Defending Liberty
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EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS:

The Texas Capital Punishment Assessment Report

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

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

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The American Bar Association Death Penalty Due Process Review Project (the Project) is pleased to present this publication, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report*.

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

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While in the federal judiciary, he was Chair of the Judicial Resources Committee of the Judicial Conference of the United States and President of the Federal Judges Association.

The Honorable Deborah Hankinson is founder of Hankinson LLP. She graduated with a B.A. from Purdue University, a M.S. from the University of Texas at Dallas, and a J.D. from Southern Methodist University's Dedman School of Law. In 1995, she was appointed, and later elected, to serve as a Justice on the Fifth District Court of Appeals in Dallas. From 1995 to 2002, she served as a Justice on the Supreme Court of Texas. In recognition of her many accomplishments on the bench, the Texas Chapter of the American Board of Trial Advocates honored Ms. Hankinson as the Texas Judge of the Year in 1999. She returned to private practice in 2003. She is nationally recognized for her deep commitment to the issue of equal access to justice. While on the Supreme Court of Texas, she was a driving force behind the creation of the Texas Access to Justice Commission, which works to ensure that low-income Texans have access to justice in civil legal matters. She is Board-Certified in Civil Appellate Law by the Texas Board of Legal Specialization, a Fellow of the American Academy of Appellate Lawyers, a member of the American Law Institute, and serves on the Board of Directors of the American Arbitration Association (AAA). Justice Hankinson is also a former chair of the ABA Standing Committee on Legal Aid and Indigent Defendants.

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Governor Mark White was born in Henderson, Texas. His career in public service began in 1966 as an assistant Attorney General. In 1973, he was appointed Secretary of State. In 1979, he became Attorney General of Texas. He served as co-chair of the Federal-State Law Enforcement Coordinating Committee and was a member of the Governor's Organized Crime Prevention Council. He was then elected Governor of Texas in 1982. Governor White is now President of GeoVox Security, Inc. He is married to Linda Gale Thompson and they have two sons and a daughter.

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EXECUTIVE SUMMARY

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

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide suspension of executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the fall of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Due Process Review Project (the Project).[1] The Project conducts research and educates the public and decision-makers on the operation of capital jurisdictions' death penalty laws and processes in order to promote fairness and accuracy in death penalty systems. The Project encourages legislatures, courts, administrative bodies, and state and local bar associations to adopt the ABA's Protocols on the Fair Administration of the Death Penalty; provides technical assistance to state and federal stakeholders on death penalty issues; and collaborates with other individuals and organizations to develop new initiatives to support reform of death penalty processes.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project began in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and minimize the risk of executing the innocent. To date, the Project has conducted assessments examining the administration of the death penalty in Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, Tennessee, and Virginia, and released reports on these states' capital punishment systems in 2006, 2007, 2011, 2012, and 2013.

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (*ABA Protocols*). While the *Protocols* are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration: defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings, clemency proceedings, jury instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new

[1] The Project was originally established as the "ABA Death Penalty Moratorium Implementation Project."

areas to be reviewed as part of the assessments in 2006: preservation and testing of DNA evidence, law enforcement identification and interrogation procedures, crime laboratories and medical examiners offices, prosecutors, and the direct appeal process.

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

The findings of each assessment team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which states implement reforms, or in some cases, impose a suspension of executions. Past state assessment reports have been used as blueprints for state-based study commissions on the death penalty, served as the basis for new legislative and court rule changes on the administration of the death penalty, and generally informed decision-makers' and the public's understanding of the problems affecting the fairness and accuracy of their state's death penalty system. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should impose the death penalty.

This Executive Summary consists of a summary of the findings and recommendations of the Texas Capital Punishment Assessment Team. The body of this Report sets out these findings and proposals in more detail, followed by an Appendix. The Texas Capital Punishment Assessment Report devotes a chapter to each of the following areas: (1) overview of the state's death penalty, (2) law enforcement identifications and interrogations, (3) collection, preservation, and testing of DNA and other types of evidence, (4) crime laboratories and medical examiner offices, (5) prosecution, (6) defense services, (7) the direct appeal process and proportionality review, (8) state habeas corpus proceedings, (9) clemency, (10) capital jury instructions, (11) judicial independence and vigilance, (12) treatment of racial and ethnic minorities, and (13) mental retardation and mental illness.[2]

Chapters begin with an introduction to provide a national perspective of the issues addressed by each chapter, followed by a "Factual Discussion" of the relevant laws and practices in Texas. The final section of each chapter, entitled "Analysis," examines the extent to which Texas is in compliance with the *ABA Protocols* and describes any recommendations for reform agreed upon by the Texas Assessment Team. While members of the Texas Assessment Team have varying perspectives on the death penalty, all team members agreed to use the *ABA Protocols* described above as a framework through which to examine the death penalty in Texas. The Project and the Texas Capital Punishment Assessment Team have attempted to describe as accurately as possible information relevant to the Texas death penalty and would appreciate notification of any factual errors or omissions in this Report so that they may be corrected in any future reprints.

[2] This Report is not intended to cover all aspects of a state's capital punishment system.

II. HIGHLIGHTS AND KEY RECOMMENDATIONS OF THE TEXAS REPORT

A. The Texas Capital Punishment Assessment Team's Findings

It is the Texas Capital Punishment Assessment Team's unanimous view that so long as Texas imposes the death penalty, its system for doing so must be comprised of sufficient checks and balances to ensure fairness in selection of offenders to receive the death penalty, reduce to the extent possible the risk of executing the innocent, and preserve public confidence in the administration of criminal justice. Despite some progress Texas has made in the last several years—which is detailed throughout this Report—the Assessment Team has identified a number of areas in which the state's death penalty system falls far short of this imperative. In many areas, Texas appears out of step with better practices implemented in other capital jurisdictions, fails to rely upon scientifically reliable methods and processes in the administration of the death penalty, and provides the public with inadequate information to understand and evaluate capital punishment in the state.

B. Recent Improvements

Notably, Texas has made strides in several areas to improve the fairness of capital proceedings in recent years. Some of the most significant improvements are summarized below.

In 2011, Texas enacted a law requiring law enforcement agencies to "adopt . . . a detailed written policy regarding the administration of photograph and live lineup identification procedures." Pursuant to the new state law, the Bill Blackwood Law Enforcement Management Institute has developed a model policy on eyewitness identification procedures that comports with a number of better practices to lessen the risk of misidentification. Agencies whose policies and practices mirror the model policy will likely reduce misidentifications and resulting wrongful convictions. Texas law also requires law enforcement agencies to review their eyewitness identification policies every two years. Through entities like the Texas Criminal Justice Integrity Unit, law enforcement officers and prosecutors receive training regarding proper procedures for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses, among many other issues concerning wrongful conviction. Texas also recently enacted a new law aimed at remedying the effect of unreliable science on convictions in the state.

In 2013, Texas adopted the Michael Morton Act which will require prosecutors to disclose police reports and witness statements, which—as past Texas cases demonstrate—often contain exonerating or mitigating evidence. The law will likely improve the fairness of criminal proceedings by allowing defense counsel to better assess the strength of the evidence before trial. Adoption of the Act is also a public affirmation of Texas's commitment to the proper role of the prosecutor in seeking justice and ensuring that a defendant receives a fair trial.

Finally, one of the most significant advancements aimed at improving the fairness of capital proceedings was brought about by the establishment of two offices to provide capital representation throughout the state. In 2007, the Regional Public Defender for Capital Cases (RPDO) was established to represent indigent capital defendants at trial in an increasing number

of Texas's 254 counties. In 2009, the Office of Capital Writs (OCW), was created to represent indigent death-sentenced inmates during state habeas proceedings. Prior to the creation of these two offices, the State of Texas relied almost exclusively on locally-appointed counsel to represent indigent capital defendants and death-sentenced inmates. Although the most populous counties continue to rely primarily upon an appointment system in capital trials, the creation of these two offices—staffed by attorneys with demonstrated knowledge and expertise in death penalty cases—is a significant step forward in the improvement of the quality of representation available to Texas's indigent defendants and inmates in death penalty cases.

C. Areas and Recommendations for Reform

The Texas Capital Punishment Assessment Team has identified a series of individual problems within the state's death penalty system. The Team notes that some of these problems, standing alone, may not appear to be significant, but cautions that their harms are cumulative. The capital system has many interconnected parts; problems in one area may undermine Texas's use of sound procedures in others.

Texas incurs a variety of costs as result of these deficiencies which may cast a pall over the integrity of its entire criminal justice system. Mistakes in the administration of the death penalty lead to a serious public safety concern: the innocent are convicted, possibly facing execution, while a guilty perpetrator remains free to commit additional crimes. An error-prone system also incurs a high financial cost. For example, since 1992, Texas has paid over $60 million to those it has wrongfully imprisoned—money that could have been applied more effectively to find the "right guy" the first time around. In addition, the state and federal courts must spend significant time and resources correcting errors in capital cases—errors that could have been prevented—to the detriment of the vast majority of Texans who rely on the justice system every day. Indeed, preventing error is often far less expensive than correcting error. And such a flawed process exacts an intangible toll on victims' families.

Accordingly, the Texas Assessment Team agrees that the following areas are most in need of reform. These areas are followed by the recommendations for reform endorsed unanimously by the Team. All of the Texas Assessment Team's findings and recommendations for reform are found in the individual chapters contained in this Report.

