaker, Director, and Lindsay B. Glauner, Project Attorney, and is advised by a presidentially appointed Steering Committee, comprised of the following individuals:

- James E. Coleman, Jr. (Chair), Professor and Associate Dean, Duke University School of Law;
- Lauralyn Beattie, Counsel, Office of University Counsel, Georgetown University;
- Stephen B. Bright, Director, Southern Center for Human Rights;
- Zachary W. Carter, Partner, Dorsey & Whitney, LLP;
- W.J. Michael Cody, Partner, Burch, Porter & Johnson and former Tennessee Attorney General;
- Ruth Friedman, consultant;
- Thomas Lorenzi, Partner, Lorenzi, Sanchez & Rosteet, LLP;
- Charles J. Ogletree, Jr., Professor, Harvard Law School;
- Morris Overstreet, Professor, Texas Southern University Thurgood Marshall School of Law and former Justice on the Texas Court of Criminal Appeals;
- Cruz Reynoso, Professor, University of California at Davis School of Law and former Justice on the California Supreme Court;
- Thomas Sullivan, Partner, Jenner & Block and Co-Chair of the Illinois Governor’s Commission on the Death Penalty; and
- Denise Young, consultant.

## **B. The European Commission Grant**

### **1. Grant Description**

In February 2003, the European Commission's European Initiative for Democracy and Human Rights ("EC") selected the Project to receive a two-year grant to examine the extent to which U.S. capital jurisdictions' death penalty systems comport with minimum standards of fairness and due process.

The objective of the grant is to conduct a preliminary assessment of U.S. death penalty systems, using as a benchmark the protocols set out in the Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* ("the Protocols"). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover eight key aspects of death penalty administration, including defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus, clemency proceedings, jury instructions, an independent judiciary, racial and ethnic minorities, juvenile offenders, and the mentally retarded and mentally ill. The findings of the preliminary assessments will serve as the bases from which to launch the more comprehensive self-examinations of death penalty-related laws and processes that the ABA is encouraging capital jurisdictions to undertake on their own.

### **2. Grant Organization**

The Project has created an Advisory Board to oversee the implementation of the grant. The Advisory Board is comprised of the following individuals:

- Talbot "Sandy" D'Alemberte (Chair), Professor of Law and former Dean, Florida State University College of Law, and former President, Florida State University;
- John J. Gibbons, Partner, Gibbons, Del Deo, Dolan, Grigginger & Vecchione and former Chief Justice, U.S. Court of Appeals for the Third Circuit;
- Parris Glendenning, President, Smart Growth Leadership Institute, and former Maryland Governor;
- Fred Gray, Partner, Gray, Langford, Sapp, McGowan, Gray & Nathanson and former attorney for Rosa Parks and Martin Luther King, Jr.;
- Mario Obledo, President, National Coalition of Hispanic Organizations;
- Raymond Paternoster, Professor, Institute of Criminal Justice and Criminology, University of Maryland;
- Virginia Sloan, President, The Constitution Project; and
- Penny Wakefield, former Director, ABA Section of Individual Rights and Responsibilities.

The Project Steering Committee, as well as the Project's staff, will also provide advice and assistance in implementing the grant. The Project encourages your team

to contact its staff with any questions or concerns regarding the completion of the assessment.

Each Assessment Team will be responsible for overseeing the assessment in its state. Each team will be chaired by a law school professor and will include or have access to current or former defense attorneys, current or former prosecutors, individuals active in the state bar, current or former judges, state legislators, and anyone else whom the Project and/or team leaders feel should be included to complete the assessment in a timely, – thorough manner. Your team includes the following individuals:

- Phyllis L. Crocker, Cleveland State University Cleveland-Marshall College of Law;
- Rep. Stephanie Tubbs Jones; United States House of Representatives;
- Marge B. Koosed, The University of Akron School of Law;
- Geoffrey Mearns, Baker & Hostetler, LLP;
- S. Adele Shank, Law Office of S. Adele Shank;
- Rep. Shirley A. Smith, Ohio House of Representatives; and
- David C. Stebbins, Law Office of David C. Stebbins.

At a minimum, Assessment Team members will provide guidance during the research process and serve as reviewers of the report as it is being drafted. The Project anticipates that the Assessment Teams will hire students to collect the actual data. *See infra* section I(E) for a detailed discussion of the role of the Assessment Teams.

### **C. Information Session and Assessment Team Binder(s)**

The Project will meet with your team to review the Assessment Guide, discuss your team's objectives and the anticipated timeline, and address any questions and/or concerns regarding the Assessment Guide, team objectives, and/or timeline. At the meeting, the Project will also provide your team with a binder(s) of useful information. The binder(s) will contain the following:

- your state's current death penalty statute;
- a list of individuals who have been on death row in your state since 1989;
- Death Row U.S.A. reports since 1989;
- a list of individuals who have been exonerated in your state since 1973;
- a list of cites of relevant statutes and articles;
- studies and reports on the administration of the death penalty in your state;
- law review and journal articles on the administration of the death penalty in your state; and
- news reports on the administration of the death penalty in your state.

### **D. The Purpose of the Assessment Guide**

The Project designed the Assessment Guide to provide your team with a thorough background of the death penalty system and a detailed account of potential problems

concerning such system. Given the detail of the Assessment Guide, the Project encourages your team to use it as a research guide, not as a checklist of required tasks. Thus, your team should not feel compelled to collect every recommended document or answer every question contained in the Assessment Guide. In fact, the Project believes that a thorough yet preliminary study of the death penalty system in your state still can be completed without collecting all of the recommended documents and/or answering all of the questions contained herein.

The Assessment Guide is divided into thirteen sections, not including the introduction: (1) Crime Data, Death Row, DNA, and the Location and Preservation of Information and Evidence; (2) Law Enforcement; (3) Crime Laboratories and Medical Examiners; (4) Prosecutors; (5) Defense Services During Trial, Appeal, State Post-Conviction Proceedings, and Federal Habeas Corpus; (6) Direct Appeal and the Unitary Appeal Process; (7) State Post-Conviction Relief and Federal Habeas Corpus; (8) Clemency; (9) Jury Instructions; (10) Judicial Independence and Vigilance; (11) Racial and Ethnic Minorities; (12) Juvenile Offenders; and (13) Mentally Retarded and Mentally Disabled Offenders.

The thirteen sections are not organized by matter of importance, but rather, the order corresponds to the recommendations contained in the Protocols. The Project encourages your team to prioritize the sections, addressing the most potentially problematic areas first.

The majority of the thirteen sections begin with an introduction, explaining the relevant substantive issues and identifying potential problems regarding these issues concerning the administration of the death penalty. Each section contains a list of documents, including laws, rules, procedures, standards, guidelines, and leading case law, that the Project recommends that your teams gather, review and explain, and a list of questions pertaining to these documents that should be answered by your team to the extent possible. Lastly, in certain sections, the Project has recommended that your team select at least two to three illustrative cases to highlight how certain systems in your state actually function. *See infra* section I(E)(1), for a further discussion on the collection and explanation of the recommended information and the case studies.

## **E. Role of the Assessment Teams**

### **1. Assessment Team's Objective for Part I: The Collection of Information on Your State's Death Penalty System**

Your Assessment Team's objective is to **collect** the laws, rules, procedures, standards, guidelines, and leading case law recommended in the Assessment Guide. The Project recognizes that some of the recommended documents may not be easily accessible or may be entirely unattainable. As a result, the Project advises your team to use its best judgment to evaluate the potential value of a recommended document in view of the length of time and effort required to obtain it. Please explain each decision by your team not to attempt to obtain a recommended document or your team's unsuccessful attempts to obtain a recommended document.



The Project also recognizes that the list of recommended documents is not exhaustive. Thus, it welcomes additional research into the issues discussed herein.

Following the collection of the recommended data, your team should **review and explain** the recommended laws, rules, procedures, standards, guidelines, and leading case law and **draft answers** to the questions to the extent possible. **Your team's answers should include detailed cites to the sources relied upon.** Please note that when the Project recommends that your team review and explain the "laws, rules, procedures, standards, guidelines, and leading case law" on a particular subject, it does not want a recitation of every law, rule, procedure, standard, guideline, and case on the subject. Instead, the Project expects that your team will use its discretion to identify and explain the most pertinent laws, rules, procedures, standards, guidelines, and leading case law on each subject.

The Project also recognizes that if your team is unable to obtain some of the recommended documents, it may be unable to answer certain questions. In these situations, please explain why your team was incapable of answering the questions.

In addition to collecting the recommended information and answering the questions contained herein, the Project, in certain sections, has recommended that your team **select and discuss** at least two to three cases (designated as "case studies") to illustrate how certain systems in your state actually function. The Project recommends either that your team identify one or two very knowledgeable individuals (who need not be team members) to select the illustrative cases or that your team jointly select the cases. When selecting the cases, please choose cases that are illustrative of the manner in which the system functions. Furthermore, although the Project has identified certain sections where case studies are recommended, your team should feel free to use or not use case studies, as it deems necessary. In contemplating case studies, your team should first determine one or two jurisdictions where courts are reasonably likely to provide the types of information desired. Then in the manner described above, select at least one or two cases from these jurisdictions. Thereafter, if your team has the time and inclination, it may select additional case(s) within other jurisdiction(s).

Once your team begins explaining the information recommended in the Assessment Guide, drafting its answers to the questions, and completing the case studies, please **send the Project updates**, including drafts of your findings and information on your team's progress. **The updates also should include any and all documents collected by your team that the Project could not obtain on the Internet.** All documents that are attainable on the Internet do not need to be sent to the Project as long as the documents are properly cited, allowing the Project to obtain the documents via the Internet. *See infra* section I(F), for a discussion on the drafting process and anticipated timeline.

## 2. Assessment Team's Objective for Part II: Race and Geography Study

The Project intends to work in conjunction with esteemed sociologists/criminologists to conduct race and geography studies in a number of states depending on various

factors, including the existence of a recent, reliable race and geography study and the availability of the requisite data. The Project anticipates that some assistance by the Assessment Teams may be necessary to complete this portion of the assessment in a thorough yet timely manner.

#### **F. Anticipated Timeline, Drafting Process, and the Structure of the Assessment Report**

Your Assessment Team will have approximately six to ten months to collect the recommended data and draft your findings. The Project expects that as your team collects the information recommended in the Assessment Guide, it will explain the recommended documents and draft answers to the questions, and submit updates to the Project with your findings. These updates are imperative to the drafting of the assessment report, as the Project will draft the report at the same time your team collects the recommended information.

The Project envisions that each final assessment report will be comprised of two or three parts, depending on your state. The first section will provide an objective review of your state's death penalty system and will consist largely of a systematic recounting of laws, rules, procedures, standards, guidelines, and case law that comprise the current system. If the Project and its consultants conduct a race and geography study in your state, the second section will discuss the results. Lastly, the third section will compare the data collected by your team with the recommendations contained in the Protocols and recent ABA resolutions.

Following the initial drafting of the assessment report, the Project, in coordination with your team, will edit and finalize the report. It is anticipated that the report will be completed approximately two months after your team has completed gathering the recommended data.

The Project anticipates that **all** of the assessments will be completed by the summer of 2006; however, your state's assessment may be completed significantly sooner than this. Upon completion of the assessments, the ABA will sponsor a national symposium, discussing death penalty issues, reviewing assessment findings, and highlighting trends found in the states.

## II. CRIME DATA, DEATH ROW, DNA, AND THE LOCATION AND PRESERVATION OF INFORMATION AND EVIDENCE

### A. Crime Data and Death Row Demographics in Your State

The purpose of this section is to collect the necessary information to provide a description of homicide perpetrators and victims, and the demographics of death row inmates in your state since it reenacted the death penalty.

*\*Note: Your binder(s) contains copies of Death Row U.S.A reports from 1989 to 2004 and a list of individuals who had been convicted and sentenced to death, **and subsequently** had their conviction overturned and they were acquitted at a re-trial, or all charges were dropped; **or** they were given an absolute pardon by the governor based on new evidence of innocence; **or** they were released upon reaching a compromise with the prosecution by pleading to a lesser offense; **or** they were released when a parole board became convinced of their innocence; **or** they were acquitted at retrial of the capital charge but convicted of lesser related charges.*

Identify the following:

1. Number of capital homicides (or all homicides, if the number of capital homicides is inaccessible) in each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of capital homicides (or all homicides) per year since your state reenacted the death penalty.
2. Number of capital homicides with a known suspect, regardless of whether the individual has been charged or convicted (or all homicides with a known suspect, if the number of capital homicides with a known suspect is inaccessible) in each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of capital homicides with a known suspect (or all homicides with a known suspect) per year since your state reenacted the death penalty. Identify the race, gender, and age of these suspects.
3. Number of capital homicides with a known victim (or all homicides with a known victim, if the number of capital homicides with a known victim is inaccessible) in each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of capital homicides with a known victim (or all homicides with a known victim) per year since your state reenacted the death penalty. Identify the race, gender, and age of these victims.
4. Number of arrests for capital homicides (or all homicides, if the number of arrests for capital homicides is inaccessible) in each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/

county, obtain the aggregate number of arrests for capital homicides (or all homicides) per year since your state reenacted the death penalty. Identify the race, gender, and age of these suspects.

5. Number of individuals who were charged with capital homicides (or all homicides, if number of individuals charged with capital homicides is inaccessible) in each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of individuals who were charged with capital homicides (or all homicides) per year since your state reenacted the death penalty.
6. Number of individuals whom the prosecutor filed a notice of intent to seek the death penalty against (regardless of whether it was later withdrawn) in each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of individuals whom the prosecutor filed a notice of intent to seek the death penalty against (regardless of whether it was later withdrawn) per year since your state reenacted the death penalty.
7. Number of individuals whom the prosecutor filed, **but did not withdraw**, a notice of intent to seek the death penalty against in each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of individuals whom the prosecutor filed, **but did not withdraw**, a notice of intent to seek the death penalty against per year since your state reenacted the death penalty. Identify the race, gender, and age of these individuals.
8. Number of life sentences (including life without the possibility of parole) imposed by each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of life sentences (including life without the possibility of parole) imposed per year since your state reenacted the death penalty. Identify the race, gender, and age of these individuals.
  - a. Identify whether the sentences were obtained through a plea bargain or at trial.
9. Number of death sentences imposed by each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of death-imposed cases per year since your state reenacted the death penalty. Identify the race, gender, and age of these individuals.
10. Number of cases in which the judge overrode the jury's recommendation of life imprisonment (including life without the possibility of parole) by each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of cases in which the judge overrode the jury's recommendation of life imprisonment (including life without the possibility of parole) per year since your state reenacted

the death penalty. Identify the race, gender, and age of the defendant's whose life sentence was overridden by a judge.

11. Number of cases in which the judge overrode the jury's recommendation of death by each jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of cases in which the judge overrode the jury's recommendation of death per year since your state reenacted the death penalty. Identify the race, gender, and age of these individuals. Identify the race, gender, and age of the defendant's whose life sentence was overridden by a judge.
12. Number of death row inmates by jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of death row inmates per year since your state reenacted the death penalty. Identify the race, gender, and age of these death row inmates.
13. Number of individuals who had been convicted and sentenced to death, **and subsequently** their conviction was overturned and they were acquitted at a re-trial, or all charges were dropped; **or** they were given an absolute pardon by the governor based on new evidence of innocence; **or** they were released upon reaching a compromise with the prosecution by pleading to a lesser offense; **or** they were released when a parole board became convinced of their innocence; **or** they were acquitted at retrial of the capital charge but convicted of lesser related charges, by jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of the aforementioned individuals.
  - a. Identify the names of these individuals; describe their cases; and explain the reason for their release.
    - i. In cases in which the jury re-sentenced the individual to a sentence other than death, attempt to assess from news reports the reasons why the individual was not re-sentenced to death. Specifically, what was it about the original trial that made the jury or judge sentence the defendant to death, or what was it about the second trial that made the jury or judge not sentence the defendant to death?
  - b. Identify the length of time these individuals spent on death row prior to their release.
14. Number of individuals who died while on death row by jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of individuals who died while on death row.
15. Number of individuals who were executed by jurisdiction/county per year since your state reenacted the death penalty. If these figures are not available by jurisdiction/county, obtain the aggregate number of individuals who were executed.

16. Identify and discuss all cases in which identifiable doubt exists as to the defendant's guilt. This list should include individuals who are currently on death row and individuals who have been executed, despite such doubts.

*\*See infra* sections XII, XIII, and XIV, for related questions on the death penalty involving juvenile offenders, racial and ethnic minorities, and the mentally retarded and mentally ill.

## **B. Overviews of Reports and Studies Conducted About Your State**

Apart from the materials included in your binder(s), **identify and briefly explain** all additional reports, studies, books, articles, and news reports addressing the administration of the death penalty in your state over the past five years. Here, we have in mind overviews, not case-specific reports.