PRETRIAL

Law Enforcement Identification Procedures (Chapter 2). Texas has, by way of the Bill Blackwood Institute, developed sound policies for reducing the risk of eyewitness misidentifications. In order to prevent future miscarriages of justice, Texas should build upon its recent adoption of a law requiring law enforcement to adopt written policies on conducting eyewitness identifications. This is particularly important given that from 1989 through 2012, at least 47 people in Texas whose convictions were based in significant part on eyewitness identification were later exonerated following DNA testing or the discovery of new evidence. Ten of those individuals had been sentenced to death. Further, despite the known problems with eyewitness identifications, Texas permits eyewitnesses to make identifications in court, even if a pretrial procedure was so suggestive as to require suppression, so long as the courtroom

identification has a source "independent" of the prior procedure. Finally, unlike the majority of U.S. jurisdictions, Texas does not permit the court to provide an instruction explaining the factors affecting eyewitness accuracy which would help jurors' improve their decision-making. Importantly, the State has yet to adopt an important and related recommendation from the Timothy Cole Advisory Panel on Wrongful Convictions that evidence of compliance or noncompliance with the model policy should be admissible in court.

Recommendations
All law enforcement agencies should at least adopt the *Model Policy*'s provisions, which provide a minimum standard for conducting identifications. Texas law should include remedies for agencies' noncompliance with state-sanctioned identification procedures. These remedies need not entail automatic exclusion of the eyewitness's identification. Further, when appropriate in an individual case, Texas courts should instruct jurors on possible factors to consider in gauging the accuracy of an eyewitness identification, as is the case in many other jurisdictions—including jurisdictions with the death penalty. Finally, Texas should not adhere to its existing "independent source rule," which permits eyewitnesses to make identifications *in court*, even if a pretrial procedure was so suggestive as to require suppression.

Law Enforcement Interrogation Procedures (Chapter 2). A review of Texas cases in the National Registry of Exonerations reveals that, from 1989 through 2012, at least five people offered confessions to law enforcement yet later were exonerated following DNA testing or the discovery of new evidence. Given the risk that an innocent person will confess to a crime, it is imperative for law enforcement officers to fully video-record a suspect's interrogation, including any questioning that precedes the formal confession and the suspect's waiver of his/her *Miranda* rights. A video-recording provides the court, jury, and prosecutor with the best means to determine whether a confession is credible, including whether law enforcement engaged in any coercive tactics in obtaining a confession.

Recommendations
Texas should adopt legislation to require all law enforcement agencies to video- or audio-record the entirety of custodial interrogations in serious felony investigations—especially those which may lead to capital charges. Noncustodial interrogations and interviews with cooperative witnesses also should be recorded. Such measures would help to conserve resources that might otherwise be spent on litigating the admissibility of confessions. To develop this legislation, the Texas Legislature ought to enlist the aid of the Bill Blackwood Law Enforcement Management Institute, which developed the state's model eyewitness identification policy in 2012. In addition, the State of Texas could draw on the experience of other states and jurisdictions that have implemented interrogation recording statutes. Limited exceptions should be permitted to ensure that the vast majority of interrogations will be recorded while also protecting public safety in those instances when a recording requirement would be imprudent or infeasible. To promote the complete recording of custodial interrogations, the statute must provide defendants with a remedy whenever law enforcement officials violate the statute by failing to make the recording.

Preservation of Biological Evidence (Chapter 3). As of August 2013, 48 convicted persons have been exonerated through DNA testing in Texas. While the State is commended for enacting a provision requiring preservation of evidence in death penalty cases, this provision is

not without significant shortcomings. Texas does not require indefinite preservation of biological evidence in violent felony cases, although the commission of a violent felony in the past can affect the decision to sentence a person to death. The statute also fails to specify who is responsible for preserving biological evidence or to require each county to adopt policies to delineate these responsibilities. Anecdotal accounts suggest that the failure to delineate responsibility has led to inadvertent destruction of evidence in some cases.

The importance of preserving biological evidence has been powerfully illustrated by the results of biological testing completed in Dallas County. The work of that county's conviction integrity unit has led to 35 exonerations, 16 of which have involved DNA testing. Dallas County was afforded this capability because the Southwestern Institute of Forensic Sciences preserved significantly more biological evidence than many other public laboratories in Texas. By contrast, the Harris County District Attorney's Office was hampered in a similar effort because biological evidence from old convictions were not preserved and thus could not be tested.

Recommendations
Texas should require indefinite preservation of biological evidence collected in any violent felony case. Furthermore, in shaping relief for a death row inmate's possible meritorious legal claims, courts or other actors—such as the Board of Pardons and Paroles—who are situated to provide equitable relief, should consider the impact the state's failure to adhere to existing preservation requirements in determining the scope of that relief.

Access to Testing of Biological Evidence (Chapter 3). Texas's current post-conviction DNA testing statute imposes a number of limitations on a death row inmate's access to testing. Among the statute's many limitations is that a death row inmate may not be afforded access to testing if such testing would show with reasonable probability that s/he should not have been sentenced to death.

Recommendations
Texas should amend its post-trial testing statute to ensure that DNA testing is available to an inmate who is seeking to show a reasonable probability exists that s/he is innocent of the offense *or* did not engage in aggravating conduct that was presented to the fact-finder during the sentencing phase of his/her capital trial. In addition, testing ought to be permitted on new evidence—subject to the rules of evidence and safeguards governing chain of custody—even if it was not secured in relation to the inmate's offense. The requirement that identity was or is an issue in the case also should be eliminated—particularly as concerns over relative culpability have significant bearing on both eligibility to be tried for capital murder, as well as the decision to sentence a defendant to death. Further, given the difficulty in foreseeing future advances in forensic science, Texas should include a provision that provides the court discretion to order post-conviction testing if it is in the interests of justice. Finally, given the possibility of error regardless of the advances of science, credible allegations of error in previous testing should give rise to access to re-testing of biological evidence. The Assessment Team also notes that the recent enactment of pretrial testing obligations in capital cases does not resolve the shortcomings cited above. This law should have no bearing on an inmate's access to testing in the post-trial context.

Crime Laboratories and Medical Examiner Offices (Chapter 4). Many of the documented occurrences of mistake and fraud in forensic analysis in Texas appear to be systemic and institutional in nature. The power of forensic science to aid in the fair administration of justice is enormous. Just as powerfully, however, is the ability of faulty or fraudulent scientific analysis to contribute to wrongful convictions. Importantly, incidents of mistake and fraud not only cast a pall over cases in which a laboratory or analyst conducted shoddy work; instead, the integrity of *many* criminal prosecutions in the state are cast—albeit unfairly—in to doubt. Texas must do more to build credibility in to its criminal justice process—particularly when a life is at stake. The current patchwork of state and local, accredited and unaccredited, and formal and informal forensic laboratory analysis does not well-serve this purpose.

Recommendations
Texas Department of Public Safety (DPS) laboratories should be the standard-bearer for accurate, timely, and reliable forensic analysis in Texas. These laboratories must be better funded, particularly because many smaller and rural jurisdictions in the state must rely on DPS for forensic analysis. All laboratories conducting forensic analysis—particularly those engaged in analysis that will be admitted in a potential death penalty case—should adhere to the highest standards for casework. Because accreditation is not a foolproof method for ensuring high quality work, however, individual laboratory standards must also require continuing education of analysts performing this work. Standards must ensure regular and meaningful verification of a laboratory by an outside authority. In addition, due to the failures at individual medical examiner offices, the State should require mandatory accreditation of offices and certification of individuals who conduct such investigations. Finally, several crime laboratories fall under the authority of law enforcement in the state. In at least one instance, a medical examiner resigned from office citing law enforcement interference with death investigations. Thus, Texas should adhere to the recommendations set forth in the 2009 *National Academy of Sciences Report on Forensic Science* which recommended that "[s]cientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed."

Forensic Science Commission (Chapter 4). With the creation of the Forensic Science Commission (Commission), Texas has formed a unique entity that serves as a valuable check on the reliability of forensic investigations. The events surrounding the Commission's investigation of Cameron Todd Willingham's case, however, in which subsequent forensic analyses indicated that Willingham—who was executed in 2004—may not have been responsible for the murder of his three children by arson, are troubling. The delays and obstruction which hampered the Commission's investigation into the case against Willingham do not serve the effort to avoid future miscarriages of justice.

Recommendations
Texas should adhere to the various recommendations promulgated by the Commission in its report on the dubious forensic science used to convict Cameron Todd Willingham and Ernest Ray Willis. Such recommendations include promoting national standards for arson investigation, requiring enhanced certification and collaborative training for fire investigators,

Recommendations (Cont'd)
encouraging periodic curriculum and peer review, evidence preservation, and standards for reexamination of cases.

TRIAL AND SENTENCING

Texas Capital Sentencing Structure (Chapter 10). Texas's capital sentencing procedure is remarkably different from that of other jurisdictions. In most states, after finding a defendant guilty of a capital crime, jurors must weigh aggravating and mitigating circumstances to determine whether a defendant should receive the death penalty. In Texas, jurors in the sentencing phase are first asked to determine whether the defendant represents a future danger to society; only after deciding unanimously that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" will the jury consider whether any evidence in mitigation supports a sentence less than death. As a result of this structure, the defendant's alleged future dangerousness is placed at the center of the jury's punishment decision.

The "future dangerousness" special issue is problematic in several respects. First, there is no precise explanation of the special issue's key terms. Jurors are left to comprehend "probability," "criminal acts of violence," and "society" so broadly that a death sentence would be deemed warranted in virtually every capital murder case. Second, the "future dangerousness" special issue too often turns on unreliable scientific evidence and the undue persuasive effect of highly-questionable expert testimony. Finally, life without possibility of parole now is the only capital sentencing alternative to death in the State of Texas, which ensures that all defendants convicted of capital murder will die in prison, posing no threat to free society.

Recommendation
Texas should restructure its capital sentencing procedures to abandon altogether the use of the "future dangerousness" special issue. The State should consider following the approach of the majority of capital jurisdictions, which enumerate specific aggravating and mitigating circumstances. Short of this restructuring, Texas should undertake a series of measures to limit the problems that result from the current application of the "future dangerousness" special issue. Specifically, • State-sponsored research must be conducted to compare Texas jurors' comprehension of state capital sentencing standards with that of their counterparts in other death penalty jurisdictions; • The Texas Code of Criminal Procedure must be amended to narrow and clarify the definition of "future dangerousness"; • Expert testimony as to a defendant's propensity to commit criminal acts of violence must be prohibited, whether by statute or by rule; and • Jurors must be explicitly informed that, notwithstanding a finding of future dangerousness and/or a finding of insufficient mitigating evidence, jurors never are required or compelled to sentence a defendant to death.

Recommendations (Cont'd)
Furthermore, the "mitigation" special issue should be revised extensively so that the legal relevance of mitigation in capital cases will not be lost on jurors.

Jury Instructions (Chapter 10). Texans who serve on capital juries deserve full information about their responsibilities and the scope of their options for sentencing a capital defendant. However, at present Texas jurors are not instructed that, even if the defendant is found to be a future danger, and even if the jury does not find sufficient evidence in mitigation, jurors may still return a sentence less than death. The explicit requirements of Texas law may also mislead capital jurors with respect to each juror's individual capacity to impose a sentence of life without the possibility of parole. The Texas Code bars all parties from informing a juror or prospective juror of what would transpire were the jury to disagree during sentencing phase deliberations, which conceals from these jurors their individual capacity to impose a sentence less than death.

Jurors who have served on death penalty cases in Texas have experienced significant miscomprehensions about their roles and responsibilities in determining if a defendant should be sentenced to death. A study by the Capital Jury Project showed that, for instance, 45% of interviewed Texas jurors who served on capital cases erroneously believed that death was required if the defendant's crime was "heinous, vile or depraved," while 68.4% believed that death was required if the defendant would be "dangerous in the future." As a matter of federal and state law, however, a finding of future dangerousness can *never* suffice to require the death penalty.

Texas also does not require jurors to be specifically instructed that a mental disorder or disability is a mitigating, not an aggravating, factor and that evidence of mental disability should not be relied upon to conclude that the defendant represents a future danger to society. This is especially worrisome given the underlying problems with Texas's capital sentencing scheme and the repeated use of unqualified experts to prove that a defendant is a future danger to society.

The form and substance of capital case jury selection also may improperly increase a prospective juror's inclination to sentence the defendant to death. Questions asked during jury selection may expand jurors' perceptions of what constitutes "future dangerousness" while limiting their understanding of what qualifies as mitigation. This practice can result in selection of jurors predisposed to sentence any capital defendant to death.

In addition, although Texas trial courts must provide clear jury instructions concerning the alternative punishment of life without parole, courts retain broad discretion to prohibit testimony on parole practices proffered by the defense. Moreover, Texas courts may permit the prosecution to emphasize a capital defendant's parole *ineligibility* in an attempt to persuade the jury that, in the absence of the "incentive" of parole to regulate the defendant's behavior, s/he would be more likely to commit acts of violence in the penitentiary. Prosecutors also have attempted to undermine the permanency of a life without parole sentence by stressing the law's mutability.

While trial courts may respond meaningfully to jurors' requests for clarification of instructions, Texas law permits trial courts to refuse to clarify legal concepts that are of the utmost importance

during the penalty phase of a capital case. Trial courts also may be reluctant to offer clarifying instructions for fear of reversal on appeal. Alleviating jurors' confusion as to their roles and responsibilities through revised capital case instructions will improve the quality of decision-making and it may also obviate altogether the need for judges to respond to individual juror questions.

Recommendations
Texas should revise its jury instructions typically given in capital cases. Texas's instructions should provide better explanation of issues clearly identified as problematic by the Capital Jury Project. Efforts to craft and promote discretionary pattern instructions must include input from attorneys, judges, linguists, social scientists, and psychologists. These instructions must do more than recite the language of the Texas Code of Criminal Procedure, and their use must be closely and continuously monitored to determine whether they ameliorate jurors' tendency to misunderstand their awesome responsibility to determine if the defendant will live or die. Further, the jury's discretion must be guided with respect to mitigation. Trial courts should more broadly instruct capital juries on the significant legal importance of mitigating circumstances. Jurors must also be informed that they may return a life sentence for any reason, as is the case in several other capital jurisdictions. Capital jury instructions should also clearly communicate that a mental disorder or disability is a mitigating factor, not an aggravating, factor and that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society. Finally, Texas should remove from the Code of Criminal Procedure the provision that misleads jurors about their individual capacity to affect capital sentencing decisions. Jurors should be explicitly informed that, in the event that they are not able to come to a unanimous decision with respect to the special issues, the defendant will be sentenced to life without parole.

Treatment of Persons with Mental Retardation (Chapter 13). The Texas Legislature has not enacted a statute banning the application of the death penalty to persons with mental retardation. The state's definition of mental retardation is based on the Texas Court of Criminal Appeals' decision in *Ex parte Briseno*, which uses seven factors that are not supported by any medical authority and instead rely on popular misconceptions regarding how persons with mental retardation behave. Continued use of *Briseno* to assess mental retardation creates an unacceptable risk that persons with mental retardation will receive the death penalty or be executed.

In addition, Texas trial courts do not typically permit a claim of mental retardation to be decided by the trial court in a pretrial hearing. Instead, the issue is usually decided by the jury during penalty phase deliberation. This procedure wastes time and judicial resources by requiring a long and costly capital trial for a defendant who may not be eligible for the death penalty in the first instance. It also requires jurors to consider evidence of mental retardation at the same time they are considering evidence related to the crime and other aggravating evidence, increasing the risk of juror confusion.

Finally, defendants who raise a mental retardation claim in a subsequent habeas petition must prove mental retardation by clear and convincing evidence. This elevated standard of proof should not be applied to a claim that the defendant is categorically ineligible for the death penalty under the United States Constitution.

Recommendations
Texas should enact a statute barring the application of the death penalty to persons with mental retardation. This statute must clearly define mental retardation in conformance with the definition set out by the American Association on Intellectual and Developmental Disabilities (AAIDD). It should also require that determinations of mental retardation be based on accepted clinical criteria. Consideration of the *Briseno* factors, which permit commonly-held misapprehensions about mental retardation to trump AAIDD-accepted criteria, should be forbidden. In addition, the issue of mental retardation should be determined before the capital trial, provided the defendant can demonstrate some evidence that s/he has mental retardation. The determination of mental retardation should be made by the trial judge unless the defendant requests that a jury be impaneled to decide the issue. This procedure should not preclude the defendant from offering evidence of mental retardation during the criminal trial. Finally, Texas should apply the preponderance of the evidence standard for mental retardation claims in all proceedings, including subsequent habeas petitions.

Treatment of the Severely Mentally Ill (Chapter 13). Texas law does not adequately protect defendants who suffer from mental illness and disorders from wrongful conviction or execution. For instance, Texas has not prohibited the death penalty for offenders with mental disabilities similar to mental retardation, such as dementia or traumatic brain injury, but which manifest after the age of eighteen. Texas also does not prohibit application of the death penalty on persons with severe mental disorders that significantly impair their ability to control their conduct. Because Texas's insanity defense is very narrowly defined, persons suffering from severe disorders such as schizophrenia are still eligible for capital punishment, even if their actions were based on delusions caused by their illness.

Recommendations
Texas should ensure that a defendant's mental health history, including evidence of mental retardation and mental illness, is fully examined and considered by the trial court before the defendant is allowed to waive his/her rights. Before a defendant is permitted to waive his/her rights to counsel, trial, direct appeal, or habeas corpus, the trial court should be required to hold a hearing during which the defendant's mental history, education, and other relevant evidence is considered. Texas should also prohibit the application of the death penalty for persons who have significant limitations in intellectual functioning and adaptive behavior resulting from dementia or a traumatic brain injury. In addition, the state should prohibit the application of the death penalty for persons who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of

Recommendations (Cont'd)
his/her conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. This recommendation does not include a disorder manifested primarily by repeated criminal conduct, such as antisocial personality disorder, or attributable solely to the acute effects of voluntary use of alcohol or other drugs.

POST-TRIAL

Proportionality Review (Chapter 7). A fundamental principle of capital jurisprudence in the U.S. is the need for procedural protections against the "random or arbitrary imposition of the death penalty." Meaningful comparative proportionality review helps to ensure that the death penalty is being administered in a rational and non-arbitrary manner, provides a check on broad prosecutorial discretion, and seeks to prevent discrimination from playing a role in the capital decision-making process—the key concerns underlying the U.S. Supreme Court's death penalty jurisprudence. For that reason, the majority of states with the death penalty engage in some form of proportionality review in capital cases. Texas, however, does not.

Proportionality review can identify and remedy inappropriate disparity in capital sentencing. For example, statistics compiled by the Texas Department of Criminal Justice indicate that 1,060 individuals have been given death sentences in the state since 1976 through 2011 and that these sentences are dispersed across 120 counties. However, just twenty of Texas's 254 counties account for over 76% of those individuals sentenced to death.

Recommendation
The Texas Court of Criminal Appeals, as the highest criminal court in the state, should conduct a searching and thorough proportionality review of every death sentence imposed. This review should include a comparison to similar cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not. The review should also encompass a meaningful comparison to co-defendants' or co-participants' cases, including those cases that resulted in a sentence less than death.

State Habeas Corpus Proceedings (Chapter 8). State habeas review is meant to correct constitutional errors in death penalty cases. However, Texas's capital habeas practices and procedures generally discourage thorough and transparent review of a death row inmate's claims of constitutional error.

Because they were tried and sentenced before recent reforms in the Texas capital punishment system, the vast majority of Texas death row inmates have not received the benefit of the improvements to fairness and due process that have developed over the past several years. Further, due to ineffective trial, appellate, and state habeas counsel, many inmates with claims of constitutional magnitude may be executed without a court ever reviewing their case on the merits.

Many of Texas's practices in state habeas review are out of step with the overwhelming majority of capital punishment states in the United States. Other states provide death row inmates with a significantly longer deadline, or do not impose a specific deadline at all, for filing a claim of post-conviction relief in a death penalty case. Because Texas does not impose filing deadlines on habeas applications in *non-capital* cases, the state affords the least amount of preparation time to those inmates who face the ultimate punishment. Other practices that discourage thorough review include denial of evidentiary hearings in capital habeas proceedings, reliance on "paper hearings" composed of affidavits and other documents submitted by the parties, and Texas district courts' adoption of one party's proposed findings of fact and conclusions of law verbatim.