*\*See infra* section XII, requesting that your team collect all studies and reports on the impact of racial discrimination on the administration of the death penalty in your state.

## **C. DNA Testing and the Location and Preservation of Information and Evidence**

Since the advent of DNA testing, it has proved to be a useful law enforcement tool to establish guilt as well as innocence. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence collected in conjunction with the investigation of a criminal case is made available to defendants and convicted persons upon request and preserved accordingly. *See* Recommendation 115, Annual Meeting 2000, *available at* <http://www.abanet.org/crimjust/policy/cjpol.html#am00115>. Since that time, over thirty-five jurisdictions have adopted laws providing for post-conviction DNA testing. *See* DNA & Crime, The National Conference of State Legislatures, *at* <http://www.ncsl.org/programs/health/genetics/dna.htm>. *See also* Legislative Page, The Innocence Project, *at* <http://www.innocenceproject.org/legislation/index.ph>. However, the standards for applying for and obtaining post-conviction DNA testing vary widely among the states.

Although the wrongly convicted may have access to DNA testing, many are incapable of proving their innocence as a result of states' failure to properly and/or sufficiently preserve material evidence. In an effort to ensure access to the truth, the ABA adopted a policy recommendation urging states to establish written procedures and policies governing the collection and preservation of evidence. *See* Recommendation 111E and accompanying Report, Annual Meeting 2004, *available at* <http://www.abanet.org/leadership/2004/annual/111e.doc>.

To assess your state's laws on DNA testing and the preservation of material evidence, the Project recommends that your team collect the information mentioned below to answer the following questions.

1. Has your state passed legislation on post-conviction DNA testing?

- a. If yes, identify and explain the rights and limitations contained therein.
    - i. Who is eligible to apply for DNA testing?
    - ii. How do the eligible individuals apply for DNA testing?
      - If it is through a motion/petition, what information, if any, must be included in the motion/petition?
    - iii. What is the deadline, if any, for apply for DNA testing?
    - iv. Are the eligible individuals guaranteed a hearing on their application for DNA testing?
    - v. What is the standard for securing DNA testing?
    - vi. What types of DNA tests may be ordered by the court?
      - Does the law allow for the re-testing of DNA evidence?
        - If yes, under what circumstances is re-testing authorized?
        - If yes, who is authorized to re-test?
    - vii. Does the state provide funding for DNA testing?
      - If yes, what tests, if any, are paid for by the state?
        - Even if the state provides funding, can a court require the petitioner to pay for the tests?
      - If yes, where are the tests performed?
        - Does the state require the tests to be performed at a certain laboratory, or require the laboratory to be accredited?
          - If no, who determines where the tests are performed?
      - If no, who is required to pay for the tests?
        - If no, who determines who pays for the tests?
      - If no, where are the tests performed?
      - If no, who determines where the tests are performed?
- \*See *infra* section IV, for questions on crime laboratory and medical examiner accreditation.
- b. If no, identify and explain any proposed legislation on point and the current status of the legislation.
- 2 Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law on the preservation of evidence, including DNA, in death penalty cases.
    - a. Is your state required to preserve evidence in death penalty cases?
      - i. If yes, what type of evidence is it required to preserve?
        - Is the state required to preserve DNA?

- If yes, is the state required to preserve all DNA or only DNA that was not previously tested?
  - If yes, how long is the state required to preserve DNA? Is the state required to preserve the DNA after the defendant's trial where s/he was convicted?
  - What other types of evidence is your state required to preserve?
    - How long is the state required to preserve this evidence?
- ii. If no, does anyone possess the ability to request and/or the discretion to decide that certain evidence be preserved?
- If yes, who has the right to request that evidence be preserved?
  - If yes, who has the discretion to decide whether certain evidence should be preserved? Are there any limitations to this discretion?
- b. Where is the evidence preserved?
- i. Who possess the discretion to determine where the evidence is preserved?
- c. What information exists regarding what evidence *actually* is preserved? For example, has anyone ever claimed that the evidence in his/her case was destroyed, damaged, or lost, precluding him/her from having it tested or retested?
3. Identify the repository in your state for death penalty files. If there is more than one repository, identify which files are stored where.
4. Identify the repository or repositories in your state for all death penalty data, including, but not limited to, profiles of capital defendants and their victims, including age, race, and mental health problems; the number of capital indictments; the number of aggravating and mitigating factors found to exist by juries and judges; time intervals between indictment and sentencing and sentencing and appeal; the type of defense services rendered; and the length and cost of a death penalty jury trial.



### III. LAW ENFORCEMENT

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. Between 1983 and 2003, approximately 199 individuals were exonerated for murder. See Samuel R. Gross, et al., *Exonerations in the United States, 1989 through 2003* (2004), available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf>. In approximately 50% of the cases, there was at least one eyewitness misidentification, and 21% of the cases involved false confessions. *Id.*

Numerous studies have indicated that the characteristics of the lineup, showup, or photospread and the administering officer's knowledge of the suspect's identity affect the accuracy of the eyewitness identification. In 2004, the ABA adopted a policy recommendation with an accompanying report and the *American Bar Association Statement of Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures*, detailing various means to reduce the number of eyewitness misidentifications. See Recommendation 111C and accompanying Report, Annual Meeting 2004, available at <http://www.abanet.org/leadership/2004/annual/111c.doc>.

The ABA first advises law enforcement agencies to consider the use of a sequential lineup or photospread instead of a simultaneous lineup or photospread. *Id.* Regardless of the type of lineup or photospread administered, the ABA recommends that such identification procedure contain a sufficient number of foils that closely, realistically resemble the suspect to reduce the risk of eyewitness misidentifications. *Id.*

Furthermore, the ABA suggests that the officer conducting the identification procedure be unaware of the offender's identification and convey his/her lack of knowledge to the witness by stating as follows: "the perpetrator may or may not be in the lineup; that [the witness] should not assume that the person administering the lineup knows who is the suspect, and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make or the lack thereof." *Id.* The ABA also advises law enforcement agencies to videotape or digitally record identification procedures, including the witness' statement regarding his/her degree of confidence in the identification. *Id.* In the absence of a videotape or digital recorder, the ABA suggests photographing the identification procedure and drafting a detailed report of the procedure. *Id.* By recommending the documentation of identification procedures, the ABA hopes to not only reduce the number of misidentifications but also ease review of eyewitness identifications. *Id.*

Of the 199 murder exonerations, forty-one of the exonerees gave false confessions, some of which were the product of police coercion. See Samuel R. Gross, et al., *Exonerations in the United States, 1989 through 2003* (2004), available at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf>. Other reported reasons for false confessions include duress, deception, fear of physical harm, ignorance of the law, and lengthy interrogations. *Id.* See also Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891 (2004). Researchers also have found a correlation between a suspect's age and mental health and the probability of a false confession. See Samuel R. Gross, et al., *Exonerations in the United States, 1989*

through 2003, at <http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf>. See also Steven A. Drizin and Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L. Rev. 891 (2004). To protect against false confessions, the Illinois Commission on Capital Punishment (“Commission”), which was established by Governor George Ryan in March 2000, recommends the videotaping or audiotaping of the entire custodial interrogation and the suspect’s confession. See Report of Former Governor Ryan’s Commission on Capital Punishment, April 2002, available at [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/index.html](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html).

In recommending the videotaping or audiotaping of interrogations, the Commission reasoned that documenting interrogation procedures provides tremendous benefits, including, but not limited to, preventing any question as to what may or may not have occurred during the interrogation, deterring law enforcement officers from using dangerous and/or prohibited interrogation tactics, and providing courts with the ability to review the interrogation and the confession. Such benefits are exemplified by a quote from the Office Policy of the Illinois Sheriff’s Office in DuPage County, “Electronic recording of suspect [interrogations] in major crime investigations protects both the suspect and interviewing officers against subsequent assertions of statement distortion, coercion, misconduct or misrepresentation. It can serve as a valuable tool to the criminal justice system, assisting the Court in the seeking of the truth.” See Thomas P. Sullivan, *Police Experiences with Recording Custodial Interrogations*, Center on Wrongful Convictions, Northwestern School of Law, (2004), available at <http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf>.

Lastly, the Commission recommends that police academies, police agencies, and the department of corrections train its personnel on law enforcement agencies’ notification obligations and foreigners’ consular rights, given the “widespread disregard for consular rights.” See Report of the Commission on Capital Punishment, April 2002, [http://www.idoc.state.il.us/ccp/ccp/reports/commission\\_report/index.html](http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html). The Commission also calls on state attorney generals to remind law enforcement agencies of these obligations and monitor the agencies to ensure full compliance. *Id.*

To assess your state’s law enforcement services, the Project recommends that your team collect the information mentioned below to answer the following questions.

- A. Has your state adopted any statewide laws, rules, procedures, standards, guidelines, and regulations bearing on the issues raised in B through G?
  - 1. If yes, address B through G based on the statewide laws, rules, procedures, standards, guidelines and regulations.
  - 2. If no, address B through G based on the various rules, procedures, standards, guidelines, and regulations that have been adopted by each county. **\*Please note the Project and your Assessment Team will decide which counties’ rules, procedures, standards, and guidelines will be reviewed and analyzed. Most likely, the group of counties will include the most active death penalty counties plus some less active ones.**
- B. Identify and explain all laws, rules, procedures, standards, guidelines, regulations,

policies, and leading case law for conducting lineups, showups, or photospreads.

1. Do the laws, rules, procedures, standards, guidelines, regulations, policies, and leading case law require law enforcement officers to conduct a certain type of lineup or photospread, such as sequential or simultaneous?
  2. Do the laws, rules, procedures, standards, guidelines, regulations, policies, and leading case law require lineups and photospreads to contain a specific/minimum number of suspects?
  3. Do the laws, rules, procedures, standards, guidelines, regulations, policies, and leading case law require lineups, photospreads, and showups to include a specific/minimum number of foils?
    - a. Are the foils required to bear a certain degree of similarity to the suspect?
  4. Do the laws, rules, procedures, standards, guidelines, regulations, policies, and leading case law require law enforcement officers to videotape or digitally record the lineup or showup procedure?
  5. Do the laws, rules, procedures, standards, guidelines, regulations, policies, and leading case law require law enforcement officers to take a photograph of the lineup and/or provide a detailed report of how the procedure was administered?
  6. Do the laws, rules, procedures, standards, guidelines, regulations, policies, and leading case law preclude law enforcement officers from knowing the identity of the suspect when conducting a lineup, showup, or photospread?
  7. Do the laws, rules, procedures, standards, guidelines, regulations, policies, and leading case law require law enforcement officers to inform the eyewitness during the lineup, showup, or photospread that the perpetrator may or may not be present?
  8. Do the laws, rules, procedures, standards, guidelines, regulations, policies, and leading case law require law enforcement officers to inform the eyewitness that s/he should assume that the officer does not know which individual is the suspect?
  9. Do the laws, rules, procedures, standards, guidelines, regulations, policies, and leading case law require law enforcement officers to inform the eyewitness that s/he need not identify anyone in the lineup, showup, or photospread?
  10. How are the laws, rules, procedures, standards, guidelines, regulations, policies, and case law enforced?
- C. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law that govern how the actual eyewitness identification of the suspect should be taken in your state.

1. Do the laws, rules, procedures, standards, guidelines, and leading case law require the eyewitness to say in his/her own words how sure s/he is that the individual identified is the offender?
    - a. If yes, are law enforcement officers required to videotape or digitally record this statement?
      - i. If no, how is the statement memorialized?
- D. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law that govern how interrogations should be conducted.
1. Are law enforcement officers required to videotape or audiotape the advice of rights?
  2. Are law enforcement officers required to videotape or audiotape waiver of rights during the interrogation?
  3. Are law enforcement officers required to videotape or audiotape the entire interrogation?
  4. What are the limitations, if any, on the length of interrogations?
  5. What tactics, if any, are discouraged or prohibited during interrogations?
  6. How are these laws, rules, procedures, standards, guidelines, and leading case law on interrogations implemented and enforced?
  7. Have there been any systematic challenges raised against the interrogation tactics used by law enforcement officers? *Note: The Project does not mean case-by-case challenges.*
- E. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law regarding taking confessions. *\*See infra* section XIV, for related questions on the procedures for assessing the competency of suspects prior to taking confessions.
1. Are law enforcement officers required to videotape or audiotape confessions?
- F. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law regarding the arrest and/or detention of foreign nationals.
1. Are there any special or additional procedures that need to be followed when arresting and/or detaining foreign nationals.
- G. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law on the training of law enforcement officers on law enforcement agencies' notification obligations and foreigners' consular rights.
1. Do state police academies train law enforcement officers on law enforcement

agencies' notification obligations and foreigners' consular rights?

2. Do the police agencies train law enforcement officers on law enforcement agencies' notification obligations and foreigners' consular rights?
3. Does the department of corrections conduct trainings regarding law enforcement agencies' notification obligations and foreigners' consular rights?

H. Identify and explain all laws, rules, procedures, standards, guidelines and leading case law on the state attorney general's obligation to advise each law enforcement agency of its notification obligations under the Vienna Convention on Consular Relations.

I. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law on the state attorney general's obligation to review state and local compliance with the Vienna Convention on Consular Relations.

1. How, if at all, does the state attorney general monitor compliance?

\* *See infra* section XII and XIV, for questions on whether law enforcement officers are trained in racial sensitivity and how to assess whether an individual suffers from mental retardation or mental illness.

#### IV. CRIME LABORATORIES AND MEDICAL EXAMINERS

With the increased reliance on forensic evidence -- including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples -- the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of such laboratories and offices cannot be understated. As of August 2004, only New York, Texas, and Oklahoma require crime laboratories to be accredited. As a result, only 262 crime laboratories have been fully accredited nationwide, while hundreds remain unaccredited. See American Society of Crime Laboratory Directors - Laboratory Accreditation Board, Laboratories Accredited Under the ASCLD/LAB Legacy Program, at <http://www.ascl-d-lab.org/legacy/asclablegacylaboratories.html>. Similarly, only forty-three medical examiner offices have been accredited nationwide. See National Association of Medical Examiners, NAME Accredited Facilities, at [http://www.thename.org/Accreditation/accredited\\_offices.htm#accredited](http://www.thename.org/Accreditation/accredited_offices.htm#accredited).

The validity and reliability of the tests performed at both unaccredited and accredited crime laboratories across the nation have been recently called into question. See Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 1*, 28 *Champion* 6 (2004); Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits & Accreditation—Part 2*, 28 *Champion* 16 (2004); Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 24 *Champion* 18 (2000); Paul C. Giannelli, *The Abuse Of Scientific Evidence In Criminal Cases: The Need For Independent Crime Laboratories*, 4 *Va. J. Soc. Pol'y & L.* 439 (1997). In fact, various laboratory technicians have been accused and/or convicted of failing to properly analyze blood and hair samples, reporting results for tests that were never conducted, misinterpreting test results in an effort to aid the prosecution, falsely testifying for the prosecution, failing to preserve DNA samples, and destroying DNA or other biological evidence. This has prompted internal investigations into the practices of crime laboratories and technicians, independent audits of crime laboratories, the re-examination of hundreds of cases, and has resulted in the wrongful conviction of numerous individuals.

The problems with crime laboratories and technicians have been attributed to the lack of proper training and supervision, non-existent testing procedures or failure to follow existing procedures, and inadequate funding. In an effort to improve the quality of forensic tests and reduce the risk of wrongly convicting the innocent, the American Bar Association, in August 2004, adopted a policy recommendation calling for the accreditation of crime laboratories and medical examiner offices, certification of laboratory technicians and medical examiners, the standardization of technical procedures, and the adequate funding of crime laboratories and medical examiner offices across the nation. See Recommendation 111B and accompanying report, Annual Meeting 2004, available at <http://www.abanet.org/leadership/2004/annual/111b.doc>.

To assess your state's forensic services, the Project recommends that your team obtain the information mentioned below to answer the following questions.

- A. Identify all accredited and unaccredited crime laboratories and medical examiner offices in your state.

- B. Identify the total amount of funding of crime laboratories and medical examiner officers and the source of such funding.
- C. Identify and explain all laws, rules, procedures, standards, and guidelines governing the accreditation process for crime laboratories.
  - 1. Does the process require the establishment of and/or compliance with standardized technical procedures?
    - a. If yes, what are the standardized technical procedures?
  - 2. How are the laws, rules, procedures, standards, and guidelines monitored?
- D. Identify and explain all laws, rules, procedures, standards, and guidelines governing the accreditation process for medical examiner offices.
  - 1. Does the process require the establishment of and/or compliance with standardized technical procedures?
    - a. If yes, what are the standardized technical procedures?
  - 2. How are the laws, rules, procedures, standards, and guidelines monitored?
- E. Identify and explain all laws, rules, procedures, standards, and guidelines on the certification process for forensic examiners.
  - 1. How are the laws, rules, procedures, standards, and guidelines monitored?
- F. Identify and explain all laws, rules, procedures, standards, and guidelines on the certification process for medical examiners.
  - 1. How are the laws, rules, procedures, standards, and guidelines monitored?
- G. Have any of the crime laboratories or lab personnel in your state come under accusations of wrongdoing in terms of processing or interpreting forensic evidence, including DNA, fingerprints, ballistics, handwriting comparisons, and hair samples?
  - 1. If yes, were the allegations investigated?
    - a. If yes, was any wrongdoing found?
      - i. If yes, what was found?
      - ii. If yes, how did the state rectify the situation? Specifically, were the crime laboratories closed and audited and/or lab workers sanctioned? Did the state re-test all of the evidence in cases linked to the wrongdoing?