Most capital habeas petitions are dismissed in a two- or three-page summary order issued by the Court of Criminal Appeals, whereas appellate courts in other death penalty states issue detailed opinions in capital post-conviction cases. Perhaps as a result of this practice, the Court of Criminal Appeals has failed to address claims that later led to relief in federal proceedings. This also creates a problem for death row petitioners and habeas lawyers attempting to research their cases, as there is little case law developed on capital habeas proceedings despite the frequency of death sentences imposed and executions carried out.

Procedural rules imposed by Texas can result in the court affirming a conviction and death sentence simply because of an inmate's inability to raise the claim any earlier, even though in some cases *the very information undermining the reliability of the trial was in the possession of another party and not the inmate*. While some preservation and procedural default rules are necessary to ensure that the trial court has an opportunity to correct an error before the claim is reviewed the appellate court, Texas imposes strict procedural default rules even in cases of egregious constitutional error. Once these claims are defaulted, they likely cannot be reviewed in federal court, as federal courts are generally prohibited from considering claims of error that were not reviewed in state court. Even in cases where an inmate presents a claim of actual innocence, the inmate is required to "unquestionably establish his innocence." Under this demanding standard, an inmate who could prove that it is more likely than not that s/he is innocent would *not* be entitled to a new trial.

The Assessment Team is particularly troubled by the court's inconsistent application in state habeas proceedings of the U.S. Supreme Court's *Penry* decisions. These Supreme Court decisions directly addressed the constitutionality of Texas's capital sentencing procedure. There can be no confidence in a death sentence based on an unconstitutional procedure which the U.S. Supreme Court has determined provides the jury an insufficient mechanism through which to consider evidence supporting a sentence less than death. Despite this, the court has granted relief to only some inmates who were sentenced under the unconstitutional procedure, while others remain on death row. As a result, inmates with nearly identical claims have received remarkably divergent treatment by the court.

Recommendations
Texas should amend its capital habeas statute to • Extend the filing deadline for an inmate's petition; • Provide that habeas proceedings should not commence until direct appeal proceedings, including review by the U.S. Supreme Court, have concluded; • Require the district court to conduct a live evidentiary hearing on any claims for which there is a dispute of material fact; and • Require the district court to draft independent findings of fact and conclusions of law in each case. In order to successfully implement these reforms, Texas should establish a dedicated capital law clerk office to assist Texas district court judges in capital cases. The federal pro se law clerk offices, established by many federal judicial districts, could serve as a model for this system. Furthermore, the Court of Criminal Appeals should publish detailed, publicly-available opinions in capital habeas cases fully explaining the bases for its disposition. For those past cases in which the Court of Criminal Appeals has adopted the findings of the district court in a summary order, the district court's findings should be made available on the Court of Criminal Appeals website. The court also should reexamine the strict application of procedural default rules in Texas capital cases to ensure that death row inmates are not executed despite serious questions of constitutional error. Texas has a long history of providing capital habeas petitioners with deficient and incompetent counsel. A death row inmate should not be forced to waive a claim of constitutional significance due to his/her attorney's poor performance. Further, Texas should adopt the harmless error standard when considering claims of constitutional error in state habeas proceedings. This standard will help to avoid cases in which the harmless error doctrine is invoked and the defendant is denied relief, notwithstanding a clear error undermining the confidence in the outcome of the trial. Finally, all remaining death row inmates who were sentenced to death prior to the U.S. Supreme Court's mandated changes to Texas's capital sentencing scheme should be granted new sentencing hearings so that their punishment can be reassessed under a constitutional standard.

Clemency (Chapter 9). Texas should have confidence that the final safeguard to prevent wrongful execution is a meaningful one. Its current clemency process—which permits the Board of Pardons and Paroles (Board) to make a decision without a hearing, permits the Board to make a recommendation to deny or grant clemency without meeting as a body, and does not provide a right to counsel—does not serve this function. Texas's clemency process may not only result in minimal review, but it also may contribute to the extraordinarily high denial rate of clemency petitions in Texas. As of August 1, 2013, Texas has executed 503 inmates in the modern death penalty era and has commuted the sentence of only two inmates facing imminent execution. By comparison, the state with the second highest number of executions after Texas—Virginia—has executed 110 inmates while commuting the sentence of eight inmates.

The U.S. Supreme Court has stated that "[e]xecutive clemency has provided the 'fail safe' in our criminal justice system ensuring that claims of innocence do not go uninvestigated, and that offenders are shown mercy as justice requires." Various members of the Board of Pardons and Paroles, however, have explicitly stated that it is not their role to determine the guilt or innocence of the petitioner. Moreover, Texas clemency decision-makers appear to have repeatedly denied clemency stating that all relevant issues have been vetted by the courts; however, as many Texas cases demonstrate, in the modern death penalty claims that may often warrant a grant of clemency have not or *cannot* be reviewed on the merits in the court system.

Recommendations
Texas law should be amended to require the Board of Pardons and Paroles to conduct a public hearing, attended by all members of the Board, in any case in which clemency is sought by a death row inmate. No recommendation for or against clemency can be made until the hearing is concluded and the Board has offered an opportunity to meet with the inmate and his/her counsel. The Board of Pardons and Paroles should also adopt guidelines directing its members to independently review all clemency applications and consider all factors that might lead a decision-maker to conclude that death is not the appropriate punishment. A set of standards or guidelines by which clemency petitions are evaluated would help create common ground among Board members, better insulate the Board from political considerations or impacts, and assist advocates who represent death row inmates in the preparation of clemency applications. As clemency is the last opportunity for a prisoner facing execution to receive a reprieve from this unalterable punishment, Texas should assign counsel to assist death row inmates in preparation and presentation of their clemency petitions. The state should ensure that funding is sufficient to compensate counsel and provide for investigative and expert resources. This effort may be aided considerably by the use of law school clinics. Legal developments in Texas and in other jurisdictions may also have significant relevance and bearing on the Board's recommendation for a reprieve or commutation of sentence. Accordingly, the Board could be well-served by use of a designated legal officer whose responsibility it is to collect and advise the Board on legal trends in the administration of the death penalty in all capital clemency cases.

External Review of Wrongful Convictions and Erroneous Death Sentences (Chapter 5). There have been 12 persons exonerated from death row in Texas and overall Texas leads the nation in exonerations and wrongful convictions in criminal cases at large. Presently, however, no entity in Texas evaluates the causes of such errors to develop methods for preventing and correcting errors in the future.

Recommendation
Texas should adopt a recent proposal in the Texas Legislature to thoroughly investigate the myriad causes of wrongful conviction in the state. Elements of the recently-proposed Timothy Cole Exoneration Review Commission would accomplish this purpose. The State should adopt such legislation, also ensuring that members of the Commission are comprised of all affected stakeholders, including members with expertise from the judiciary, prosecution, defense, and forensic science communities. The exoneration commission would be charged with investigating

Recommendations (Cont'd)
"all cases in which an innocent person was convicted and exonerated" in order to "identify the cause of wrongful convictions" and "consider and develop solutions and methods to correct the identified errors and defects through legislation, rule, or procedural change."

PROFESSIONALISM: Defense, Prosecution, and the Courts

Defense Services (Chapter 6). Since 1976, half of all Texas death sentences have originated in just four counties: Harris, Dallas, Bexar, and Tarrant. In these counties, no public defender office has been established to handle capital cases.[3] Although Texas has improved its delivery of indigent defense services in capital cases, the most active death penalty jurisdictions in the state continue to rely on list-qualified appointed counsel. This is a fragmented, uneven system of representation for capital defendants at trial and on direct appeal. List-qualified habeas counsel is also appointed in cases in which the Office of Capital Writs is unable to undertake habeas representation. Many of the recent safeguards enacted by the Texas legislature concerning eyewitness identifications and discovery reform cannot be effectively enforced without the guiding hand of competent counsel.

With respect to the right to counsel, Texas law does not establish the right to two qualified attorneys at *every* stage of the legal proceedings: no more than one attorney will be appointed to represent a defendant on direct appeal or during state habeas proceedings. There is no right to counsel during clemency proceedings and Texas law appears to prohibit the Office of Capital Writs from providing defense services at this stage.

Appointment and Monitoring of Counsel in Death Penalty Cases

The criteria developed by the Texas legislature for qualification of defense counsel in capital cases fall short of ensuring high-quality legal representation, emphasizing experiential requirements which may do very little to improve the quality of representation since many of the worst lawyers are "those who have long taken criminal appointments and would meet the qualifications." No defender organization or statewide independent appointing authority is responsible for the selection, training, or monitoring of capital counsel.

Instead, Texas law generally empowers the presiding judge to make all attorney appointments, as well as to approve or deny funding requests by defense counsel for expert or ancillary services. This system not only permits the assignment of counsel to capital cases to be influenced by factors irrelevant to ensuring effective representation, but also unnecessarily complicates the judge's role as neutral arbiter, inviting uneven treatment of capital cases. Such an arrangement may induce counsel to provide less-than-zealous representation for fear of antagonizing the presiding judge on whom their livelihood depends.

Further, list-qualified counsel are not rigorously screened and monitored, nor does a complaint and remedy process for cases in which counsel did not provide high-quality legal representation exist. The ill-effects of this system remain well-documented: attorneys who have missed filing

[3] As of July 2012, the public defender office in Dallas County had not represented a capital defendant since 2001.

deadlines in past capital cases remain on the appointment lists. Moreover, there is no requirement under Texas law that mitigation specialists, investigators, and other non-attorneys participating in a capital case on behalf of the defense receive continuing professional education appropriate to their areas of expertise.

Compensation

Counties relying on appointed counsel may distinguish between in-court and out-of-court work and some counties impose caps on compensation. In- and out-of-court rate disparities, along with flat fees, may induce counsel to bring a case to trial, as opposed to negotiating a plea agreement that, in many capital cases, is in the best interest of the client. Qualified counsel also may opt not to represent capital defendants out of concerns that their considerable efforts will not be fairly compensated. Flat fees also pose an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee. Furthermore, the hourly compensation rates in Texas's most active death penalty counties fall below the hourly compensation rate for attorneys appointed to represent indigent death-sentenced inmates under federal law.

Recommendations

Provision of Counsel

To ensure high-quality legal representation for every capital defendant and death-sentenced inmate in Texas, the State should guarantee that every person facing the death penalty has access to two qualified attorneys, an investigator, and a mitigation specialist at every stage of the proceedings, including state habeas and clemency proceedings. Counsel must be appointed at the earliest stage, even if capital charges have not been filed but the case could be death-eligible.

Qualifications, Selection, and Evaluation of Capital Counsel

Texas must better ensure that appointed counsel possess the knowledge and skills necessary to meet the uniquely complex and demanding challenges of capital representation. Texas should adopt statewide qualification standards that include an assessment of the applicant's knowledge, skills, and commitment to zealous advocacy as set forth by the *ABA Guidelines* and the State Bar of Texas's *Guidelines and Standards for Texas Capital Counsel*. Texas should empower regional or county authorities to make selection and evaluation determinations with respect to list-qualified appointed counsel. As with the appointing authorities established in other capital jurisdictions, these local authorities should be comprised of individuals with demonstrated knowledge and expertise in capital representation, and their membership should be, to the extent possible, independent of the elected judiciary.

Attention also must be paid to monitoring the performance of capital counsel. What constitutes tolerable attorney competency in a non-capital case may be fatal in the capital context. To this end, Texas must adopt performance standards for capital counsel, with particular emphasis on required training and acceptable attorney workloads. Finally, Texas must implement mechanisms for monitoring the performance of list-qualified appointed counsel.

Recommendations (Cont'd)
Compensation and Funding Texas should unburden their trial courts of the difficult pecuniary decisions in determining the compensation amounts for list-appointed counsel and ancillary services in death penalty cases. This authority could be transferred to, for example, the Office of Court Administration. In so doing, the state's judges would be empowered to focus on thier role as "an arbiter of facts and law for the resolution of disputes," improving the public's confidence in the impartiality of the judiciary in criminal cases. To ensure a sufficient pool of qualified attorneys is available and willing to be appointed to represent indigent capital defendants and death-sentenced inmates, and to ensure that all counsel are able to provide high-quality legal representation to those who may face or are facing the death penalty, jurisdictions within Texas should • Remove the distinction in compensation rates between in-court and out-of-court services. Flat fees should be prohibited and counsel should be compensated for actual time and services performed; • Ensure that compensation provided to counsel is reasonable, including providing comparable compensation for defense services at trial, on direct appeal, and during state habeas and clemency proceedings; • Compensate counsel for representing a death-sentenced inmate during clemency proceedings; and • Compensate investigative, expert, and other ancillary services so that high-quality representation is provided at every stage of the legal proceedings, including the stages of state habeas and clemency. The Assessment Team also encourages Texas to continue to fully fund the Office of Capital Writs so that it has the necessary resources to accept capital appointments and hire well-qualified attorneys and support staff, including mitigation specialists and investigators.

Disclosure of Evidence (Chapters 5 & 11). The failure of some Texas prosecutors to disclose evidence to the defense has led to several wrongful convictions—including cases in which the actual perpetrator remained at large and was able to commit additional crimes. While inadvertent *Brady* violations will likely be reduced under Texas's new Michael Morton Act, the new law is but a first step toward robust and comprehensive discovery in Texas criminal cases. This is particularly true in death penalty cases as the prosecution possesses material not only relevant to guilt or innocence, but also relevant to mitigating punishment—all of which must be timely disclosed to the defense.

Recommendations
Texas should adopt additional measures to build upon the foundation laid by the Michael Morton Act. The entire case file, including investigation notes, should be disclosed to defense counsel with limited exception for a particularized showing of need for protection of witnesses. Strengthening disclosure requirements will enable more just and accurate outcomes to be reached, the risk of wrongful convictions reduced, and the public's confidence in judicial

Recommendations (Cont'd)
independence and vigilance in Texas's criminal system improved. District Attorneys also should develop procedures to ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with the duty to disclose *all* evidence in a particular case. Ultimately, prosecutors should have in their possession a complete copy of the investigating agencies' case file or must conduct a full inspection of the complete contents of the file. As a great deal of discretion remains with the prosecutor in determining what material should be disclosed under the new law, in capital cases the trial court should also be permitted to conduct in camera inspection of the prosecutor's file to ensure that all *Brady* and other discoverable material has been disclosed. Prosecutors should be required to affirm that all *Brady* material has been disclosed. In addition, trial judges should monitor discovery in capital cases, resolving disputes as they occur and ensuring that the case is progressing. Given the limitations faced by defense counsel in obtaining discovery post-trial, all disclosure obligations under law should be applicable to state habeas proceedings.

Investigation and Sanction of Conduct (Chapters 5 & 6). Currently, no formal mechanism exists for lodging complaints against defending or prosecuting attorneys in capital cases short of alleging professional misconduct pursuant to the Texas Rules of Disciplinary Procedure. While the Assessment Team acknowledges that only some violations—those committed with extreme or reckless carelessness, or higher degrees of fault—are appropriately met with individual discipline, it does not appear that the State Bar of Texas has consistently disciplined ineffective defense lawyers or prosecutors who engage in misconduct in capital cases. Derogations of duty, even where unintentional, must be consistently and reliably identified so that defense counsel, prosecutors, judges, and other actors in the criminal justice system can learn from past errors and prevent errors in the future.

Recommendation
The State Bar of Texas (SBOT) disciplinary process for attorneys in capital cases must be assessed and strengthened. As suggested by the Texas District County and Attorney Association, "the State Bar [should] develop more robust data reporting for the purposes of identifying grievances involving prosecutors and detecting any trends, shortcomings, or changes needed in relation to those grievances." SBOT must ensure that investigations of ineffective counsel or prosecutorial misconduct are conducted by individuals "knowledgeable in the intricacies of criminal justice." Finally, SBOT should consider measures to make the grievance process accessible to prisoners.

Training of All Actors in the System (Chapters 5, 6 & 11). In order to ensure the fairness of death penalty proceedings, judges, prosecutors, and defense counsel who handle capital cases must undergo training particularized to their unique roles and responsibilities in a death penalty case. For example, while judges are appropriately cautious about injecting themselves into the proceedings on the side of one party or another, a trial court ultimately must serve as a backstop to the adversarial system, thus ensuring that the rights of all parties are protected—especially in

cases where a defendant's life is at stake. The occurrences of ineffective lawyering and unfair prosecutorial conduct in capital cases raise questions, however, as to whether judges take enough precautions to ensure the fairness of the proceedings. Trial judges have failed to sustain objections when prosecutors have, in their closing arguments, referred to inadmissible evidence, or erroneously described the acts of the defendants in some cases. They have also failed to notice or correct wrongdoing on the part of defense counsel.

Recommendations
Courts Routine training should be required of any trial judge who may handle capital cases to address the particular legal issues incident to such cases. Facilitated by the Texas Center for the Judiciary and comparable educational institutions, this training should emphasize to participating judges the corrective action the trial court may take upon observing unfair conduct by the prosecution or defense. Defense Counsel Pursuant to its authority under Texas law, the Texas Indigent Defense Commission should promulgate additional rules to require capital defense counsel to complete, at regular intervals, a comprehensive training program covering at least the topics set out in the *ABA Guidelines* and the State Bar of Texas's *Guidelines and Standards for Texas Capital Counsel*. Non-attorneys who wish to be eligible to participate on defense teams must also receive continuing professional education appropriate to their areas of expertise. Prosecutors Texas should impose training requirements, accompanied by adequate funding to support participation in such trainings, for Texas prosecutors assigned to capital cases. Trainings related to the prosecutor's role in capital cases should reflect the prosecutor's obligation to seek justice and ensure a fair trial—imperatives which recently gave rise to the State's passage of the Michael Morton Act. All Texas prosecutors also should be required to receive training on how to evaluate the accuracy of eyewitness identifications, confessions, and jailhouse informant testimony. Prosecutors should be aware of the ways in which unconscious and unintentional cognitive biases can undermine their effort to conscientiously scrutinize police investigations. Research has demonstrated that training as well as internal procedures can minimize the negative effects of cognitive bias. Accordingly, prosecutorial training should address the dangers of cognitive bias as well as instruct prosecutors on methods to guard against the influence of cognitive bias in their decision-making.

III. SUMMARY OF THE REPORT

Chapter One: An Overview of the Texas Death Penalty System

In this Chapter, the Assessment Team examined the demographics of Texas's death row, the statutory evolution of the Texas death penalty scheme, and the progression of an ordinary death penalty case through the Texas death penalty system from arrest to execution.

Chapter Two: Law Enforcement Identifications and Interrogations

Eyewitness misidentification and false confessions are two of the leading causes of wrongful convictions. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this Chapter, the Assessment Team reviewed Texas's laws, procedures, and practices on law enforcement identifications and interrogations and assessed whether they comply with the ABA's policies.

A summary of Texas's overall compliance with the ABA's policies on law enforcement identifications and interrogations is illustrated in the following chart.[1]

Law Enforcement Identifications and Interrogations	
ABA Recommendation	**Compliance Level**
Recommendation #1: Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the *ABA Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (Best Practices)*.	Partial Compliance
Recommendation #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.	In Compliance
Recommendation #3: Law enforcement agencies and prosecutor offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and the continuing lessons of practical experience.	In Compliance
Recommendation #4: Video-record the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where video-recording is impractical, audio-record the entirety of such custodial interrogations.	Partial Compliance
Recommendation #5: Ensure adequate funding for the proper development, implementation, and updating of policies and procedures relating to identifications and interrogations.	Partial Compliance
Recommendation #6: Courts should have the discretion to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy.	In Compliance

[1] Where necessary, the Recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed Recommendations are not substantively different from the Recommendations contained in the "Analysis" section of each Chapter.