H. Have any forensic experts admitted or been found guilty of providing false testimony about forensic evidence in criminal cases?

1. If yes, provide the name of the expert and the circumstances surrounding the admission and/or conviction.



## V. PROSECUTORS

While the majority of prosecutors are ethical, law-abiding individuals who seek justice, one cannot ignore the existence of prosecutorial misconduct and the impact it has on innocent lives and society at large. “Since 1970, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions or reducing sentences in at least 2,012 cases.” See Steve Weinberg, *Breaking the Rules Who suffers when a prosecutor is cited for misconduct?*, Center for Public Integrity, Jul. 16, 2004, at <http://www.publicintegrity.org/pm/>.

Prosecutorial misconduct encompasses various actions, including, but not limited to, failure to disclose exculpatory evidence, abuse of discretion in filing notices of intent to seek the death penalty, covering-up and/or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments. *Id.* See also Police and Prosecutorial Misconduct, The Innocence Project, at <http://www.innocenceproject.org/causes/policemisconduct.php>. The causes of prosecutorial misconduct range from an individual’s desire to obtain a conviction at any cost to lack of proper training, inadequate supervision, insufficient resources, and excessive workloads.

To curtail prosecutorial misconduct and reduce the number of wrongly convicted individuals, the ABA, in August 2004, adopted a policy recommendation urging federal, state, and local governments to provide adequate funding to prosecutors’ offices, to adopt standards to ensure manageable workloads for prosecutors, and to require that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the police or prosecution. See Recommendation 111F and accompanying report, Annual Meeting 2004, available at <http://www.abanet.org/leadership/2004/annual/111f.doc>.

To assess the prosecutorial services in your state, the Project recommends that your team obtain the information mentioned below to answer the following questions.

- A. Identify the amount of funding applied for by the prosecutor’s office, and/or attorney general’s office, for the prosecution of capital or potentially capital cases in each jurisdiction and the amount distributed to each jurisdiction, as well as the sources of the funding, by year since your state reenacted the death penalty through the present time.
- B. Identify and explain all laws, rules, procedures, standards, and guidelines on the minimum qualifications required of prosecutors assigned to capital or potentially capital cases.
- C. Identify and explain all laws, rules, procedures, standards, and guidelines governing the training programs that should be offered by your state to prosecutors who handle capital or potentially capital cases.
  1. What training programs are offered in your state?
  2. Are any of the training programs mandatory?

\**See infra* section XII and XIV, requesting that your team identify whether the state or county/jurisdiction offers any training programs for prosecutors on race and the death penalty and mental retardation and mental illness.

- D. Identify and explain all laws, rules, procedures, standards, and guidelines governing prosecutors' workloads.
1. How are the standards monitored?
  2. Are prosecutors handling capital or potentially capital cases given a lesser number of cases compared to other prosecutors handling non-capital cases?
- E. Identify and explain all laws, rules, procedures, standards, and guidelines on the notice of intent to seek the death penalty.
1. Who decides whether a notice of intent should be filed?
  2. How is the decision made?
  3. What is the decision based on?
  4. What information must be contained in a notice of intent?
  5. What is the timeframe for filing a notice of intent?
    - a. When may and when must the notice of intent be filed?
    - b. Are extensions of time allowed?
  6. Following defendants' arraignments for a capital crime, but prior to the filing of the notice of intent to seek death, what types of resources are provided to these defendants? Are they provided with the resources guaranteed to a past-notice capital defendant, or the resources provided to a non-capital defendant?
    - a. At what rate are counsel paid at this stage?
    - b. Do they get funding to begin investigating their cases?
      - i. Do they get funding for investigator(s), mitigation specialist(s), and/or other expert(s)?
    - c. Do defense counsel get the opportunity to present evidence or arguments to the prosecution, in an effort to persuade the prosecution not to seek death?
      - i. If yes, how does this work?
- F. Identify and explain all laws, rules, procedures, standards, and guidelines on withdrawal

of the notification to seek the death penalty.

1. Under what circumstances, can a notice to seek the death penalty be withdrawn?
  2. Who decides whether a notice of intent to seek the death penalty should be withdrawn?
  3. How is the decision made?
  4. What is the decision based on?
  5. What is the procedure for withdrawing a notice to seek the death penalty?
- G. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law addressing whether prosecutors may seek the death penalty in cases based exclusively on types of evidence that are subject to human error, such as eyewitness identifications and statements from informants or co-defendants.
1. If a prosecutor can seek the death penalty in a case based exclusively on types of evidence that are subject to human error, can the jury convict the defendant of capital murder and sentence him/her to death based on that evidence?
- H. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law governing plea-bargaining that could apply in capital cases.
1. Have your state or any of the counties within your state adopted plea bargaining standards that could apply in capital cases?
    - a. If yes, please obtain these documents, photocopy them, and send your originals to the Project, if the documents cannot be obtained on the Internet.
  2. How do prosecutors decide whether or not to offer a plea bargain? *Note: When answering these questions, please consider what the law allows as well as what office policies allow individual prosecutors to do.*
    - a. Do prosecutors have total discretion to decide whether or not to enter into a plea bargain?
    - b. What factors, if any, are prosecutors required to consider before offering a plea?
    - c. Under what circumstances, if any, are prosecutors prohibited from offering plea bargains?
  3. Since your state reenacted the death penalty, how many capital defendants were offered plea bargains and how many plea bargains were accepted? If possible, identify the name of the capital defendant, the date of the offense, the county in which the crime occurred, the date of the plea, and describe the circumstances of the crime.

- I. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law governing the scope of discovery that prosecutors are required to provide to the defense in capital cases.
  1. Is full “open file” discovery required in capital cases?
  2. Is the state required to disclose evidence favorable to the defendant?
  3. Is the state required to disclose plea arrangements with witnesses?
  4. Is the state required to disclose its experts’ reports?
  5. Are there any mutual discovery obligations for the defense?
  6. How are the laws, rules, procedures, standards, and guidelines on the scope of discovery that prosecutors are required to provide to the defense monitored and enforced?
  
- J. Identify and explain the laws, rules, procedures, standards, and guidelines on the scope of prosecutors’ closing arguments.
  1. May the prosecutor comment on the defendant’s failure to testify during the guilt phase and/or the penalty phase?
  2. May the prosecutor express his/her personal opinion as to the defendant’s guilt?
  3. May the prosecutor express his/her personal opinion as to the appropriate sentence?
  4. May the prosecutor reference race in general and/or the race of the defendant?  
\*See *infra* section XII, including questions on whether prosecutors have ever raised issues of race during any part of a capital case.
  5. May the prosecutor reference the appeals process and the likelihood that the defendant’s case will be reviewed by another court?
  6. May the prosecutor reference the possibility of the defendant receiving parole or clemency?
  
- K. Identify and explain the laws, rules, procedures, standards, and guidelines on the duty of the prosecutors’ office to investigate and sanction prosecutorial misconduct.
  1. How are the laws, rules, procedures, standards, and guidelines implemented and monitored?
  
- L. Determine in each jurisdiction/county whether complaints have ever been filed against prosecutors in connection with their conduct in capital cases.
  1. If yes, what was the disposition of the complaint?

M. In cases in which a court found that there had been prosecutorial misconduct, including police misconduct, in a capital case, obtain the prosecutor's name and then contact the state bar to determine whether s/he was ever disciplined or sanctioned for his/her conduct.

1. If reasonable, assess whether such prosecutors have ever been disciplined or sanctioned for their conduct in any other case, including non-capital cases.
2. Assess whether such prosecutors were ever promoted following the finding of prosecutorial misconduct.

\*Tip: If prosecutors' names are not contained in the decisions, attempt to obtain such names from news reports of the trial.

N. In how many cases in which a court found that there had been prosecutorial misconduct, including police misconduct, in a capital case, was relief denied due to harmless error, procedural default, etc?

\*See *infra* section XII requesting that your team identify the race of prosecutors who are qualified to handle capital cases in each county/jurisdiction.

## **VI. DEFENSE SERVICES DURING TRIAL, APPEAL, STATE POST-CONVICTION PROCEEDINGS, AND FEDERAL HABEAS CORPUS**

To assess your state's defense services system, the Project recommends that your team obtain the information mentioned below to answer the following questions.

*Note: Section VI covers all phases of a capital case—Trial, Appeal, State Post-Conviction, and Federal Habeas Corpus—EXCEPT clemency proceedings. All questions concerning the quality and performance of counsel during clemency proceedings are addressed in section IX.*

*Additionally, please note that the term “defense counsel,” has been used loosely to describe an attorney who represents a capital defendant during any of the stages of a capital case, including Trial, Appeal, State Post-Conviction, and Federal Habeas Corpus. See infra section IX, for questions on clemency proceedings.*

### **A. Statewide Systems**

1. Is there a statewide system for providing defense services, including fully or partially state-funded public defender offices?
  - a. If yes, describe the system.
  - b. If no, is there any proposed legislation on the establishment of a statewide system?
2. Has your state promulgated guidelines on the defense of capital cases?
  - a. If no, is there any proposed legislation on the creation of guidelines regarding the defense of capital cases?
3. Is there a state established and/or funded appellate defender and/or post-conviction defense organization?

### **B. County-Based Public Defender and Private Law Firms**

1. Identify the county-based public defender and any private law firm that handles the majority of the county's death penalty cases.

### **C. Appointment, Qualifications, and Training of Trial, Appeal, State Post-Conviction Proceedings, and Federal Habeas Corpus Counsel.**

*Note: If there is a statewide system for providing defense services, address the following issues based on that system. However, if a statewide system does not exist, address the following issues for a **select group of counties**. The Project and your Assessment Team will decide which counties' defense services systems will be reviewed and analyzed. Most likely, the group of counties will include the most active death penalty counties plus*

*some less active ones. Additionally, when assessing counties' defense services, take into consideration whether the county has a county-based public defender and/or whether there is a private law firm that handles the majority of the county's death penalty cases.*

1. Identify the amount of funding applied for by the statewide defense system or by each county/jurisdiction to defend capital cases, the amount of funding received, and the source of the funding per year since your state reenacted the death penalty.
    - a. Since your state reenacted the death penalty, have any of the governors attempted to significantly or completely de-fund, or actually de-funded any of the defense systems?
      - i. Has such legislation, even if not backed by the governor, passed the house of legislators?
    - b. Also, if there is an identifiable private law firm that handles the majority of the death penalty cases, attempt to obtain its budget.
  2. Identify and explain all laws, rules, procedures, standards, and guidelines governing who or what organization or governmental body should be responsible for appointing defense attorneys at each phase of a capital case.
    - a. Provide name and description of who or what organization or governmental body appoints defense counsel at each phase of a capital case.
      - i. Is the individual, organization, or governmental body independent of the judiciary or political process?
    - b. How does the individual, organization, or governmental body select which defense attorney to appoint to a capital case at each phase of the proceedings?
      - i. Is the individual, organization, or governmental body responsible for appointing counsel required to maintain a roster of attorneys who are qualified to defend capital cases?
        - If yes, obtain a copy of the roster/registry. If each circuit or county maintains a separate list, please obtain each roster/registry.
        - If yes, does s/he or it refer to the roster when appointing defense attorneys to capital cases?
        - If yes, how many attorneys are currently on the roster?
        - If yes, does s/he or it review and update the roster periodically?
- \*See infra section XII, requesting that your team identify race of defense attorneys who are qualified to handle capital cases in each county/jurisdiction.*
- ii. Is any other group required to maintain a roster of attorneys who are qualified to defend capital cases?

- If yes, obtain a copy of the roster/registry. If there is more than one roster/registry (i.e. for each circuit or county), please obtain each roster/registry.
  - If yes, does s/he or it possess the authority to appoint defense attorneys?
    - If yes, does s/he or it refer to the roster when appointing defense attorneys to capital cases?
  - If yes, how many attorneys are currently on the roster?
  - If yes, does s/he or it review and update the roster periodically?
- iii. What other means are used to appoint attorneys to capital cases?
- iv. Does the individual, organization, or governmental body responsible for appointing defense attorneys at each phase of a capital case, or any other appointing group, use a low-bidder system to select which attorney(s) it will appoint to capital cases?
- c. Have any defense attorneys claimed that they were appointed to a capital case, despite their lack of proper experience and training?
- d. Have any defense attorneys claimed that they were involuntarily appointed to defend a capital case?
- i. If yes, please discuss these cases.
- e. Have any defense attorneys claimed that they were pressured or encouraged to take a capital case from someone other than the individual, organization, or governmental body responsible for appointing counsel?
- i. If yes, what were the circumstances surrounding the attorneys decision to take the case?
3. Identify and explain all laws, rules, procedures, standards, and guidelines on the qualification standards for defense attorneys in capital cases.
- a. What are the standards?
- b. During what phases of a capital case are the standards applicable?
- c. Who monitors and enforces the standards?
- d. How are the standards monitored and enforced?
4. Identify and explain all laws, rules, procedures, standards, and guidelines governing conflicts of interest during the appointment process.
- a. Under the current appointment process, what are the possible conflicts of interest?



- b. What mechanism does the individual, organization, or governmental body responsible for appointing counsel use to identify and resolve conflicts of interest?
5. Identify and explain all laws, rules, procedures, standards, and guidelines on training for attorneys representing defendants in capital cases.
    - a. Does the individual, organization, or governmental body responsible for appointing counsel conduct, sponsor, or approve training programs for attorneys representing defendants in death penalty cases?
    - b. Are other training programs available?
      - i. If yes, who offers and funds those programs?
    - c. Are any of the training programs mandatory?
      - i. If yes, who monitors whether attorneys attend the trainings?
      - ii. If no, who monitors whether attorneys voluntarily attend trainings?
- \*See infra* section XII and XIV, requesting that your team identify whether the state or county offers training of race and the death penalty and/or mental retardation or mental illness.
6. Identify and explain all laws, rules, procedures, standards, and guidelines on the timing of appointment of defense counsel at **each phase of a capital case**.
    - a. How are these laws, rules, procedures, standards, and guidelines monitored?
  7. Identify and explain all laws, rules, procedures, standards, and guidelines on the minimum number of appointed defense attorneys required to defend a capital case **during each phase**.
    - a. What is the minimum number of appointed attorneys required to defend a capital case **during each phase**?
    - b. Who possess the discretion to request additional defense attorneys?
    - c. Who possess the discretion to grant such requests?
  8. Identify and explain all laws, rules, procedures, standards, and guidelines on the appointment and funding of new defense counsel on appeal and during state post-conviction relief proceedings and federal habeas corpus.
    - a. Does the jurisdiction/county appoint and/or fund new counsel on appeal and/or certiorari, and/or during state post-conviction proceedings and federal habeas corpus?

- i. If yes, under what circumstances are new counsel appointed?
  - Are new counsel appointed when defendant seeks to raise a claim based on ineffective assistance of counsel?
- ii. If yes, when is the new counsel appointed?

**\*If your state is a unitary appeal state, please explain your state's laws pertaining to the appointment and funding of new counsel on appeal and/or in state post-conviction proceedings. See also section VII, for questions concerning the unitary appeal process.**

9. Identify and explain all laws, rules, procedures, standards, and guidelines on when appointed counsel should first visit his/her client following appointment.
10. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the appointment process and the qualifications and training of **appointed trial counsel** in capital cases. In particular, assess the following:
  - a. At what point in the proceedings was the defense attorney(s) appointed?
  - b. How many defense attorneys were appointed?
  - c. Who appointed the defense attorney(s)?
  - d. How was the defense attorney(s) selected for appointment?
  - e. What were the qualifications of the defense attorney(s)?
  - f. What type of training programs had the defense attorney(s) completed?
  - g. Following the appointment, when did the defense attorney(s) first visit his/her client?
11. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the appointment process and the qualifications and training of **appointed appellate counsel** in capital cases. In particular, assess the following:
  - a. Is the attorney(s) different from the trial(s) attorney?
  - b. At what point in the proceedings was the appellate attorney(s) appointed?
  - c. How many appellate attorneys were appointed?
  - d. Who appointed the appellate attorney(s)?
  - e. How was the appellate attorney(s) selected for appointment?