Law Enforcement Identifications and Interrogations (Cont'd)	
ABA Recommendation	**Compliance Level**
Recommendation #7: Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy.	Not in Compliance
Recommendation #8: Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.	Insufficient Information
Recommendation #9: Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.	Insufficient Information

A review of state cases in the National Registry of Exonerations reveals that in Texas, from 1989 through 2012, at least forty-seven people whose convictions were based in significant part on eyewitness identification were later exonerated following DNA testing or the discovery of new evidence. Ten of those individuals had been sentenced to death. In response to these findings, Texas recently enacted a law requiring all law enforcement agencies to "adopt, implement, and as necessary amend a detailed written policy regarding the administration of photograph and live lineup identification procedures." To fulfill this requirement, an agency may adopt a model policy—one formulated by the Bill Blackwood Law Enforcement Management Institute of Texas (Bill Blackwood Institute)—or it may adopt its own policy, provided that policy conforms with standards specified in the Texas Code of Criminal Procedure.

The Bill Blackwood Institute's *Model Policy* has many features in keeping with known best practices to reduce misidentifications. For example, the *Model Policy* emphasizes that "[v]ideo documentation (with audio) is the preferred method" for documenting an identification procedure, and that an eyewitness making an identification should be pressed on his/her certainty and his/her responses documented "using the witness's own words." A law enforcement agency that adopts the *Model Policy* would, in fact, have procedures that align with the ABA's *Best Practices*.

Periodic training is also made available to law enforcement officers and prosecutors regarding proper procedures for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses. The Texas Criminal Justice Integrity Unit, established by the Texas Court of Criminal Appeals, has facilitated such training at times in partnership with the Texas Commission on Law Enforcement Office Standards and Education.

Despite the known problems with eyewitness identifications, Texas permits eyewitnesses to make identifications in court, even if a pretrial procedure was so suggestive as to require suppression, so long as the courtroom identification has a source "independent" of the prior procedure. Finally, unlike the majority of jurisdictions in the U.S., Texas does not permit the court to provide an instruction explaining the factors affecting eyewitness accuracy which would help jurors' improve their decision-making. Importantly, the State has yet to adopt an important and related recommendation from the Timothy Cole Advisory Panel on Wrongful Convictions:

"The State of Texas should permit evidence of compliance or noncompliance with the model policy to be admissible in court."

With respect to interrogation practices, at least five people in Texas offered confessions to law enforcement yet later were exonerated following DNA testing or the discovery of new evidence. Given the risk that an innocent person will confess to a crime, it is imperative for law enforcement officers to video-record the entirety of a suspect's interrogation, including any questioning that precedes the formal confession and the suspect's waiver of his/her *Miranda* rights. A video-recording provides the court, jury, and prosecutor with the best means to determine whether a confession is credible, including whether law enforcement engaged in any coercive tactics in obtaining a confession. Despite these benefits, Texas law does not require law enforcement agencies to record the entirety of custodial interrogations of crime suspects. In practice, is appears that law enforcement agencies rely on written rather than oral statements.

Chapter Three: Collection, Preservation, and Testing of DNA and Other Types of Evidence

DNA testing has proved to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depends on the state's laws and on its law enforcement agencies' policies and procedures concerning the collection, preservation, and testing of biological evidence. In this Chapter, the Assessment Team examined Texas's laws, procedures, and practices concerning not only DNA testing, but also the collection and preservation of all forms of biological evidence, and the Team assessed whether the state complies with the ABA's policies.

A summary of Texas's overall compliance with the ABA's policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the following chart.

Collection, Preservation, and Testing of DNA and Other Types of Evidence	
ABA Recommendation	**Compliance Level**
Recommendation #1: The state should preserve all biological evidence for as long as the defendant remains incarcerated.	Partial Compliance
Recommendation #2: All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law. Jurisdictions should provide access to post-conviction DNA testing to comport, at a minimum, with the standards and procedures set forth in the *ABA Criminal Justice Standards on DNA Evidence, Standard 6.1, Post-conviction Testing*.	Partial Compliance
Recommendation #3: Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.	Partial Compliance
Recommendation #4: Provide adequate funding to ensure the proper preservation and testing of biological evidence.	Partial Compliance

As of August 2013, 48 convicted persons have been exonerated through DNA testing in Texas. In each of these cases, the existence and preservation of the biological evidence which was later tested was critical to ensuring the subsequent exoneration and release of the innocent person

from prison. In Texas, if a defendant is convicted of capital murder, biological evidence must be retained and preserved "until the inmate is executed, dies, or is released on parole."

While the State of Texas is commended for enacting this provision, it is not without significant shortcomings. For example, the statute does not require indefinite preservation of biological evidence in violent felony cases, although the commission of a violent felony in the past can affect the decision to sentence a person to death. The statute also fails to specify who is responsible for preserving biological evidence or to require each county to adopt policies to delineate these responsibilities. Anecdotal accounts suggest that the failure to delineate responsibility has led to inadvertent destruction of evidence in at least some cases. Nor does the statute specify a remedy for the unlawful destruction of biological evidence.

Finally, prior to 2001, there was no requirement under Texas law that biological evidence in capital cases had to be preserved until the inmate is executed. Thus, a significant number of current death-sentenced inmates—and many individuals who already have been executed—will not have received the benefit of the preservation statute.

The importance of preserving biological evidence has been powerfully illustrated by the results of biological testing completed in Dallas. The work of that county's conviction integrity unit has led to thirty-five exonerations, sixteen of which have involved DNA testing. A circumstance unique to Dallas is that the Southwestern Institute of Forensic Sciences preserved significantly more biological evidence than many other public laboratories in Texas. By contrast, for example, the Harris County District Attorney's Office sought re-investigation of convictions through testing of biological evidence; however, that office's efforts were hampered as old evidence from convictions was not preserved and thus could not be tested.

As of September 1, 2013, a defendant tried for a capital offense in which the State is seeking the death penalty is guaranteed DNA testing "on any biological evidence that was collected as part of an investigation of the offense and is in the possession of the state." This statute, however, does not address a number of current limitations on a death row inmate's access to DNA testing. Unlike the *ABA Criminal Justice Standards on DNA Evidence* or the statutes of several states, Texas does not permit an inmate to request DNA testing and analysis to show that there is a reasonable probability that s/he would not have been sentenced to death if testing and analysis produced favorable results. Further, the statute's requirement that "identity was or is an issue in the case" eliminates the possibility of testing in cases where relative culpability is at issue—such as in the case of two co-defendants tried and convicted of the same crime. In addition, the requirement that the evidence must have been secured in relation to the challenged offense may limit an inmate's ability to have newly-discovered evidence tested. The existing statute also excludes the possibility of retesting, even if there is credible evidence that the previous testing results were simply incorrect. Finally, Texas law also does not provide a catch-all provision which would permit testing in the interests of justice. An inmate's invocation of the DNA testing statute may also be challenged by the local district attorney.

Chapter Four: Crime Laboratories and Medical Examiner Offices

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

A summary of Texas's overall compliance with the ABA's policies on crime laboratories and medical examiner offices is illustrated in the following chart.

Crime Laboratories and Medical Examiner Offices	
ABA Recommendation	**Compliance Level**
Recommendation #1: Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.	**Partial Compliance**
Recommendation #2: Crime laboratories and medical examiner offices should be adequately funded.	**Partial Compliance**

The power of forensic science to aid in the fair administration of justice is enormous. Just as powerful, however, is the ability of faulty or fraudulent scientific analysis to contribute to wrongful convictions. In Texas, there are numerous documented occurrences of mistake and fraud in forensic analysis—many of which appear to be the result of systemic and institutional causes. The current patchwork of state and local, accredited and unaccredited, and formal and informal forensic laboratory analysis does not build credibility in the criminal justice process—particularly when a life is at stake.

Texas law makes a distinction between two groups of forensic science service providers. The first group of services cannot provide the basis for expert testimony unless they are performed by a crime laboratory "accredited by the [DPS] director." The second group of services is exempted from this requirement. As of May 22, 2013, DPS lists as accredited fifty-two in-state and fifty-four out-of-state laboratories. Most of these laboratories are operated by federal, state, or local government. DPS does not compile lists of in- and out-of-state forensic science service providers that, by virtue of the analyses they perform, are not required to be accredited under Texas law.

A series of audits throughout the past ten years raise questions about the integrity of forensic tests performed at some Texas laboratories. One audit of the Houston crime laboratory revealed that the laboratory lacked a quality assurance program and employed inadequately trained analysts who used poor analytical technique and incorrectly interpreted data. These problems are aggravated by numerous allegations that some forensic analysts have deliberately falsified or distorted testing results. Problems in Texas crime laboratories appear to have affected at least four capital cases.

Apart from internal quality controls, crime laboratories principally are monitored by the Texas Forensic Science Commission (Commission), established in 2005. Legislation was passed in the 2013 General Assembly and signed into law in June 2013 to clarify that the jurisdiction of the Commission included any laboratory conducting forensic analysis—not just those that are accredited.

Particularly troubling, however, are the events surrounding the Commission's investigation of Cameron Todd Willingham's case, in which subsequent forensic analyses indicated that Willingham—who was executed in 2004—may not have been responsible for the murder of his three children by arson. Delays and obstruction hampered the Commission's investigation into the case against Willingham.

The existence of considerable backlogs at several of Texas crime laboratories also suggests an absence of sufficient resources for forensic service providers in the State. In addition, a joint review by the *Austin American-Statesman* and an Austin-based news channel found that, as of late-2012, DPS laboratories have "become overwhelmed and backlogged" as "the number of blood samples submitted to [those laboratories] increased 500 percent" in the past six years.

Only those Texas counties having a population of over one million and no reputable medical school are mandated to have a medical examiner's office. In counties with no medical examiner, justices of the peace are authorized to perform inquests into the death of a person and in 2012 alone, justices of the peace performed 15,371 inquests. This is troublesome in light of the fact that justices of the peace, who are not required to have any medical training or certification, need only consult with a health officer or physician regarding cause of death at their discretion.

Anecdotal evidence of failures at individual medical examiner offices illustrates that—whatever the accreditation status of these offices—the validity, reliability, or timely analysis of forensic evidence performed in some offices is lacking. For example, the examiner who conducted the 1999 autopsy in the case against Larry Ray Swearingen substantially revised her estimate of the decedent's date of death—a crucial detail—in 2007. While it is agreed that professionals should acknowledge their errors as soon as they become known, the interpretation of forensic evidence must be accurate in the first instance.

Chapter Five: Prosecution

The prosecutor plays a critical role in the criminal justice system. The character, quality, and efficiency of the whole system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases, where prosecutors have enormous discretion in deciding whether or not to seek the death penalty. In this Chapter, the Assessment Team examined Texas's laws, procedures, and practices relevant to the role of the prosecution in death penalty cases and assessed whether they comply with the ABA's policies.

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

Prosecution	
ABA Recommendation	**Compliance Level**
Recommendation #1: Each prosecutor office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.	Insufficient Information
Recommendation #2: Each prosecutor office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.	Insufficient Information
Recommendation #3: Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.	Insufficient Information
Recommendation #4: Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.	Insufficient Information
Recommendation #5: Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.	Partial Compliance
Recommendation #6: The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.	Partial Compliance

The Assessment Team was unable to determine whether Texas complies with several of the Recommendations contained in this Chapter. The Team submitted surveys to Texas District Attorney Offices in 23 counties. These jurisdictions represented both counties that had sentenced the most defendants to death in Texas, as well as represented the geographic diversity of the State. The survey requested general data regarding the death penalty in each prosecutor's jurisdiction, as well as information on training and qualification requirements of prosecutors who handle capital cases, funding and budget limitations, and capital charging and discovery practices. The Assessment Team received completed surveys from two District Attorney Offices.

Unlike the death penalty sentencing schemes in many capital jurisdictions in the U.S., the Texas capital murder statute itself establishes the absolute limits on a prosecutor's discretion to seek the death penalty. Many of the factors that would be considered "aggravating" in other jurisdictions are instead treated as elements of "capital murder" under Texas law—meaning that probable cause to find those factors does not distinguish cases in which the death penalty will be pursued from those cases in which it will not be sought. Texas law does establish that a jury must consider the special sentencing issues before sentencing a defendant to death in the penalty phase. However, these special issues do little to guide a prosecutor's decision to seek the death penalty as they are based on subjective criteria such as the probability that the defendant will "constitute a continuing threat to society."

Thus, given this broad discretion and the relatively unique nature of Texas's statutory scheme for capital cases, little guidance is available from the existing legal framework to assist prosecutors in determining whether s/he should seek the death penalty in a given case. The very nature of the Texas death penalty scheme takes away some of de facto guidance that exists in other statutory schemes.

Relying on publicly available information, including statutory and case law, media reports, and studies conducted by other entities, disparate charging practices among some District Attorneys' offices in capital cases emerged. For example, in 2011 the Harris County District Attorney stated that her office does not seek the death penalty in the "vast majority" of capital murder cases. In contrast, the Harris County District Attorney from 1981-2000 sought the death penalty in "every single case that could qualify as a capital murder." Texas also imposes no requirement on prosecutors to maintain written policies governing the exercise of prosecutorial discretion in capital cases. In addition, there is significant geographic disparity across Texas in capital charging and sentencing practices: as of March 2012, over half of the 1,060 death sentences handed down in Texas since 1976 have been imposed in only four of Texas's 254 counties.

Law enforcement agencies must follow procedures to ensure the accuracy of eyewitness identifications, confessions, and statements of informants; however, it is imperative that prosecutors also carefully scrutinize cases that rely on these types of evidence. Many of Texas's 117 wrongful convictions since 1988 might have been avoided had prosecutors realized that the evidence admitted in the case was unreliable. Texas law, however, does not require prosecutors to establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse informants and witnesses who receive a benefit for their testimony.

The failure of some Texas prosecutors to disclose evidence to the defense has also led to several wrongful convictions—including cases in which the actual perpetrator remained at large and committed additional crime(s). Data published by the National Registry of Exonerations reveals at least fifteen persons exonerated of serious felonies in Texas from 1977 to 2013 in which exculpatory or mitigating *Brady* material was not disclosed to the defense at trial. In four of these cases, the person was sentenced to death. While inadvertent *Brady* violations will likely be reduced under Texas's new Michael Morton Act, this new law is but a first step toward robust and comprehensive discovery in Texas criminal cases.

While only some violations—those committed with extreme or reckless carelessness, or higher degrees of fault—are appropriately met with individual discipline, it does not appear that the Texas State Bar has consistently disciplined prosecutors who engage in misconduct. In 2012, the Innocence Project examined Texas trial and appellate court decisions addressing allegations of prosecutorial misconduct from 2004 to 2008. According to the study, courts found prosecutorial error or misconduct in 91 Texas cases in this period, including 19 cases in which the error was not harmless and merited reversal. Notably, however, those cases that did not result in reversal may underrepresent the actual extent of prosecutorial negligence, error, and misconduct due to the doctrines of procedural default and harmless error.

A review of Texas wrongful convictions similarly reveals cases in which the prosecutors involved do not appear to have been investigated or disciplined. In 2012, the Texas Tribune studied 83 Texas exonerations between 1989 and 2011, and found that in 21—nearly a quarter—violations of a prosecutorial duty were the basis for granting relief. Six of those cases involved defendants sentenced to death, yet none of the prosecutors involved were disciplined by the State Bar.

The Texas Court of Criminal Appeals provides some funding for the training of prosecutors, including training programs related to capital cases. Training is available from other sources as well. However, aside from a one-hour training on the duty to disclose *Brady* evidence, Texas prosecutors are not required to attend any training directly related to the prosecution of criminal cases, capital or otherwise. Thus, under the current system, even if training programs are available, there is no mechanism to ensure that all prosecutors are trained.

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, full and fair compensation to lawyers who undertake capital cases, and sufficient resources for investigators and experts. States must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases as an integral part of a fair justice system. In this Chapter, the Assessment Team examined Texas law, procedure, and practice relevant to defense services and assessed whether they comply with the ABA's policies.

A summary of Texas's overall compliance with the ABA's policies on defense services is illustrated in the following chart.

Defense Services	
ABA Recommendation	**Compliance Level**
Recommendation #1: Guideline 4.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*)—The Defense Team and Supporting Services	Partial Compliance
Recommendation #2: Guideline 5.1 of the *ABA Guidelines*—Qualifications of Defense Counsel	Partial Compliance
Recommendation #3: Guideline 3.1 of the *ABA Guidelines*—Designation of a Responsible Agency	Not in Compliance
Recommendation #4: Guideline 9.1 of the *ABA Guidelines*—Funding and Compensation	Partial Compliance
Recommendation #5: Guideline 8.1 of the *ABA Guidelines*—Training	Partial Compliance

Provision of Counsel

Prior to the 2007 establishment of the Regional Public Defender for Capital Cases (RPDO), which represents indigent capital defendants at trial in an increasing number of Texas's 254 counties, and the 2009 establishment of the Office of Capital Writs (OCW), which represents

indigent death-sentenced inmates during state habeas proceedings, the State of Texas relied almost exclusively on locally-appointed counsel to represent indigent capital defendants and death-sentenced inmates. The creation of these offices, staffed by attorneys and support staff specially qualified to represent capital defendants at trial and during state habeas proceedings, has significantly improved the quality of representation available to Texas's indigent defendants and inmates in death penalty cases. However, in the most active death penalty jurisdictions in the State, counties continue to rely on a fragmented, uneven system of representation for capital defendants at trial and on direct appeal. In these counties, indigent capital defendants are represented by local counsel appointed by the trial court (list-qualified appointed counsel).

At present, Texas law does not establish the right to two qualified attorneys at *every* stage of the legal proceedings. Only one of two assigned trial attorneys must be qualified to handle death penalty representation, while no more than one attorney will be appointed to undertake representation of a capital case on direct appeal or during state habeas proceedings. Texas law also provides no right to counsel during clemency proceedings and it appears that Texas law forbids OCW from providing defense services during clemency.

Qualifications of Counsel in Death Penalty Cases

The Texas legislature has developed and published qualification standards for defense counsel in capital cases, although the criteria fall short of ensuring high-quality legal representation. The standards do not encompass the many facets of capital representation, such as requiring skill in oral advocacy and voir dire. Furthermore, Texas's standards emphasize experiential requirements which may do very little to improve the quality of representation since many of the worst lawyers are "those who have long taken criminal appointments and would meet the qualifications." One Houston-based attorney, for example, has had at least twenty clients sentenced to death. Finally, there also appears to be a limited pool of attorneys available to represent death-eligible defendants in some of the more active death penalty regions of the state. Public defender agencies report that each strives to meet the *ABA Guidelines* in their employment practices. For example, RPDO's qualification requirements for capital case attorneys list all of the prerequisite skills set out by the *ABA Guidelines*.

Appointment of Counsel

No defender organization or statewide independent appointing authority is responsible for the selection of capital counsel; instead, the power to appoint an attorney to represent an indigent capital defendant or death-sentenced inmate rests with the elected judges of Texas's court system. Nor does any statewide independent authority bear the responsibility to train or monitor attorneys who will or may represent indigent capital defendants or death-sentenced inmates. These provisions generally empower the presiding judge to make all attorney appointments, which can permit the assignment of counsel to capital cases to be influenced by factors irrelevant to ensuring effective representation.