- f. What were the qualifications of the appellate attorney(s)?
  - g. What type of training programs had the appellate attorney(s) completed?
  - h. Who, if anyone, filed for certiorari?
    - i. If not appellate counsel, why not?
    - ii. How was the attorney paid?
- 12. \*Case Studies:** Select at least two to three cases in your state that are illustrative of the appointment process and the qualifications and training of **appointed state post-conviction relief counsel** in capital cases. In particular, assess the following:
- a. Is the attorney(s) different from the trial and/or appeal attorney(s)?
  - b. At what point in the proceedings was the state post-conviction relief attorney(s) appointed?
  - c. How many state post-conviction relief attorneys were appointed?
  - d. Who appointed the state post-conviction relief attorney(s)?
  - e. How was the state post-conviction relief attorney(s) selected for appointment?
  - f. What are the qualifications of the state post-conviction relief attorney(s)?
  - g. What type of training programs has the state post-conviction attorney(s) completed?
- 13. \*Case Studies:** Select at least two to three cases in your state that are illustrative of the appointment process and the qualifications and training of **appointed federal habeas corpus counsel** in capital cases. In particular, assess the following:
- a. Is the attorney(s) different from the trial, appeal, and/or state post-conviction relief attorney(s)?
  - b. At what point in the proceedings was the federal habeas corpus attorney(s) appointed?
  - c. How many federal habeas corpus attorneys were appointed?
  - d. Who appointed the federal habeas corpus attorney(s)?
  - e. How was the federal habeas corpus attorney(s) selected for appointment?
  - f. What are the qualifications of the federal habeas corpus attorney(s)?

- g. What type of training programs has the federal habeas corpus attorney(s) completed?

**D. Counsel Performance During Trial, Appeal, State Post-Conviction Proceedings, and Federal Habeas Corpus**

1. Identify and explain all laws, rules, procedures, standards, and guidelines on the performance of **appointed, privately hired, and pro bono attorneys** in each phase of a capital case.
  - a. What mechanism does the individual, organization, or governmental body responsible for appointing counsel use to monitor the performance of appointed attorneys in capital cases?
    - i. Is the information gathered by the individual, organization, or governmental body responsible for appointing counsel shared with judges and/or other attorneys? For example, are judges and/or other attorneys alerted to the filing of a complaint regarding a counsel's performance in prior cases?
      - If no, does an information sharing system exist through which judges and/or lawyers are alerted to the filing of a complaint against a counsel regarding his/her performance in prior cases?
  - b. What mechanism does a non-appointing group that has the responsibility of maintaining the list of qualified attorneys use to monitor the performance these attorneys in capital cases?
  - c. What mechanism is used to monitor the performance of privately hired and pro bono counsel?
  - d. In capital cases in which the defendant raised a claim of counsel incompetence, and the court was critical of the attorney's performance, including appointed, privately hired, and pro bono counsel, when analyzing whether his/her performance "fell below an objective standard of reasonableness," on what basis was it critical of the attorney's performance and what action did it take?
    - i. Did it grant relief based on the defense attorney's incompetence?
    - ii. Did it find the incompetence to be harmless error?
    - iii. Did it find the claim to have been defaulted?
    - iv. Did it or the prosecutor file a complaint with the bar?
  - e. In capital cases in which the defendant raised a claim of counsel incompetence, and the court was critical of the attorney's performance, including appointed, privately hired, and pro bono counsel, when analyzing whether his/her performance "fell below an objective standard of reasonableness," obtain

the defense attorneys' names and then contact the state bar to determine whether these attorneys were ever disciplined or sanctioned for their performance.

- i. If reasonable, assess whether these defense attorneys have ever been disciplined or sanctioned for their performance in any case, including non-capital cases.
  - ii. Assess whether any of these defense attorneys were promoted following the claims of counsel incompetence.
2. Identify and explain all laws, rules, procedures, standards, and guidelines governing complaints on the performance of appointed, privately hired, and pro bono counsel in capital cases.
- a. How does the individual, organization, or governmental body responsible for appointing counsel investigate, maintain records, and take action on complaints about the performance of attorneys?
  - b. What other group, if any, possesses the discretion to investigate and take action on complaints regarding counsel performance.

**E. Workload of Trial, Appellate, State Post-Conviction Relief, and Federal Habeas Corpus Counsel**

1. Identify and explain all laws, rules, procedures, standards, and guidelines on the allowable workload for appointed defense attorneys.
  - a. What process does the appointing authority use to monitor the workload of the attorneys representing defendants in capital cases to ensure high quality legal representation?
2. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the work load of **trial counsel** in capital cases. In particular, assess the following:
  - a. How many capital cases did the attorney(s) handle during the calendar year(s) covered by the case in question?
  - b. How many non-capital cases did the attorney(s) handle during the calendar year(s) covered by the case in question?
  - c. How many hours did the attorney(s) spend on the case?
  - d. What was the total amount of counsel fees requested by the attorney(s) on the case?
    - i. What was awarded?

3. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the work load of **appellate counsel** in capital cases. In particular, assess the following:
  - a. How many capital appeals did the attorney(s) handle during the calendar year(s) covered by the case in question?
  - b. How many non-capital appeals did the attorney(s) handle during the calendar year(s) covered by the case in question?
  - c. How many hours did the attorney(s) spend on the appeal?
  - d. What was the total amount of counsel fees requested by the attorney(s) on the appeal?
    - i. What was awarded?
4. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the work load of **state post-conviction relief** counsel in capital cases. In particular, assess the following:
  - a. How many capital cases did the attorney(s) handle during the calendar year(s) covered by the case in question?
  - b. How many non-capital cases did the attorney(s) handle during the calendar year(s) covered by the case in question?
  - c. How many hours did the attorney(s) spend on the case?
  - d. What was the total amount of counsel fees requested by the attorney(s) on the case?
    - i. What was awarded?
5. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the work load of **federal habeas corpus** counsel in capital cases. In particular, assess the following:
  - a. How many federal habeas corpus petitions in capital cases did the attorney(s) handle during the calendar year(s) covered by the case in question?
  - b. How many non-capital cases did the attorney(s) handle during the calendar year(s) covered by the case in question?
  - c. How many hours did the attorney(s) spend on the case?
  - d. What was the total amount of counsel fees requested by the attorney(s) on the case?

- i. What was awarded?

**F. Compensation for Trial, Appellate, State Post-Conviction Relief, and Federal Habeas Corpus Attorneys and Paralegals**

1. Identify and explain all laws, rules, procedures, standards, and guidelines on who or what organization or governmental body should be responsible for establishing and adjusting the compensation rate.
  - a. Who or what organization or governmental body establishes and adjusts the compensation rate in your state or counties?
2. Identify and explain all laws, rules, procedures, standards, and guidelines on the frequency of adjustment of the compensation rate for attorneys defending capital cases at all phases of the proceedings.
  - a. What is the current compensation rate (per stage, if it varies by stage)?
  - b. How often has the compensation rate for attorneys handling capital cases at all phases of the proceedings been adjusted over the last five years?
  - c. What have the adjustments been over the last five years?
  - d. Have there been any complaints filed about the rate of compensation and/or the frequency (or infrequency) in which it is adjusted?
3. Identify and explain all laws, rules, procedures, standards, and guidelines on limitations to attorney compensation.
  - a. Are there caps on defense attorneys' fees?
  - b. Do judges possess the discretion to limit the amount of compensation?
4. Identify and explain all procedures for obtaining compensation.
  - a. How do defense attorneys apply for compensation?
5. Identify and explain all laws, rules, procedures, standards, and guidelines governing the recommended manner of compensation of appointed counsel; for example, is the compensator required to pay appointed counsel an hourly wage for their services?
  - a. How are the laws, rules, procedures, standards, and guidelines monitored?
6. Identify and explain all laws, rules, procedures, standards, and guidelines governing the point(s) during the case at which capital defense attorneys should be compensated for their services.
  - a. How are the laws, rules, procedures, standards, and guidelines monitored?

- b. Have any complaints been filed alleging that the compensator does not allow for periodic billing and payment during the course of representation, and/or that attorneys are not being paid?
  - c. Are there any bar studies, reports, or news stories indicating that defense attorneys are not being paid during the course of representation?
  - d. Are there any bar studies, reports, or news stories indicating that defense attorneys are being paid, improperly, for fewer hours than reasonably expected and/or not being paid for their services at all?
7. Identify and explain all laws, rules, procedures, standards, and guidelines governing the reimbursement of attorneys' expenses associated with defending a capital case.
- a. Apart from defense attorney' fees, what additional expenses associated with the defense of a capital case is the state or county obligated to reimburse?
  - b. What discretion does the state or county have to refuse or limit the reimbursement of such expenses?
8. Identify and explain all laws, rules, procedures, standards, and guidelines on limitations to paralegal compensation.
- a. Are there caps on paralegals' fees?
9. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the compensation practices of the state or counties for **trial attorneys** in capital cases. In particular, assess the following:
- a. How much compensation did the attorney(s) request?
  - b. How much was the attorney(s) compensated?
  - c. If the amount compensated was less than that requested, on what basis was it less?
  - d. When in the process was the attorney(s) compensated?
    - i. If the attorney was compensated in increments, how many payments were made and how much was paid out each time?
  - e. Was the attorney(s) reimbursed for additional expenses related to the defense of the case?
  - f. Did the attorney(s) end up "eating" the costs of paralegals, investigators, mitigation specialists, and/or other experts because the court would not cover the costs?



10. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the compensation practices of the state or counties **for appellate attorneys** in capital cases. In particular, assess the following:
- a. How much compensation did the attorney(s) request?
  - b. How much was the attorney(s) compensated?
  - c. If the amount compensated was less than that requested, on what basis was it less?
  - d. When in the process was the attorney(s) compensated?
    - i. If the attorney was compensated in increments, how many payments were made and how much was paid out each time?
  - e. Was the attorney(s) reimbursed for additional expenses related to the defense of the case?
11. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the compensation practices of the state or counties **state post-conviction relief attorneys** in capital cases. In particular, assess the following:
- a. How much compensation did the attorney(s) request?
  - b. How much was the attorney(s) compensated?
  - c. If the amount compensated was less than that requested, on what basis was it less?
  - d. When in the process was the attorney(s) compensated?
    - i. If the attorney was compensated in increments, how many payments were made and how much was paid out each time?
  - e. Was the attorney(s) reimbursed for additional expenses related to the defense of the case?
  - f. Did the attorney(s) end up “eating” the costs of paralegals, investigators, mitigation specialists, and/or other experts because the court would not cover the costs?
12. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the compensation practices of the state or counties **federal habeas corpus counsel** in capital cases. In particular, assess the following:
- a. How much compensation did the attorney(s) request?
  - b. How much was the attorney(s) compensated?

- c. If the amount compensated was less than that requested, on what basis was it less?
- d. When in the process was the attorney(s) compensated?
  - i. If the attorney was compensated in increments, how many payments were made and how much was paid out each time?
- e. Was the attorney(s) reimbursed for additional expenses related to the defense of the case?
- f. Did the attorney(s) end up “eating” the costs of paralegals, investigators, mitigation specialists, and/or other experts because the court would not cover the costs?

**G. The Availability and Use of Investigators, Mitigation Specialists, Mental Health Experts, and Other Experts Pre-Trial and During Trial, Appeal, State Post-Conviction Proceedings, and Federal Habeas Corpus**

1. Identify and explain all laws, rules, procedures, standards, and guidelines governing the obligation of the state or county to provide the defendant with and compensate investigators, mitigation specialists, mental health experts, and other experts at each phase of a capital case.
  - a. What discretion does the state, county, or judge have to limit payment of, or limit reimbursement to counsel for use of investigators, mitigation specialists, mental health experts, or other experts during each phase of a capital case?
    - i. Are there caps on fees?
2. Identify the procedures for obtaining an investigator, mitigation specialist, mental health expert, or other expert during each phase of a capital case.
  - a. Are requests for obtaining an investigator, mitigation specialist, mental health expert, or other expert addressed during an adversarial or *ex parte* proceeding?
  - b. Have the procedures for obtaining such services ever been challenged? If yes, what was the basis for the challenge and the disposition?
3. Identify and explain all laws, rules, procedures, standards, and guidelines on who or what organization or governmental body should be responsible for compensating investigators, mitigation specialists, mental health experts, and other experts.
  - a. Have there been any systematic attacks raised against the compensator for restricting compensation or failing to compensate investigators, mitigation specialists, mental health experts, and/or other experts for their services?
4. Identify and explain all laws, rules, procedures, standards, and guidelines governing the point(s) during the case at which the investigators, mitigation specialists, mental

health experts, and other experts should be compensated for their services.

- a. Have there been any systematic attacks raised against the compensator for failing to provide for periodic billing and payment during the case?

*\*See infra* section XIV, including questions pertaining to the resources provided to a defense attorney representing individuals with mental retardation or a mental illness.

5. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the procedure for obtaining and compensating investigators, mitigation specialists, mental health experts, and other experts used **pre-trial and during capital trials**. In particular, assess the following:

- a. What type of services did the trial attorney request?
- b. Did the trial attorney request the services *ex parte*?
- c. Of those services, which did the court grant him/her?
- d. How was the investigator, mitigation specialist, mental health expert, and/or other expert compensated?
  - i. Did counsel pay?
    - If yes, was counsel reimbursed by the state (where client could not afford to pay)?
- e. When in the process was the investigator, mitigation specialist, mental health expert, and/or other expert compensated?
- f. How much was the investigator, mitigation specialist, mental health expert, and/or other expert compensated?

6. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of the procedure for obtaining and compensating investigators, mitigation specialists, mental health experts, and other experts used **during state post-conviction relief proceedings**. In particular, assess the following:

- a. What type of services did the trial attorney request?
- b. Did the trial attorney request the services *ex parte*?
- c. Of those services, which did the court grant him/her?
- d. How was the investigator, mitigation specialist, mental health expert, and/or other expert compensated?
  - i. Did counsel pay?

- If yes, was counsel reimbursed by the state (where client could not afford to pay)?
- e. When in the process was the investigator, mitigation specialist, mental health expert, and/or other expert compensated?
- f. How much was the investigator, mitigation specialist, mental health expert, and/or other expert compensated?

## VII. DIRECT APPEALS AND THE UNITARY APPEAL PROCESS

To assess the appeal procedures in your state, the Project recommends that your team obtain the information mentioned below to answer the following questions. **If your state currently has a unitary appeal process, skip section A and obtain the recommended information in section B and answer the questions contained therein. If your state does not currently have a unitary appeal process, but previously had adopted such process, please discuss the process and explain why it is not longer in effect. For example, did your state's supreme court strike down the process?**

### A. Non-Unitary Appeal States

1. Identify and explain all laws, rules, procedures, standards, and guidelines on direct appeals in capital cases.
  - a. Are direct appeals mandatory in capital cases?
    - i. If they are mandatory, are individuals required to file a notice of appeal or are the cases automatically considered for appeal by the court?
  - b. Who is eligible to file a direct appeal?
  - c. What are the filing deadlines for direct appeals?
  - d. With what court(s) should eligible individuals file a notice of appeal?
    - i. Where there can be reviews in two levels of appeal courts, what is the process for seeking review in the higher of these?
      - Is review there automatic or discretionary?
        - Where discretionary, what factors are reviewed?
2. Identify and explain all laws, rules, procedures, standards, and guidelines on automatic stays of execution during the time permitted for seeking discretionary review and during the pendency of such reviews.
  - i. At what point during the progression of a death penalty case is a stay of execution necessary?
  - ii. At what point during the progression of a death penalty case may the Governor or other responsible body issue a warrant of execution?
3. Identify and explain all laws, rules, procedures, standards, and guidelines on the types of claims that **can and must be raised** on direct appeal.
  - a. What claims, if any, are waived if they are not raised on direct appeal? For example, are claims of ineffective assistance of counsel waived if not raised on direct appeal?

4. Identify and explain all laws, rules, procedures, standards, and guidelines on the scope of review conducted on appeal.
  - a. What must be reviewed?
  - b. What can but needn't be reviewed?
    - i. If the court has discretion to overlook procedural default, or to examine matters, even if not raised on direct appeal, that are in the record, what does the court really do?
  - c. What cannot be reviewed?
  - d. How has the scope of review evolved since your state reenacted the death penalty?
5. Identify and explain all laws, rules, procedures, standards, and guidelines bearing on the appropriate harmless error rule that should be used on appeal.
6. Identify and explain all laws, rules, procedures, standards, and guidelines on proportionality review in capital cases.
  - a. Does your state's appeal court(s) undertake a proportionality review?
    - i. If yes, what does the proportionality review entail? Specifically, does your state's appeal court(s) compare the case under review to similar cases to evaluate whether a death sentence is disproportionate to sentences in other, similar cases?
      - Does your state's appeal court(s) compare the case under review to cases in which the death penalty could have been sought but wasn't?
      - Does your state's appeal court(s) compare the case under review to cases in which the death penalty was not imposed and/or to cases in which it had been imposed?
      - Does your state's appeal court(s) compare the case under review to cases that took place in similar geographic areas?
      - Does your state's appeal court(s) compare the case under review to cases in which the defendants are of the same race, different race, and/or both?
      - Does your state's appeal court(s) compare the case under review to cases in which there were more than one defendant?
    - ii. If yes, what kinds of data do(es) the court(s) look at regarding these comparisons?
7. Identify and explain all laws, rules, procedures, standards and guidelines on the discretion of your state's appeal court(s) to review the propriety of the lower court's decision, to re-sentence an offender on appeal, and to override a jury verdict.

- a. Does your state's appeal court(s) assess whether death was the appropriate sentence? For example, can the court re-weigh the aggravators and mitigators to assess whether death was the appropriate sentence?
  - i. If yes, has your state's appeal court(s) ever overridden a jury decision?
    - If yes, identify the case(s) and explain the disposition(s).
  - ii. If yes, has your state's appeal court(s) ever re-sentenced an offender on appeal?
    - If yes, identify the case(s) and explain the disposition(s).

## **B. Unitary Appeal States**

1. Identify and explain all laws, rules, procedures, standards, and guidelines on your state's unitary appeal process.

### **a. Direct Appeal**

- i. What are the time limitations for filing a direct appeal?
  - Are there any exceptions to the time limitations?
- ii. With what court(s) do eligible individuals file their direct appeals?
  - Where there can be review in two levels of appeal courts, what is the process for seeking review in the higher of these?
    - Is review there automatic or discretionary?
      - Where discretionary, what factors are used?
- iii. What claims **can and must** eligible individuals raise on direct appeal?
  - What claims, if any, are waived if they are not raised on direct appeal?
    - For example, are claims of ineffective assistance of counsel waived if not raised on direct appeal?
- iv. What is the scope of review performed on direct appeal?
  - What must be reviewed?
  - What can but needn't be reviewed?
    - If the court has discretion to overlook procedural default, or to examine matters, even if not raised on direct appeal, that are in the record, what does the court really do?
  - What cannot be reviewed?
- v. Identify and explain all laws, rules, procedures, standards, and guidelines bearing on the appropriate harmless error rule that should be used on appeal.
- vi. Identify and explain all laws, rules, procedures, standards, and guidelines on proportionality review in capital cases.

- Does your state’s appeal court(s) undertake a proportionality review?
    - If yes, what does the proportionality review entail? Specifically, does your state’s appeal court(s) compare the case under review to similar cases to evaluate whether a death sentence is disproportionate to sentences in other, similar cases?
      - Does your state’s appeal court(s) compare the case under review to cases in which the death penalty could have been sought but wasn’t?
      - Does your state’s appeal court(s) compare the case under review to cases in which the death penalty was not imposed and/or to cases in which it had been imposed?
      - Does your state’s appeal court(s) compare the case under review to cases that took place in similar geographic areas?
      - Does your state’s appeal court(s) compare the case under review to cases in which the defendants are of the same race, different race, and/or both?
      - Does your state’s appeal court(s) compare the case under review to cases in which there were more than one defendant?
    - If yes, what kinds of data does the court(s) look at regarding these comparisons?
- vii. Identify and explain all laws, rules, procedures, standards and guidelines on the discretion of your state’s appeal court(s) to review the propriety of the lower court’s decision, to re-sentence an offender on appeal, and to override a jury verdict.
- Does your state’s appeal court(s) assess whether death was the appropriate sentence? For example, can the court re-weigh the aggravators and mitigators to assess whether death was the appropriate sentence?
    - If yes, has your state’s appeal court(s) ever overridden a jury decision?
      - If yes, identify the case and explain the disposition.
    - If yes, has your state’s appeal court(s) ever re-sentenced an offender on appeal?
      - If yes, identify the case and explain the disposition.

*\*See supra* section VI, for questions on whether new counsel must be appointed on direct appeal

**b. State Post-Conviction Petition**

- i. What are the time limitations, if any, for filing a state post-conviction petition?
  - Are individuals required to file their state post-conviction petition at the same time they file their direct appeal?
    - If no, how long after filing a direct appeal, are individuals required, if there is a time limit, to file their state post-conviction petition? Are individuals required to file their state post-conviction petition prior to the disposition of the direct appeal?



- Are there any exceptions to the time limitations?
  - What are the repercussions, if any, of filing a late petition?
- ii. With which court should state post-conviction petitions be filed?
- Is it the same court where direct appeals are filed?
    - If yes, is the state post-conviction petition consolidated with the direct appeal?
- iii. What are the limitations, if any, to the types of claims that can be raised?
- iv. Identify and explain all laws, rules, procedures, standards, and guidelines on automatic stays of execution during the unitary appeal process.
- v. **Although this section discusses some of the procedural issues involved with state post-conviction petitions, please also obtain the information mentioned in section VIII, as it pertains to state post-conviction petitions under the unitary appeal system.**

*\*See supra* section VI, for questions on whether new counsel must be appointed for post-conviction petitions.

## **VIII. STATE POST-CONVICTION RELIEF PROCEEDINGS AND FEDERAL HABEAS CORPUS**

The availability of state post-conviction and federal habeas corpus relief through collateral review of state court judgments long has been an integral part of the capital punishment process. Numerous capital convictions and death sentences have been set aside in such proceedings as a result of, among others, successful claims of ineffective assistance of counsel, claims made possible by the discovery of crucial new evidence, claims based upon prosecutorial misconduct, and other constitutional holdings.

The importance of such collateral review to the fair administration of justice in capital cases cannot be overstated. Because many capital defendants receive inadequate counsel at trial and on direct appeal, state post-conviction proceedings often provide the first real opportunity to establish claims of innocence, pursue claims based upon newly developed facts, or prove constitutional errors that infected the earlier proceedings.

But if counsel for death row inmates fail to develop and present meritorious claims in state post-conviction proceedings, those claims generally are forfeited forever because no federal remedy exists for ineffective or even grossly incompetent state post-conviction counsel.

Additionally, securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal habeas corpus proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Among the latter are: a one-year statute of limitations on bringing federal habeas proceedings; tight restrictions on evidentiary hearings with respect to facts not presented in state court (no matter how great the justification for the omission) unless there is a convincing claim of innocence; and a requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts conclude that the rulings are erroneous.

In addition, U.S. Supreme Court decisions and the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA") have greatly limited the ability of a death row inmate to return to federal court a second time. Another factor limiting grants of federal habeas corpus relief is the more frequent invocation of the harmless error doctrine; under recent decisions, prosecutors no longer are required to show in federal habeas that the error was harmless beyond a reasonable doubt in order to defeat meritorious constitutional claims.

Changes permitting or requiring courts to decline consideration of valid constitutional claims, as well as the federal government's de-funding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage frivolous claims in federal courts. In fact, however, a principal effect of these changes has been to prevent death row inmates from having valid claims heard or reviewed at all.

State courts and legislators could alleviate some of the unfairness these developments have created if there were greater awareness of the changes and their unfair consequences. It generally is assumed that judicial review is an important means of ensuring the fairness of

the death penalty, but that assumption increasingly is wrong. Numerous rounds of judicial review may not result in consideration of the merits of the inmate's claims or even consideration of compelling new evidence that comes to light shortly before an execution. Under current procedures, a "full and fair judicial review" often does not include reviewing the merits of the inmate's claims.

To assess your state's post-conviction proceedings and federal habeas corpus, the Project recommends that your team obtain the information mentioned below to answer the following questions.

#### **A. Grounds for State Post-Conviction Relief**

1. Identify and explain all laws, rules, procedures, standards, and guidelines governing the grounds for state post-conviction relief.
  - a. What are the limitations, if any, to the grounds that can be raised?

#### **B. Time Limitations, Contents of Petition, and Second and Successive Petitions**

1. Identify and explain all laws, rules, procedures, standards, and guidelines on any statute of limitations for state post-conviction petitions.
  - a. How are your state post-conviction courts implementing the laws, rules, procedures, standards, and guidelines? Identify and explain all significant decisions.
2. Identify and explain all laws, rules, procedures, standards, and guidelines on the tolling of time limitations during periods that the defendant is not represented by counsel, including where s/he filed his/her petition pro se.
3. Identify and explain all laws, rules, procedures, standards, and guidelines detailing the required contents of a state post-conviction petition.
4. Identify and explain all rules on the filing of second and successive post-conviction petitions in capital cases.
  - a. Are second and successive post-conviction petitions allowed? If yes, when and under what circumstances?
  - b. How are your state courts applying the rules? Identify and explain all significant decisions.

#### **C. Stay of Execution**

1. Identify and explain the standards for obtaining a stay of execution during pendency of a state post-conviction petition.
  - a. When is a stay of execution necessary?

- b. How does any individual apply for a stay of execution?
  - i. Is this done orally or in writing?
    - What are the required contents, if any, of the request, either oral or written?
- c. What are the standards for securing a stay of execution?
- d. How are the standards implemented?
- e. How have the standards changed over the past five years?

#### **D. Evidentiary Hearings and Discovery**

1. Identify and explain all laws, rules, procedures, standards, guidelines on evidentiary hearings on the individual's state post-conviction petition.
2. Identify and explain all laws, rules, procedures, standards, guidelines on discovery in state post-conviction proceedings, including a judge's discretion to limit both the amount of time provided for discovery and the types of documents counsel is able to request and receive.
3. **\*Case Studies:** Select at least two to three cases in your state that are illustrative of evidentiary hearings and discovery for state post-conviction proceedings, then assess the following:
  - a. Was the petitioner granted a state post-conviction hearing?
  - b. How much time was provided for discovery?
  - c. What type of evidence could s/he present?

#### **E. Findings of Law and Fact**

1. Identify and explain all laws, rules, procedures, standards, guidelines on how the state post-conviction courts should make findings of law and fact.
  - a. Are the courts required to explicitly address issues of law and fact raised in the petition?
  - b. Are the courts required to fully explain the bases for the disposition of the claims?
  - c. Have there been any allegations/reports indicating that judges simply sign orders written by the state?

## F. Standards Used When Reviewing State Post-Conviction Petitions

1. Identify and explain all laws, rules, procedures, standards, and guidelines governing the standard that state courts should use when reviewing claims of state or constitutional error that were not properly raised at trial or on appeal.
  - a. What is the standard?
  - b. How are your state courts applying this standard? Identify and explain all significant decisions.
2. What standard do state courts use when reviewing errors of constitutional law that were not properly preserved at trial and/or on appeal that are included **in the initial state post-conviction application**?
  - a. How are your state courts applying this standard? Identify and explain all significant decisions.
3. Identify and explain all laws, rules, procedures, standards, and guidelines governing the harmless error standard that should be used by state courts in post-conviction proceedings.
  - a. What is the standard?
  - b. What is burden of proof?
  - c. How are your state courts applying this harmless error standard? Identify and explain all significant decisions.
4. How does your state handle claims that are technically defaulted?
  - a. Does your state consider defaulted claims?

## G. Retroactivity Rules

1. Identify and explain all state retroactivity rules pertaining to U.S. Supreme Court, lower federal court or state court decisions.
  - a. How are your state post-conviction courts applying the rules? Identify and explain all significant decisions.

*\*See supra* section VI, for questions on whether new counsel must be appointed for state post-conviction hearings.

## IX. CLEMENCY

Clemency is the act of a governor or state executive body either to commute a death sentence to life imprisonment or to grant a pardon for a criminal offense. The clemency process traditionally was intended to function as a final safeguard to evaluate thoroughly and fairly whether a person should be put to death. However, the process cannot fulfill that critical function when political considerations influence the exercise of clemency power.

It is essential that governors and clemency boards recognize that the clemency power requires an inquiry into the fairness of carrying out an execution in each case in which clemency is sought. In recent years, except in Illinois, clemency has been granted in substantially fewer cases than it was prior to the United States Supreme Court's 1972 decision in *Furman v. Georgia*, 408 U.S. 238 (1972), declaring the death penalty unconstitutional. Among the factors accounting for this decline include a changing political climate that encourages "tougher" criminal penalties and the erroneous belief that clemency is unnecessary today because death row inmates receive "super due process" in the courts.

In fact, the need for a meaningful clemency power is more important than ever. Because of restrictions on judicial review of meritorious claims, including those involving actual innocence, clemency often is a state's last opportunity to prevent miscarriages of justice. A clemency decisionmaker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decisionmaking.

To assess the clemency process in your state, the Project recommends that your team obtain the information mentioned below to answer the following questions.

### A. Clemency Decisionmakers

1. Identify and explain all laws, rules, procedures, standards, and guidelines on who is authorized to consider and recommend and/or grant clemency petitions.
  - a. Does the **governor possess the sole authority** to consider and grant clemency petitions?
    - i. If yes, how does s/he review clemency petitions?
      - Does s/he personally review the clemency petition and any supporting documents?
      - Does s/he investigate the petitioner and his/her case?
      - Does s/he interview and/or meet with the petitioner?
      - Does s/he discuss the case with the petitioner's family and friends?
      - Does s/he discuss the case with the victim's family and friends?
      - Does s/he discuss the case with the former prosecutor and/or defense attorneys?

- b. Does **an administrative board possess the sole authority** to consider and grant clemency petitions?
- i. If yes, answer the following questions:
    - Is the administrative board independent of the governor, or is the governor a member of the board?
    - How are these individuals selected to serve on the administrative board?
      - Are they appointed, popularly elected, or selected by other means?
    - For what length of time do these individuals serve on the board?
    - What type of training, if any, do these individuals receive?
  - ii. If yes, how does the administrative board review clemency petitions?
    - Does every member of the administrative board personally review the clemency petition and any supporting documents?
    - Does the administrative board possess the authority to investigate the clemency petition?
      - If yes, does the administrative board perform investigations?
    - Does the board possess the authority to conduct a clemency interview, meeting, and/or hearing?
      - If yes, does the administrative board conduct a clemency interview, meeting, and/or hearing?
    - Does the administrative board collectively discuss the petition or does each member of the board individually assess the petition without there being a meeting?
- c. Does **an administrative board possess the authority to consider clemency petitions and make clemency recommendations** to the governor, who then makes the final decision?
- i. If yes, answer the following questions:
    - Is the administrative board independent of the governor, or is the governor a member of the board?
    - How are these individuals selected to serve on the administrative board?
      - Are they appointed, popularly elected, or selected by other means?
    - For what length of time do these individuals serve on the board?
    - What type of training, if any, do these individuals receive?
  - ii. If yes, how does the administrative board review clemency petitions?
    - Does every member of the administrative board personally review the clemency petition and any supporting documents?
    - Does the administrative board possess the authority to investigate clemency petitions?
      - If yes, does the administrative board perform investigations?
    - Does the board/ possess the authority to conduct a clemency interview, meeting, or hearing?

- If yes, does the administrative board conduct a clemency interview, meeting, or hearing?
  - Does the administrative board discuss the petition as a board, or does each member of the board individually assess the petition without there being a meeting?
- iii. If yes, what weight, if any, is given to the administrative board's clemency recommendation?
  - Is a recommendation for clemency required before the governor can grant a clemency petition?
  - Is an administrative board's recommendation non-binding?
- 2. Identify and explain all laws, rules, procedures, standards, and guidelines governing conflicts of interest among clemency decisionmakers, where the board members include the attorney general and/or other prosecutors.
  - a. What method does the clemency authority use to identify and resolve conflicts of interest among the clemency board members/advisors?

**B. Clemency Petitions and Clemency Interviews, Meetings, and/or Hearings**

1. Identify and explain all laws, rules, procedures, standards, and guidelines on an individual's eligibility to file a clemency petition in a death penalty case.
  - a. Who is eligible to file a clemency petition in a death penalty case?
2. Identify and explain all laws, rules, procedures, standards, and guidelines on the required contents of a clemency petition in a death penalty case.
  - a. What information, if any, must be included in a clemency petition in a death penalty case?
  - b. What additional information can be included?
  - c. What information, if any, cannot be included in a clemency petition in a death penalty case?
  - d. What is the average length of a clemency petition in a death penalty case?
3. Identify and explain all laws, rules, procedures, standards, and guidelines on filing deadlines for clemency petitions in death penalty cases.
  - a. Are there any filing deadlines for clemency petitions in death penalty cases?
4. Since your state reenacted the death penalty, how many clemency petitions in death penalty cases have been filed?



5. Identify and explain all laws, rules, procedures, standards, and guidelines on whether death penalty clemency petitioners should be provided with clemency interviews, meetings, and/or hearings on the merits of their clemency petitions.
  - a. Are death penalty clemency petitioners guaranteed interviews, meetings, and/or hearings on the merits of their petitions?
    - i. If yes, are clemency petitioners notified of the date, time, and location of the interview, meeting, and/or hearing?
      - If yes, how far in advance are clemency petitioners notified of their interview, meeting, and/or hearing?
    - ii. If yes, where are the interviews, meetings, and/or hearings conducted?
      - Are the hearings formally conducted in public?
    - iii. If yes, who conducts the interview, meeting, and/or hearing?
    - iv. If yes, what is the structure of the interview, meeting, and/or hearing?
      - What is the role of the petitioner's counsel?
      - Can the clemency petitioner and/or his/her counsel make a statement?
      - Can the clemency petitioner and/or his/her counsel present evidence, including witnesses, in support of the petition?
      - Can the clemency petitioner and/or his/her counsel cross-examine witnesses?
    - v. If yes, how many death penalty clemency hearings have been held since your state reenacted the death penalty?
6. Since your state reenacted the death penalty, how many death penalty clemency petitions have been granted?
  - i. If one or more, who was granted clemency and for what reason(s) was clemency granted?
  - ii. Where clemency was denied in death penalty cases, what, if any, reasons were given – formally or to the press?

**C. Types of Documents Provided to Death Penalty Clemency Decisionmakers Regarding Petition**

1. Identify and explain all laws, rules, procedures, standards, guidelines, and public policies regarding the types of documents that should be provided to the clemency decisionmakers to assist them in assessing the death penalty clemency petition.
  - a. What types of documents must be provided to death penalty clemency decisionmakers?

- i. Must they be provided with a copy of the clemency petition?
  - ii. Must they be provided with all documents supporting the clemency petition?
  - iii. What other documents, if any, must be provided to the clemency decisionmakers?
- b. What additional documents, if any, can be provided to them?
  - c. What documents, if any, cannot be provided to them?
  - d. How much documentation do clemency decisionmakers actually see?

#### **D. Scope of Review Recommended AND Scope of Review Actually Performed**

*\*Note: In terms of the scope of review actually performed, some of this information may be inferred from actual outcomes.*

1. Identify and explain all laws, rules, procedures, standards, guidelines, and public policies on the recommended scope of review that should be followed when assessing death penalty clemency petitions.
  - a. Is there a recommended scope of review that should be followed?
    - i. If yes, what is the scope of review **in theory and in practice**?
      - Can and do clemency decisionmakers consider policies set forth publicly regarding the appropriate scope of review?
      - Can and do clemency decisionmakers consider patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction?
      - Can and do clemency decisionmakers consider clemency petitioners' ages at the time of the offense?
      - Can and do clemency decisionmakers consider clemency petitioners' mental retardation, mental illness, and/or competency to be executed?
      - Can and do clemency decisionmakers consider evidence of petitioners' innocence not raised at trial?
      - Can and do clemency decisionmakers consider lingering doubts of guilt?
      - Can and do clemency decisionmakers consider all mitigating evidence, regardless of whether it was raised at trial?
      - Can and do clemency decisionmakers consider clemency petitioners' possible rehabilitation and performance while on death row?
      - Can and do clemency decisionmakers consider claims that were barred in court proceedings due to procedural default, non-retroactivity, abuse of writ, statutes of limitations, or similar doctrines?

- Can and do clemency decisionmakers consider constitutional claims whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not “unreasonable,” state court decisions?

b. If no, how does the governor or administrative board make its decision?

#### **E. Clemency Decisions**

1. How long do death penalty clemency decisionmakers have to make their decisions?
2. How long after filing a death penalty clemency petition is the average petitioner informed of the clemency decision?
3. Identify and explain all laws, rules, procedures, standards, and guidelines on the manner in which death penalty clemency decisions should be communicated to the petitioner.
  - a. How are clemency petitioners informed of the clemency decision?
4. Identify and explain all laws, rules, procedures, standards, and guidelines on the contents of a death penalty clemency decision.
  - a. Is the clemency petitioner provided with reasons for the decision?
  - b. If an administrative board makes a clemency recommendation to the governor, is the petitioner informed of the board’s recommendation as well as the governor’s decision?

#### **F. Politics and Clemency Decisions**

1. Identify and explain all procedures intended to insulate clemency decisions from political considerations.

#### **G. Appointment and Compensation of Counsel During the Clemency Process**

1. Identify and explain all laws, rules, procedures, standards, and guidelines governing the duty of the state or county to provide death penalty clemency petitioners with counsel.
  - a. Does the state authorize the appointment and/or compensation of counsel?
2. Identify and explain all laws, rules, procedures, standards, and guidelines governing who or what organization or governmental body is authorized to appoint counsel in death penalty clemency proceedings.
3. Identify and explain all laws, rules, procedures, standards, and guidelines governing the timing of appointment.

- a. At what point in the death penalty clemency process is the appointment of counsel authorized?
4. Identify and explain the procedures attorneys must follow in order to obtain compensation.
5. Identify and explain all laws, rules, procedures, standards, and guidelines governing the point during the process at which death penalty clemency attorneys should be compensated for their services.

#### **H. Investigators and Experts Witnesses**

1. Identify and explain all laws, rules, procedures, standards, and guidelines governing the duty of the state or county to provide death penalty clemency petitioners with investigators and/or expert witnesses.
2. Identify and explain all laws, rules, procedures, standards, and guidelines on when in the process the death penalty clemency petitioner should be provided with investigators and/or expert witnesses.

#### **I. \*Case Studies:** Select at least two to three cases in your state that are illustrative of the death penalty clemency process in your state, then assess the following:

1. Was the clemency petitioner represented by counsel?
  - a. If yes, when was s/he appointed?
  - b. If yes, how was s/he compensated?
  - c. If yes, when was s/he compensated?
  - d. If yes, how much was s/he compensated?
  - e. If yes, did s/he request investigators, experts, etc?
    - i. If yes, were his/her requests fulfilled?
      - If yes, who compensated these individuals; when were they compensated; and how much were they compensated?
2. What did the clemency petition entail?
  - a. How long was the petition?
  - b. Did the petition cite statutes and cases?

3. When did the inmate file the clemency petition?
4. Did the clemency petitioner meet with the clemency decisionmakers?
  - a. Did the decisionmakers interview the clemency petitioner?
    - i. If yes, when was the petitioner informed of the interview?
    - ii. If yes, was the interview conducted in person?
    - iii. If yes and if represented, was the petitioner's attorney present?
  - b. Did the decisionmakers meet with the clemency petitioner in person?
    - i. If yes, when was the petitioner informed of the meeting?
    - ii. If yes and if represented, was the petitioner's attorney present?
  - c. Did the decisionmakers hold a hearing on the clemency petition?
    - i. If yes, when was the petitioner informed of the hearing?
    - ii. If yes, was the hearing conducted in public?
    - iii. If yes and if represented, was the petitioner's attorney present?
    - iv. If yes, did the petitioner present evidence?
  - d. What evidence did the clemency decisionmakers consider when making their decision?
  - e. How soon after filing the clemency petition did the clemency decisionmakers make a decision?
  - f. How was the decision communicated to the clemency petitioner?
  - g. Did the clemency decision explain the reasons for denial or grant?
    - i. If yes, what were the reasons?

## X. JURY INSTRUCTIONS

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the "awesome responsibility" of deciding whether another person will live or die. *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985). Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors' decisionmaking. Often, however, sentencing instructions are poorly written and conveyed. As a result, instructions often serve only to confuse jurors, not to communicate.

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. Some trial courts, whether intentionally or not, give instructions that may lead jurors to misunderstand their responsibility or to believe that reviewing courts independently will determine the appropriate sentence. In some cases, jurors conclude that their decisions are not vitally important in determining whether a defendant will live or die.

It also is important that courts ensure that jurors make their decisions based upon accurate facts. For example, if jurors do not believe that a sentence of "life without parole" really means that the offender will remain in prison for the rest of his life, or if they substantially underestimate the amount of time that a life-sentenced offender must serve before becoming eligible for parole, they misguidedly may impose a death sentence to ensure the person never will be free without realizing that they could have accomplished the same result by sentencing the offender to life in prison. Nowhere is a miscarriage of justice more likely than in a capital case in which jurors mistakenly believe that a defendant who is not sentenced to death may be released within a few years.

To assess your state's pattern jury instructions, the Project recommends that your team obtain the information mentioned to answer the following questions.

- A. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law on the selection of a capital jury, including any pattern questions, if any, that the judge is recommended and/or required to ask during voir dire.
  1. Are there limitations to the types of questions that may be asked during voir dire?
  2. Does the court have the discretion to limit the types of questions that may be asked during voir dire?
  3. On what grounds can a potential witness be excluded from the jury?
- B. Identify and explain the current pattern jury instructions for capital cases and all prior versions. Once you obtain the current pattern capital jury instructions, including guilt and sentencing phases, and all prior amendments, photocopy all documents that cannot be obtained on the Internet and send them to the Project.

### C. Content of the Pattern Jury Instructions

*Note: See infra section XIV, for questions on the definition of insanity and its burden of proof as well as the burden of proof for “guilty but mentally ill.”*

1. How are mitigating factors explained in the pattern jury instructions?
  - a. Do the instructions define “mitigation” and “mitigating factors”?
  - b. Identify and explain the list of mitigating factors.
    - i. Do the instructions explain that the list is not exhaustive?
    - ii. Do the pattern jury instructions explain that the jurors can and must consider “any aspect of a defendant’s character or record and any of the circumstances of the offense” that could be “the basis for a sentence less than death?”
    - iii. Do the pattern jury instructions explain that mental illness is a mitigating factor, not an aggravating factor, in a capital case? *See infra* section XV, including questions on the treatment of the mentally retarded and mentally ill.
    - iv. Do the pattern jury instructions explain that the offender’s juvenile status is a mitigating factor? *See infra* section XIV, including questions on the death penalty and juvenile offenders.
  - c. Do the pattern jury instructions explain how “mitigating factors” should be considered?
    - i. Do the pattern jury instructions explain defendants’ burden of proof with regard to mitigating factors?
    - ii. Do the pattern jury instructions explain the difference between the burden of proof that applies to a juror’s finding of a mitigating factor and the burden that applies to a jury’s finding of an aggravating factor?
    - iii. Do the pattern jury instructions explain that a juror can act on his/her belief that a mitigating factor exists, regardless of whether other jurors agree?
2. How are “aggravating factors” explained in the pattern jury instructions?
  - a. Do the pattern jury instructions define “aggravating factor”?
    - i. Do the pattern jury instructions explain the difference between the legal meaning of “aggravating” and its meaning in everyday usage?

- b. Identify and explain the list of aggravators found in the pattern jury instructions.
  - i. How have courts interpreted the aggravators?
  - ii. Where future dangerousness is an aggravator, what kind of evidence is allowed on both sides?
  - iii. Where future dangerousness is an aggravator, do the pattern jury instructions explain that mental illness should not be a factor in supporting such a finding?
  - iv. Do the pattern jury instructions explain that the list of aggravating factors is exhaustive OR not exhaustive?
- c. Do the pattern jury instructions explain how aggravating factors should be considered?
  - i. Do the pattern jury instructions explain that each aggravating factor must be established beyond a reasonable doubt?
  - ii. Do the pattern jury instructions explain that jurors must be unanimous in finding an aggravating factor?
- 3. Do the pattern jury instructions indicate that it is improper for the jury to consider any racial factors in its decisionmaking and that it should report any evidence of racial discrimination in jury deliberations? *See infra* section XII, including questions on racial and ethnic minorities and the death penalty.
- D. Do the pattern jury instructions require the jury to weigh the aggravating factors against all mitigating factors to determine whether death is appropriate (**weighing state**), **OR** do the instructions require the jury to assess the existence of aggravating circumstances, but do not require the jury to balance the aggravating factors against the mitigating factors (**non-weighing state**)?
  - 1. If your state is a **weighing state**, how is the weighing process explained in the pattern jury instructions?
    - a. Do the pattern jury instructions explain that in weighing aggravating and mitigating factors, the relative number of aggravating versus mitigating factors is not determinative of the outcome?
  - 2. If your state is a **non-weighing state**, do the jury instructions explain that the jury is not required to sentence the defendant to death upon finding the existence of at least one aggravating factor, but rather that they may sentence the defendant to a lesser sentence, despite such finding?
- E. Identify and explain all laws, rules, procedures, standards, and guidelines on a **judge's duty** to instruct the jurors concerning the "awesome power" to decide



between life and death.

- F. Identify and explain all laws, rules, procedures, standards, guidelines, and case law governing a **judge's duty** to explain alternative punishments.
1. Is "life without parole" a sentencing option in every death penalty case?
  2. Is the judge required to explain the meaning of "life without parole"?
    - a. Are there pattern jury instructions on this?
      - i. If yes, what do they say?
  3. In cases where a sentence of less than life without parole is available, is the judge required to instruct the jury on the minimum length of time that a capital defendant must serve before s/he would be eligible for parole?
    - a. Are there pattern jury instructions on this?
      - i. If yes, what do they say?
  4. In cases where a sentence of less than life without parole is available, is the judge required to instruct the jury on the actual parole practices in the jurisdiction?
    - a. Are there pattern jury instructions on this?
      - i. If yes, what do they say?
  5. In cases in which jurors ask what would happen under a "life with parole" sentence, or a "life without parole", or a "life" sentence, or if there is a "hung" jury regarding sentence, is the judge required to explain the meaning of "life with parole," "life without parole," or a "life" sentence and/or the actual parole practices in the jurisdiction?
    - a. Are there pattern jury instruction on this?
      - i. If yes, what do they say?
- G. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law on a **judge's duty** to explain that residual doubt about defendant's guilt should be considered a mitigating factor?
1. Are there pattern jury instructions on this?
    - a. If yes, what do they say?
- H. Identify and explain all laws, rules, procedures, standards, and guidelines on victim impact testimony.

1. Is victim impact testimony allowed?
  - a. If yes, what are the limitations, if any, to the types of testimony allowed?
  - b. Are there pattern jury instructions regarding the extent to which such testimony may be used?
    - i. If yes, what do they say?
  
- I. Identify and explain all laws, rules, procedures, standards, and guidelines governing how judges should instruct the jury after they have been deliberating for an extended period of time.
  1. Are there pattern jury instructions on this?
    - a. If yes, what do they say?
  2. How should judges address juror's questions regarding what would happen if there was a non-unanimous verdict?
  
- J. Challenges to the Pattern Jury Instructions
  1. Have there been any challenges raised against the pattern jury instructions over the last ten years?
  2. Has a court ever found the pattern jury instructions, or any part of the instructions, to be invalid?
  
- K. Is your state currently monitoring the extent to which jurors understand the pattern jury instructions?
  1. Identify and **briefly** explain all studies exploring the extent to which jurors understand the pattern jury instructions in your state.
  2. Is your state currently revising the pattern jury instructions and monitoring the extent to which jurors understand the revised instructions to permit further revision as necessary?
  
- L. Are there particular jury instructions that have been frequently requested by defense counsel, but denied by trial judges in capital cases?
  
- M. Identify and explain all laws, rules, procedures, standards, and guidelines governing the manner in which the jury instructions should be communicated to the jury; for example, are courts required to provide jurors with written copies of the instructions?
  1. Have there been any challenges raised regarding the manner in which the instructions were communicated to the jury? If yes, what was the outcome?

- N. Identify and explain all laws, rules, procedures, standards, and guidelines governing how judges should respond to jurors' questions regarding the content of the jury instructions.
1. Do the laws, rules, procedures, standards, and guidelines require the judge to explain the instructions rather than merely repeat the instructions?
  2. Have there been any challenges raised based on a judge's refusal to answer jurors' questions?
- O. Identify and explain all laws, rules, procedures, standards, and guidelines on testimony regarding alternative sentences during the sentencing phase of the proceedings.
1. Are jail officials, parole officers, and/or others with knowledge of alternative sentences permitted to testify about parole practices and/or the prison conditions facing those serving life sentences to clarify jurors' understanding of alternative sentences?
- P. Has a **juror ever alleged** that there was misconduct among the jury, including, but not limited to, a foreperson misreporting a non-unanimous verdict, jurors ignoring a vote for a life sentence by one juror, or racism during jury deliberations? *See infra* section XII, including questions on whether there are any documented cases in your state in which race interfered with jury deliberations.
- Q. Has a **court in your state ever found, or not reached on the merits a claim of** misconduct among the jury including, but not limited to, a foreperson misreporting a non-unanimous verdict, jurors ignoring a vote for a life sentence by one juror, or racism during jury deliberations?
1. If yes, have relief ever been granted, or has it been denied due to procedural default, anti-successor rule, or harmless error?

## **XI. JUDICIAL INDEPENDENCE AND VIGILANCE**

Judicial independence assumes that judges will decide cases to the best of their abilities without political or other bias and, where necessary to protect the constitution and laws, in the face of official and public opposition. However, elections, appointments, and confirmations of judges increasingly are being influenced by consideration of judicial nominees' or candidates' purported views on the death penalty or of judges' decisions in capital cases.

During election campaigns, judicial candidates increasingly seem to be expected to assure the public that they will be “tough on crime,” that they will impose the death penalty whenever possible and that, if appellate judges, they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of decisions that are unpopular even though they are based upon a reasonable, or even binding, application of law. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases.

This erosion of judicial independence increases the possibility that judges will be selected, elevated, and retained in office by a process that ignores the larger interests of justice and fairness, and instead focuses narrowly on the alleged conduct of capital defendants. As a result, some judges may decide cases not on the basis of their best understanding of the law, but rather on the basis of the effects of their decisions on their careers. Others will act independently—some at the expense to their careers. Either way, judicial independence is sacrificed.

Judges also are expected to be vigilant against conduct that undermines justice, particularly prosecutorial misconduct and incompetent representation by defense counsel. Where judges witness prosecutorial misconduct, they have an obligation to take effective measures both to remedy the harm and to prevent such conduct in the future.

Judges also should ensure that defendants receive a full and effective defense. Judges who appoint incompetent counsel or ignore evidence of incompetence in their courts contribute to the miscarriage of justice. Judges serve as the nation's front line against injustice and unfairness; that function is never more important than in a capital case.

To assess judicial independence and vigilance in your state, the Project recommends that your team obtain the information mentioned below to answer the following questions.

- A. Identify and explain all laws, rules, procedures, standards, and guidelines governing the method by which judges are selected; for example, are judges elected or appointed.
- B. Has a judicial candidate, or anyone else, alleged that during the judicial appointment process, the governor or a member of his/her staff or nominating body asked the judicial candidate questions about his/her opinion on any aspect of the death penalty system, including his/her position on the death penalty, habeas corpus, and/or the harmless error doctrine, or indicated that if a judicial candidate has a certain view then s/he would not be appointed?

- C. Identify and explain all laws, rules, procedures, standards, and guidelines in each jurisdiction on the allowable topics of discussion during a judicial campaign, including a judicial candidate's position on the death penalty, decisions in past capital cases, promises of guilty verdicts or death sentences in future death penalty cases, and promises concerning future decisions involving the harmless error doctrine.
1. Have any judges campaigned on the fact that they have sentenced a certain individual(s) to death?
  2. Have any judges campaigned on the fact that they have sentenced a certain number of individuals to death?
  3. Have any judicial candidates made promises concerning future decisions affecting capital cases?
  4. Have any judicial candidates made promises concerning future decisions involving the harmless error doctrine?
  5. Have ethics proceedings ever been initiated against a judge for making promises concerning future decisions affecting capital cases?
- D. Are there any documented instances in which the death penalty has been a decisive issue in the election or appointment of a judge? For example, has a judicial candidate ever been defeated or passed over because of his/her position or past decision on the death penalty, habeas corpus, or the harmless error doctrine?
- E. Have there been any studies, reports, or newspaper articles identifying a correlation between the timing of death penalty proceedings and election years and/or death verdicts and election years and/or death penalty case affirmance rates and election years in your state?
- F. Are judges who preside over capital cases required to participate in special training on death penalty law and procedure?
- G. Have any judges who presided over capital cases been the subject of ethics proceedings?
1. If yes, what were the allegations?
  2. If yes, was the disposition of the proceedings?
- H. Have any judges been publicly criticized for their rulings in death penalty cases?
1. If yes, by whom? What was the nature of the criticism?
  2. If yes, what did the bar associations and/or community leaders do to protect his/her

judicial independence? Did they speak out in support of the sitting judge?

3. If yes, how have the criticisms or protective actions impacted elections, retentions, and appointments to higher courts?
- I. Identify and explain all laws, rules, procedures, standards, guidelines governing how a judge should remedy defense counsel incompetence or prosecutorial misconduct.
1. Are judges authorized to sanction prosecutors and defense attorney for such behavior?
  2. Are judges required to report such behavior?
  3. Have there been any documented instances of judges taking measures to remedy the harm and prevent such harm from occurring in the future?

## **XII. RACIAL AND ETHNIC MINORITIES AND THE DEATH PENALTY**

In the past twenty-five years, numerous studies have found that race is often a major explanatory factor concerning decisions to seek and impose the death penalty. Most of the studies have found that, holding other factors constant, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is African-American. Studies also have found that in some jurisdictions, the death penalty has been sought and imposed more frequently in cases involving African-American defendants than in cases involving white defendants.

In 1987, the U.S. Supreme Court ruled in *McCleskey v. Kemp*, 481 U.S. 279 (1987), that such evidence of systemic racial disparity in capital cases does not establish a federal constitutional violation. At the same time, the Court invited legislative bodies to consider adopting legislation that would permit courts to grant relief to defendants based upon the type of evidence of systematic racial disparity presented in *McCleskey*.

The pattern of racial discrimination persists today, many jurisdictions, in part because courts often tolerate actions by prosecutors, defense lawyers, trial judges, and juries that can infect the entire trial process with a racial impact. Specific problem areas include discrimination by prosecutors in choosing which cases to notice as death penalty cases; ineffective assistance of counsel in not objecting to systemic discrimination and in failure to pursue discrimination claims; discriminatory use of peremptory challenges to obtain all-white or largely all white juries; racial insensitivity or outright racism of jurors, judges, prosecutors, law enforcement officials, and defense lawyers; and the lack of a reliable mechanism for defendants to raise and get decisions on the merits of claims of racial discrimination.

There is little dispute about the need to strive to eliminate race as a factor in the administration of the death penalty. To eliminate the impact of race in death penalty administration, the ways in which race infects the system must be identified and strategies must be devised to root out the discriminatory practices.

To assess the impact of racial discrimination on the administration of the death penalty in your state, obtain the information mentioned below to address the following questions.

- A. Identify and explain your state's racial justice act, or other legislation addressing systematic racial discrimination in capital sentencing, or in sentencing generally.
  1. If your state does not have a racial justice act, has one ever been introduced in the legislature?
    - a. If yes, identify the bill(s) and describe the history.
- B. Is your state collecting and maintaining data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases?
  1. If yes, who is collecting the data; how is it being collected; and where is it being

stored?

2. If the data is being collected for some but not all cases, who is collecting the data; how much is being collected; how is it being collected; and where is it being stored?
- C. Is your state collecting and reviewing all studies already undertaken to determine the impact of race on the administration of the death penalty?
- D. Is your state conducting any studies that would help determine racial impacts on capital cases?
- E. Apart from the materials included in your binder(s), identify all studies and reports on the impact of race on the administration of the death penalty in your state.
- F. Racial Composition of Attorneys and Judges
1. What is the current racial composition of attorneys who the state or county deem qualified to defend capital cases by county/jurisdiction?
  2. What is the current racial composition of prosecutors who the state or county deem qualified to handle capital cases by county/jurisdiction?
  3. What is the current racial composition of judges who handle capital cases by county/jurisdiction?
- G. Education and Training
1. Has your state developed and implemented educational programs applicable to all parts of the criminal justice system, including law enforcement officers, prosecutors, defense attorneys, and judges, to stress that race should not be a factor in any aspect of the death penalty administration?
  2. Does your state or counties train defense counsel to identify and develop racial discrimination claims in capital cases and to identify biased jurors in *voir dire*?
    - a. If yes, is the training mandatory?
- H. Systematic Claims of Racial Discrimination
1. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law on when claims of racial discrimination can be raised.
  2. Have any systematic claims of racial discrimination in capital cases been raised in your state during grand jury or jury selection?
    - a. If yes, what was the claim, the alleged factual basis for it, and how was it resolved?



3. Have any systematic claims of racial discrimination in capital cases been raised in your state at trial?
    - a. If yes, what was the claim, the alleged factual basis for it, and how was it resolved?
  4. Have any systematic claims of racial discrimination been raised in your state during appeal?
    - a. If yes, what was the claim, the alleged factual basis for it, and how was it resolved?
  5. Have any systematic claims of racial discrimination been raised in your state during state post-conviction proceedings and/or federal habeas corpus?
    - a. If yes, what was the claim, the alleged factual basis for it, and how was it resolved?
- I. Actions of Attorneys, Judges, and Jurors.
1. Are there any documented instances in your state in which a prosecutor or defense attorney referenced race at any time during a capital case?
  2. Are there any documented instances in your state in which race was considered during jury deliberations?
    - a. If yes, in what ways was it considered?
    - b. If yes, what, if anything, was done to consider the impact on deliberation?
      - i. If nothing, why not?
  3. Have any judges recused themselves from a capital case in response to claims of judicial bias based on racial discrimination?
  4. Have any courts found that state actors have acted on the basis of race in a capital case?
    - a. Identify and discuss all cases in which an appellate court overturned a death sentence based on a *Swain v. Alabama*, 380 U.S. 202 (1965) or *Batson v. Kentucky*, 476 U.S. 79 (1986), violation since your state reenacted the death penalty. \*See *supra* section X for questions on jury selection.

### XIII. JUVENILE OFFENDERS

The American Bar Association opposes the execution of individuals for crimes they committed when under the age of 18 ("juvenile offenders"). See Recommendation Against Executing Juvenile Offenders, Annual Meeting 1983, available at <http://www.abanet.org/crimjust/juvjus/jdppolicy.html>. See also Recommendation 101D, Mid-Year Meeting 2002, at <http://www.abanet.org/crimjust/policy/cjpol.html#my02101d>.

In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the United States Supreme Court held that the execution of offenders younger than 16 years old at the time of their crimes is "cruel and unusual" punishment under the Eighth Amendment. In *Stanford v. Kentucky*, 192 U.S. 361 (1989), however, the Court concluded that the Eighth Amendment does not prohibit execution of juveniles who were at least 16 years old at the time they committed capital offenses.

In January 2004, the Court granted *certiorari* in *Roper v. Simmons*, No. 03-633, to re-examine whether executing offenders who were 16 or 17 years old at the time of the offense violates the Eighth Amendment's ban on cruel and unusual punishment. The Court is scheduled to hear oral arguments in *Roper* in Fall 2004.

From January 1973 through June 2004 in this country, states have imposed a total of 227 death sentences upon juvenile offenders. Appellate courts have reversed a majority of these sentences but, between January 1973 and June 2004, seven states--Texas, Louisiana, South Carolina, Georgia, Virginia, Oklahoma, and Missouri--executed 22 individuals for crimes committed as juveniles. As of June 2004, 72 inmates were on death row for crimes they committed as juveniles. See Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions For Juvenile Crimes, January 1, 1973-June 30, 2004*, available at <http://www.law.onu.edu/faculty/streib/documents/JuvDeathJune302004NewTables.pdf>.

States have the power to change the administration of the death penalty in juvenile offender cases. Of course, states also are free to set the minimum age for capital punishment higher than 16 years old; indeed, 21 of the 40 death penalty jurisdictions--38 states and the federal government (both civilian and military)-- that authorize capital punishment have set the minimum age at 18.

Since 1990, other countries that have executed juvenile offenders include China, Democratic Republic of Congo, Iran, Pakistan, Saudi Arabia, and Yemen. Those countries together have executed a total of 10 juvenile offenders. In the same period, there have been 19 such executions in the United States. The United States has signed, but not ratified, the United Nations Convention on the Rights of the Child, which bars capital punishment for juveniles; in doing so, the United States has deferred to the individual states concerning application of the death penalty to juvenile offenders.

To assess juvenile offenders and the death penalty in your state, the Project recommends that your team obtain the information mentioned below to answer the following questions.

A. Identify and explain the current laws pertaining to the transfer of juveniles from juvenile

court to adult court and all prior versions of these laws over the past twenty years. Once you obtain the current and prior laws, photocopy the documents that cannot be obtained on the Internet and send them to the Project.

1. Prior to your state enacting its first law permitting juvenile transfer to adult court, how did your state try and punish juveniles who committed serious offenses, such as homicide?
  - a. What were the possible punishments?
    - i. Could these juveniles be sentenced to numerous years of imprisonment?
    - ii. Could these juveniles be sentenced to life imprisonment?
    - iii. Could these juveniles be sentenced to death?
      - If yes, were any of these juveniles sentenced to death?
        - If yes, describe the date of the murder, the date of the sentence, the county/jurisdiction in which the sentence was imposed, and the current status of the sentence.
2. In what year did your state first enact a juvenile transfer law?
3. How have your state's juvenile transfer laws evolved over the past twenty years?
4. What mechanism does your state currently use to transfer juveniles from juvenile court to adult court? **Identify and explain the mechanism.**
  - a. Is a judicial waiver used to transfer juveniles from juvenile court to adult court?
    - i. If yes, explain the mechanism.
      - What criteria should the juvenile court judge consider when deciding the appropriate jurisdiction?
  - b. Is a legislative waiver (also known as "statutory exclusion") used to transfer cases from juvenile court to adult court?
    - i. If yes, explain the mechanism.
      - Identify and explain any age limitations and the list of offenses that automatically exclude juveniles from juvenile court (thereby transferring them to adult court).
  - c. Is a prosecutorial waiver (also known as "a direct file") used to transfer cases from juvenile court to adult court?
    - i. If yes, explain the mechanism.
      - Are there any limitations to prosecutors' discretion to file a juvenile case in adult court?

- d. Is a combination of two or more of the mechanisms used to transfer cases from juvenile court to adult court?
    - i. If yes, explain the interplay between the mechanisms; for example, is one mechanism used more often than the others?
  - e. Is a mechanism other than those mentioned above used to transfer juveniles to adult court?
    - i. If yes, explain the mechanism.
  - 5. Since your state enacted its first juvenile transfer law, how many juveniles have been transferred to adult court and with what mechanism were they transferred?
- B. Since your state reenacted the death penalty, how many juveniles have been charged with a capital offense?
- 1. Of the juveniles charged with a capital offense, how many were sentenced to death?
    - a. For each case, describe the date of the murder, the date of the sentence, the county/jurisdiction in which the sentence was imposed, and the current status of the sentence.
    - b. Have any of these sentences been commuted?
      - i. If yes, what was the reason given for the commutation?
    - c. How many juveniles have been executed?
    - d. How many juveniles, if any, have died on death row?
- C. Identify and explain all laws relating to barring or limiting the execution of juvenile offenders.

## XIV. MENTALLY RETARDED AND MENTALLY DISABLED OFFENDERS

### A. Mentally Retarded

1. Identify and explain all legislation and leading case law in your state restricting or banning the imposition of the death penalty upon individuals who have mental retardation.
  - a. Do your state statutes or case law exclude from the death penalty or from execution an individual with mental retardation?
2. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law governing the definition of “mental retardation” that should be used by your state in capital cases.
  - a. What definition of “mental retardation” is used by your state for other purposes, such as disability?
    - i. How do the definitions compare?
3. Identify and explain all laws, rules, procedures, standards, and guidelines governing the duty of the state or county to train police officers, prosecutors, and/or defense counsel to assess whether an individual has mental retardation.
  - a. Does your state or counties offer training in assessing whether an individual suffers from mental retardation?
    - i. If yes, which group of individuals, if any, receives the training: police officers, prosecutors, and/or defense counsel?
      - Is the training mandatory for any of these groups?
4. Identify and explain all laws, rules, and procedures governing the protection of mentally retarded persons charged with crimes in your state.
  - a. Has your state police department/bureau of investigation and county police departments adopted mechanisms to ensure that the *Miranda* rights of mentally retarded persons are protected?
  - b. Has your state police department/bureau of investigation and county police departments adopted procedures for assessing the competence of the suspect before taking a confession?
  - c. Has your state adopted any laws, rules, standards, or guidelines to ensure that during court proceedings, the rights of mentally retarded persons are protected against “waivers” that are the product of their mental retardation?
5. Identify and explain all laws, rules, procedures, standards, and guidelines

governing at what phase(s) of the capital proceedings a defendant **can raise** a claim of mental retardation.

6. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law governing the burden of proof regarding mental retardation.
  - a. Who has the burden of proof?
  - b. What is the burden of proof?
  - c. What rules of evidence apply?
  - d. What evidence is admissible?
    - i. Is evidence of the crime admissible?
      - If yes, under what circumstances?
      - If yes, with what restrictions?
        - With what jury instructions?
    - ii. Can the defense present new and/or old evidence regarding the crime or confession?
      - If yes, under what circumstances?
      - If yes, with what restrictions?
        - With what jury instructions?
7. Identify and explain all laws, rules, procedures, standards, and guidelines governing who is authorized to assess and decide whether an offender is mentally retarded.
8. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law governing at what point(s) during the case should/can a determination of mental retardation be made.
9. Identify and explain all laws, rules, procedures, standards, and guidelines governing the resources available to defense counsel regarding mental retardation, including investigators, experts on mental retardation, rebuttal experts, and discovery of records that may bear on the individual's mental retardation.
  - a. Are requests for resources made *ex parte*?
  - b. What resources actually are provided?

*Note: If there is a statewide system for providing defense services, address these questions based on that system. However, if a statewide system does not exist, address these questions for the **selected group of counties** chosen in section VI.*

10. Have any defendants charged with a capital offense or any death row inmates raised claims of mental retardation in your state?

- a. If yes, when during the proceeding was the issue raised?
  - b. If yes, when during the proceeding was a determination about mental retardation made?
  - c. If yes, who decides the issue of mental retardation?
  - d. If yes, have any of the defendants been found to be mentally retarded?
    - i. If yes, discuss the decision.
    - ii. If no, what was the basis for the rejection of the claim, or settlement, or mistrial?
11. What is your state's procedure for handling claims of mental retardation from individuals who were on death row when the United States Supreme Court banned the execution of the mentally retarded in *Atkins v. Virginia*, or when the state banned such executions?
- a. What are the required contents of the claim?
  - b. What is the inmate's burden of proof?
    - i. Is there a burden of production before the inmate can get a hearing on the issue?
  - c. Where does the inmate file a claim?
  - d. What are the time limitations on filing a claim?
  - e. What types of resources are provided to the inmate to develop his/her claim, such as investigators, experts on mental retardation, rebuttal experts, and discovery of records that may bear on the individual's mental retardation?
    - i. Are requests for resources made *ex parte*?
    - ii. What resources actually are provided?

*Note: If there is a statewide system for providing defense services, address these questions based on that system. However, if a statewide system does not exist, address these questions for the **selected group of counties** chosen in section VI.*
  - f. Who decides the issue of mental retardation?
  - g. When is the decision made?

## **B. Mentally Disabled**

1. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law governing the definition of “mental disability” or “mental illness” that should be used by your state in capital cases.
2. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law governing the definition of “insanity.”
  - a. How is “insanity” explained in the criminal jury instructions?
  - b. What is the burden of proof as to sanity?
3. Identify and explain all legislation and leading case law in your state excluding mentally disabled persons from the death penalty.
  - a. Does your state exclude from the death penalty or from execution individuals who have a history of any particular mental disability or were suffering from any particular mental disability at the time of the offense?
  - b. Does your state exclude from the death penalty or from execution individuals who would meet your state’s definition of mental retardation, except that their brain injury and adaptive behavior deficits occurred after the age of 18?
  - c. Does your state exclude from the death penalty or from execution individuals who either plead or are found “guilty but mentally ill”?
    - i. To whom does it apply?
    - ii. What is the burden of proof?
    - iii. What impact does it have?
4. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law governing the burden of proof regarding mental disability.
  - a. Who has the burden of proof?
  - b. What is the burden of proof?

*Note: This question is relevant to #2 above and section D below.*

5. Identify and explain all laws, rules, procedures, standards, and guidelines governing the resources available to defense counsel regarding mental disability, including investigators, experts on mental disability, rebuttal experts, and discovery of records that may bear on the individual’s mental illness.
  - a. How do defense counsel submit requests for resources?



- b. Are requests for resources made *ex parte*?
- c. Is a preliminary showing needed before resources will be authorized?
- d. What resources are actually provided to defense counsel in these types of cases?

*Note: This question is relevant to #2 above and section D below.*

- 6. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law regarding “next friend” claims filed on behalf of the mentally disabled
  - a. Does your state allow for the filing of “next friend” claims?
- 7. Identify and explain all laws, rules, procedures, standards, and guidelines governing the duty of your state or counties to train police officers, prosecutors, and/or defense counsel to assess whether individuals suffer from disability.
  - a. Does your state or counties offer training in assessing whether individuals suffer from mental illness?
    - i. If yes, which group of individuals, if any, receives the training: police officers, prosecutors, or defense counsel?
    - ii. Is the training mandatory for any of these groups?
- 8. Identify and explain all laws, rules, and procedures adopted to protect mentally disabled persons who are charged with crimes in your state.
  - a. Has your state police department adopted a mechanism to ensure that the *Miranda* rights of mentally disabled persons are protected?

**C. Waivers of Rights (In General and as it Pertains to Mental Retardation, Mental Disability, and Individuals who receive Ineffective Assistance of Counsel)**

- 1. Identify and explain all laws, rules, procedures, standards, and guidelines on waivers of rights, such as the right to trial counsel, the right to present mitigating evidence, and/or the right to pursue an appeal, state post-conviction relief, habeas corpus relief, and/or clemency.
  - a. Are defendants authorized to waive the following rights:
    - i. Right to trial counsel?
    - ii. Right to present mitigating evidence?
    - iii. Right to pursue a direct appeal?

- iv. Right to pursue state post-conviction relief?
  - v. Right to pursue habeas corpus relief?
  - vi. Right to pursue clemency?
- b. Under what circumstances, if any, can a defendant challenge his/her waiver?
- i. Can the defendant challenge his/her waiver when issues of mental competency/mental disability exist?
  - ii. Can the defendant challenge his/her waiver where issues of ineffective assistance of counsel exist?
- c. If the defendant can challenge his/her waiver, what standards do the courts use when reviewing waivers?
- i. In what cases, if any, will the court apply the plain error rule?
2. Has your state adopted any laws, rules, standards, or guidelines to ensure that, during court proceedings, the rights of mentally ill persons are protected against “waivers” that are the product of their mental disability, including waiver of counsel, appeals, post-conviction relief, and clemency?

**D. Competency to be Executed**

1. Identify and explain all laws, rules, procedures, standards, guidelines, and leading case law on an individual’s competency to be executed.
- a. What is the legal standard used to assess an individual’s competency to be executed?
  - b. What resources are provided to an inmate whose competency is in dispute?
  - c. Do your state statutes or case law permit the drugging of an inmate to gain competency to be executed? If yes, identify and explain all cases in which your state has drugged an inmate in order for him/her to gain competency to be executed

## GLOSSARY

**Absolute pardon-** One which frees the criminal without any condition whatever. That which reaches both the punishment prescribed for the offense and the guilt of the offender. It obliterates in legal contemplation the offense itself. It goes no further than to restore the accused to his civil rights and remit the penalty imposed for the particular offense of which he was convicted in so far as it remains unpaid.

**Aggravating factor/circumstance-** Any circumstance attending the commission of a crime which increases its enormity or adds to its injurious consequences. As a matter of federal constitutional law, it must differentiate a given capital murder from intentional homicides generally, but need not necessarily go beyond the elements of capital murder.

***Atkins v. Virginia-*** On June 20, 2002, the United States Supreme Court held 6-3 in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the execution of offenders with mental retardation constitutes cruel and unusual punishment in violation of the Eighth Amendment.

**Ballistics-** The science of gun examination frequently used in criminal cases, especially cases of homicide, to determine the firing capacity of a weapon, its fireability, and whether a given bullet was fired from a particular gun.

***Batson v. Kentucky-*** In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme Court held that the Equal Protection Clause prohibits a prosecutor from using peremptory challenges to exclude potential jurors solely on account of their race or on the assumption that black jurors as a group are unable to impartially consider the case.

***Caldwell v. Mississippi-*** The United States Supreme Court in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), prohibited the use of arguments that have the effect of misleading the jury about its role in sentencing, finding such arguments in violation of the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case.

**Capital homicide-** Any homicide that could, under the jurisdictions laws, be punishable by death.

***Certiorari-*** The writ is issued in order that the court issuing the writ may inspect the proceedings and determine whether there have been any irregularities. It is most commonly used to refer to the Supreme Court of the United States, which uses the writ of certiorari as a discretionary device to choose cases it wishes to hear.

**Clemency-** Kindness, mercy, forgiveness, leniency; usually relating to criminal acts. E.g. Act of governor of state when he commutes death sentence to life imprisonment, or grants pardon.

**Consular rights -** Under Article 36 of the 1963 Vienna Convention on Consular Relations, all detained foreigners have the right to be informed of their right to have the consular post informed of their arrest and the right to have any communication addressed to the consular post forwarded without delay.

**Direct Appeal-** A defendant sentenced to death may appeal directly to a state appellate court. In some jurisdictions, this is, in the first instance, the state's highest court with criminal jurisdiction. In some states, the initial direct appeal is to an intermediary appellate court, from which appeal can be sought – in some cases, as a matter of discretion to the state's highest court with criminal jurisdiction.

**Discovery-** Right to obtain access to evidence from the other side or third party necessary to prepare a case.

**DNA identification-** DNA profiling or fingerprinting is an analysis of Deoxyribonucleic Acid resulting in the identification of an individual's patterned chemical structure of genetic information. It can be used to identify the source of a biological specimen, such as blood, tissue or hair.

**Exculpatory statement or evidence-** A statement or other evidence which tends to justify, excuse or clear the defendant from alleged fault or guilt. Evidence which extrinsically tends to establish defendant's innocence of crimes charged as differentiated from that which although favorable, is merely collateral or impeaching. For purposes of rule constraining State from disposing of potentially exculpatory evidence, is evidence which clears or tends to clear accused person from alleged guilt.

**Exoneration-** The removal of a burden, charge, responsibility, or duty.

**Ex parte-** On one side only; by or for one party; done for, in behalf of, or on the application of, one party only.

**Ex parte proceeding-** Any judicial or quasi judicial hearing in which only one party is heard as in the case of a temporary restraining order.

**Foil-** An individual who resembles the witness' description but is known to be innocent.

**Foreigner or foreign national-** Includes tourists and visitors, migrant workers with temporary permits, resident aliens, undocumented aliens, asylum-seekers and persons in transit.

**Furman v. Georgia-** In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held that then-existing state statutes were unconstitutional. There was no majority opinion, but concurred in the majority that the existing statutes failed to properly balance the need to ensure overall consistency in capital sentencing with the need to ensure fairness in individual cases.

**Habeas Corpus-**The name given a variety of writs (of which these were anciently the emphatic words), having for their object to bring a party before a court or judge. In common usage, and whenever these words are used alone, they are usually understood to mean the *habeas corpus ad subjiciendum*; a writ directed to the person detaining another, and commanding him to produce the body of the prisoner, or person detained. This is the most common form of habeas corpus writ, the purpose of which is to test the legality of the detention or imprisonment.

**Harmless error rule/doctrine-** The doctrine that minor or harmless errors during a trial do not require reversal of the judgment by an appellate court. An error which is trivial or formal or merely academic and was not prejudicial to the substantial right of the party assigning it, and in no way affected the final outcome of the case. An error is “harmless” if reviewing court, after viewing entire record, determines that no substantial rights of defendant were affected and that error did not influence or had only very slight influence on verdict. Doctrine which permits an appellate court to affirm a conviction in spite of such type of error appearing in the record.

**Judicial Independence-** Assumes that judges will decide cases to the best of their abilities without political or other bias and, where necessary, to protect the constitution and laws, in the face of official and public opposition.

**Judicial waiver-** Judge decides whether a juvenile should be transferred from juvenile court to adult court.

**Jury instructions-** A direction given by the judge to the jury concerning the law of the case; a statement made by the judge to the jury informing them of the law applicable to the case in general or some aspect of it; and exposition or the rules or principles of law applicable to the case or some branch or phase of it, which the jury are bound to accept and apply. Attorneys for both sides normally furnish judge with suggested instructions. Many states and federal courts have model or pattern jury instructions that are required to be used, or substantially followed, by the trial judge.

**Juvenile-** A person who has not yet attained age 18.

**Known suspect-** A individual who has been arrested, charged, and/or convicted of a crime and whose identity, including race, gender, and age, is known.

**Known victim-** A individual who is an alleged victim of a crime and whose identity, including race, gender, and age, is known.

**Legislative waiver** (also known as “statutory exclusion”) - Statutorily excludes juveniles from juvenile court based on the offense charged.

**McCleskey v. Kemp-** In *McCleskey v Kemp*, 481 U.S. 279 (1987), the United States Supreme Court held that Equal Protection would not be violated by a systematic disparity in the imposition of the death penalty based on the race of the victim or defendant.

**Miranda Rule-** Prior to any custodial interrogation (that is, questioning initiated by law enforcement officers after a person is taken into custody or otherwise deprived of his freedom in any significant way) the person must be warned: 1. That he has a right to remain silent; 2. That any statement he does make may be used as evidence against him; 3. That he has a right to the presence of an attorney; 4. That if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires.

Unless and until these warnings or a waiver of these rights are demonstrated at the trial no evidence obtained in the interrogation may be used against the accused. *Miranda v. Arizona*, 384 U.S. 436 (1966).

**Mitigating factor/circumstance-** Anything about the crime or the defendant that might cause anyone involved in capital sentencing to be less likely to vote for or impose the death sentence.

**Mitigation expert/specialist** - A person who specializes in compiling information about the defendant's history, character, mental or physical health to help lessen the severity of punishment during the penalty phase of a trial.

**Moratorium-** Suspension of an action or proceeding.

**Next friend-** One acting for benefit of a person sui juris, without being regularly appointed guardian. A "next friend" is not a party to an action, but is an officer of the court, especially appearing to look after the interests of the person for whose benefit s/he appears. Where permitted, in a capital case, this includes on acting to assert claims for a defendant who seeks to waive such claims.

**"Notice of intent"**- The state must file a notice of intent to pursue the death penalty against a specific defendant within a certain amount of time.

**Notification obligations-** Pursuant to Article 36 of the 1963 Vienna Convention on Consular Relations, law enforcement authorities must inform all detained foreigners "without delay" of the following rights: (1) the right to have the consular post informed of their status, and (2) the right to have any communication addressed to the consular post forwarded without delay.

**Open File Discovery-** Requires the prosecution to provide **all** information in its possession to defense attorneys.

**Pardon-** An executive action that mitigates or sets aside punishment for a crime. An act of grace from governing power which mitigates the punishment the law demands for the offense and restores the rights and privileges forfeited on account of the offense.

The power to pardon for non-federal crimes is generally invested in state governors, while the President has the power to pardon for federal offenses.

**Parole-** Release from jail, prison or other confinement after actually serving part of sentence. Conditional release from imprisonment which entitles parolee to serve remainder of his/her term outside confines of an institution, if s/he satisfactorily complies with all terms and conditions provided in parole order.

**Photospread-** Presentation to an eyewitness a group of photos of possible suspects.

**Plea bargaining-** The process whereby the accused and the prosecutor in a criminal case seek to work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant's pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that possible for the graver charge.

**Post-conviction remedies** (state)- Almost every state has one or more post-conviction procedures that differ from (and usually occur after) direct appeal, and permit prisoners to challenge at least some constitutional violations.

**Proportionality Review**- Comparing a case, or certain aspects of a case, to other cases, or other aspects of cases, according to a certain standard of review.

**Prosecutorial Waiver** (also known as “direct files”)- State gives the prosecutor discretion to file juvenile cases in either juvenile court or adult court.

**Residual doubt**- Doubt remaining as to the defendant’s guilt after the defendant has been convicted.

**Retroactivity**- Generally refers to whether decisions or laws which affect transactions or events that have occurred prior to the rendering of the decisions or enactment of the laws.

**Roper v. Simmons**- In January 2004, the Court granted *certiorari* in *Roper v. Simmons*, No. 03-633, to re-examine whether executing offenders who were 16 or 17 years old at the time of the offense violates the Eighth Amendment’s ban on cruel and unusual punishment.

**Show-up**- A type of pre-trial identification procedure in which a single suspect is exposed to a witness.

**Stanford v. Kentucky**- In *Stanford v. Kentucky*, 192 U.S. 361 (1989), the Court held that the Eighth Amendment does not prohibit execution of juveniles who were at least 16 years old at the time they committed capital offenses.

**Stay of execution**- A time during which no execution can issue on a judgment.

**Swain v. Alabama**- The United States Supreme Court in *Swain v. Alabama*, 380 U.S. 202 (1965), held that in order to show discrimination, a defendant must demonstrate a pattern of discrimination through exclusion of black jurors in other cases as well as in the defendant’s case.

**Thompson v. Oklahoma**- In *Thompson v. Oklahoma*, 487 U.S. 815 (1988), the United States Supreme Court held that the execution of offenders younger than 16 years old at the time of their crimes is “cruel and unusual” punishment under the Eighth Amendment.

**Transfer laws**- Include conditions under which juveniles may be prosecuted as adults.

**Unitary Appeal**- Require direct appeal and state post-conviction proceedings to occur almost simultaneously.

**United Nations Convention on the Rights of the Child**- Article 37(a) explicitly bars capital punishment for juveniles. The Convention entered into force on September 2, 1990. As of July 2004, 194 countries have ratified the Convention; only two countries have refrained from signing the Convention—the United States and Somalia.

**Vacate**- To annul; to set aside; to cancel or rescind. To render an act void; as, to vacate an entry of record, or a judgment.

**Vienna Convention on Consular Relations (“Vienna Convention”)**- A multilateral treaty that regulates the rights, privileges, and duties of consulates and consular staff worldwide. Article 36 of the Vienna Convention recognizes and enshrines the right of consuls to communicate with and assist their detained nationals.

***Voir dire***- To speak the truth. This phrase denotes the preliminary examination that the court and attorneys make of prospective jurors to determine their qualification and suitability to serve as jurors.