Monitoring of Capital Counsel Performance

It appears that local selection committees and the presiding judges of Texas's administrative judicial regions possess some capacity to monitor the performance of counsel. The Texas Code requires the local selection committee to annually review the list of attorneys qualified for appointment to ensure that each listed attorney satisfies the Code's requirements. Similarly, the presiding judges of the administrative judicial regions who retain the list of counsel available for state habeas appointments are responsible to ensure that the membership of that list "may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case."

The evaluation of public-defender appointed counsel (the El Paso Public Defender's Office, RPDO, and OCW) does not depend on the state judiciary. However, the majority of defendants facing a capital trial in Texas continue to be represented by list-qualified appointed counsel. Applicant attorneys are not rigorously screened and monitored, nor does a complaint and remedy process for cases in which counsel did not provide high-quality legal representation exist. The ill effects of this system remain well-documented: for example, one Houston-based attorney has missed federal filing deadlines in at least three capital cases, yet the attorney remains on that administrative judicial region's list of capitally-qualified counsel.

Currently, no formal mechanism exists for lodging complaints against attorneys providing representation in capital cases short of alleging professional misconduct pursuant to the Texas Rules of Disciplinary Procedure.

Compensation and Funding

Texas has improved its compensation of defense counsel in death penalty cases in many regions of the State through creation of public defender offices to represent capital defendants and death row inmates. In particular, Texas now provides state and local funding to support RPDO, which currently provides capital trial defense services in more than 190 of Texas's 254 counties. In addition, the Texas Legislature established OCW—an office staffed with salaried capital writ attorneys to provide much-needed representation to death-sentenced inmates during state habeas proceedings.

A majority of capital defendants, however, are tried in counties that rely on list-qualified appointed counsel to represent indigents facing the death penalty. The compensation schemes in these counties are subject to caps, differentiation between in-court and out-of-court work, and trial court approval. Caps on compensation are improper as they may amount to too little in the way of compensation, particularly as preparing thoroughly for a capital case may consume hundreds or thousands of hours of out-of-court work. As a consequence, qualified counsel may opt not to represent capital defendants out of concerns that their considerable efforts will not be fairly compensated. Furthermore, a flat fee poses an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee. Flat fees, as well as in and out-of-court rate disparities also may induce counsel to bring a case to trial, as opposed to negotiating a plea agreement that may be, in many capital cases, in the best interest of the client.

Further, the State of Texas does not guarantee, nor does it provide funding for, defense services during federal habeas and state clemency proceedings.

Compensation for counsel and ancillary services must also be approved by the court in ordinary and extraordinary cases alike. Such an arrangement may induce counsel to provide less-than-zealous representation for fear of antagonizing the presiding judge on whom their livelihood depends.

While Texas provides funding to support investigator and mitigation specialist positions within public defender offices, such services are not guaranteed to assist list-qualified appointed counsel in Texas's most active death penalty jurisdictions. Trial courts also possess the authority to approve or deny funding requests for these ancillary services. Such a responsibility unnecessarily complicates the judge's role as neutral arbiter, as well as invites uneven treatment of capital cases.

Training of Counsel

Neither Texas law nor internal agency policy require public defender-appointed counsel to complete a comprehensive training program on capital case representation, although the capital defender offices appear to possess internal policies which require or encourage staff to attend relevant trainings.

In those regions that rely on list-qualified counsel to undertake capital representation, the requirements for remaining on an appointment roster include continuing legal education specific to death penalty cases. Local selection committees must annually review the list of attorneys to ensure that each attorney satisfies the qualification requirements, which include participation in continuing legal education courses or other training relating to criminal defense in death penalty cases. The Texas Code further requires that list-qualified appointed counsel regularly present proof that the attorney has successfully completed the minimum continuing legal education requirements of the State Bar of Texas, including a course or other form of training relating to criminal defense in death penalty cases or in appealing death penalty cases, "as applicable." The quality of the training provided, however, as well as the extent to which local selection committees scrutinize list-qualified appointed counsel's assertions pertaining to their training, remains unclear.

There is no requirement under Texas law that mitigation specialists, investigators, and other non-attorneys participating in a capital case on behalf of the defense receive continuing professional education appropriate to their areas of expertise.

Chapter Seven: The Direct Appeal and Proportionality Review

One important function of appellate review is to ensure that death sentences are not imposed arbitrarily or based on improper biases. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly-situated defendants to ensure that the sentence is not disproportionate, is the primary method to prevent and remedy arbitrariness and bias at sentencing. In this Chapter, the Assessment Team

examined Texas's laws, procedures, and practices and assessed whether they comply with the ABA's policies.

A summary of Texas's overall compliance with the ABA's policies on the direct appeal process and proportionality review is illustrated in the following chart.

The Direct Appeal Process and Proportionality Review	
ABA Recommendation	**Compliance level**
Recommendation #1: In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been but was not sought.	Not in Compliance

Texas is in the minority of jurisdictions that do not undertake proportionality review of death sentences to guard against the execution of offenders sentenced to death arbitrarily. While at least 18 of the 33 states with the death penalty conduct proportionality review in cases in which a death sentence was imposed, Texas does not. While every case in which a defendant is sentenced to death is "subject to automatic review by the [Texas] Court of Criminal Appeals," this review does not encompass a comparison of the case at bar to previous capital cases to ensure that the sentence imposed was both proportionate to the offense and offender.

The importance of meaningful proportionality review is underscored by the rates at which various Texas counties impose death sentences. Statistics compiled by the Texas Department of Criminal Justice indicate that 1,060 individuals have been given death sentences in the state since 1976 through 2011 and that these sentences are dispersed across 120 counties. However, just 20 of Texas's 254 counties account for over 76% of the 1,060 individuals sentenced to death. And just four of Texas's 254 counties account for over 50% of death sentences imposed in the state since 1976.

Chapter Eight: State Habeas Corpus Proceedings

The importance of state post-conviction proceedings, or state habeas corpus review, to the fair administration of justice in capital cases cannot be overstated. Because capital defendants may receive inadequate representation at trial and on direct appeal, and because some constitutional violations are unknown or cannot be litigated in earlier proceedings, state post-conviction often provides the first opportunity to establish meritorious constitutional claims. For these reasons, all post-conviction proceedings should be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. In this Chapter, the Assessment Team examined Texas's laws, procedures, and practices relevant to state habeas corpus, and assessed whether they comply with the ABA's policies on state post-conviction proceedings.

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

State Habeas Corpus Proceedings	
ABA Recommendation	**Compliance Level**
Recommendation #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.	Not in Compliance
Recommendation #2: The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.	Not in Compliance
Recommendation #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.	Not in Compliance
Recommendation #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.	Partial Compliance
Recommendation #5: On the initial state post-conviction application, state post-conviction courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.	Not Applicable
Recommendation #6: When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.	Not in Compliance
Recommendation #7: The states should establish post-conviction defense organizations, similar in nature to the capital resources centers defunded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.	Partial Compliance
Recommendation #8: For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.	Partial Compliance
Recommendation #9: State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.	Partial Compliance
Recommendation #10: State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.	Partial Compliance
Recommendation #11: In post-conviction proceedings, state courts should apply the harmless error standard of Chapman v. California, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.	Not in Compliance

State Habeas Corpus Proceedings (Cont'd)	
ABA Recommendation	**Compliance Level**
Recommendation #12: During the course of a moratorium, a "blue ribbon" commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.	Not Applicable

Texas has taken some limited measures to promote the adequate development and full judicial consideration of state habeas claims. Most notably, the Texas Legislature has created the Office of Capital Writs (OCW), a state agency dedicated to the representation of indigent death row inmates in habeas proceedings. While OCW has not existed long enough to accurately assess its efficacy, establishment of a statewide agency with a professional staff is an important step toward assuring the provision of high-quality representation in capital habeas cases.

In general, however, Texas's capital habeas practices and procedures discourage thorough and transparent review of a death row inmate's claims of constitutional error. Many of these practices are out of step with the overwhelming majority of capital jurisdictions in the United States. The result is a large number of capital habeas petitions that are dismissed in a summary order without the petitioner receiving an evidentiary hearing or discovery. The Assessment Team acknowledges that some of these laws and practices have been adopted to improve judicial efficiency and promote the finality of judgments. Such interests, however, must be balanced with the need to ensure that an inmate's claims are fully and fairly considered and that innocent persons are not executed.

At the district court level, Texas law imposes strict filing deadlines on capital habeas petitions, although no such deadlines are imposed by statute in non-capital cases. Texas's capital habeas statute also requires the inmate to file his/her habeas petition before his/her direct appeal proceedings have concluded, making it virtually impossible to present an ineffective assistance of appellate counsel claim. Furthermore, district courts often decline to hold evidentiary hearings, even when presented with unresolved factual disputes. Instead, the courts often rely on "paper hearings" composed of affidavits and other documents submitted by the parties. Under this system, the parties have no opportunity to test a witness's credibility through cross-examination. Texas district courts also regularly adopt one party's proposed findings of fact and conclusions of law verbatim.

Frequently, capital habeas cases receive a limited review at the Texas Court of Criminal Appeals. In the overwhelming majority of cases, the court dismisses the capital habeas petition in a two or three-page summary order. These orders do not analyze the facts or legal arguments of the parties in any detail. In those cases in which the district court adopts the proposed findings of the prosecution, the end result is a final state habeas order that was, in effect, written by a party to the case. In 2011 and 2012, for example, the Court of Criminal Appeals issued a summary order in 87% of the twenty-three initial capital habeas petitions in which it denied relief. With respect to subsequent writs in which relief was denied, the court issued a summary order in 95% of capital cases. This practice is contrary to many other capital jurisdictions, where appellate

courts issue detailed orders in capital post-conviction cases. Perhaps as a result of these practices, the court has failed to address claims that later led to relief in federal proceedings.

The Court of Criminal Appeals also imposes strict procedural limitations on habeas claims. Typically, the court will not consider claims of error in state habeas that should have been raised at trial or on direct appeal. The court imposes similar preservation rules in direct appeal proceedings. Furthermore, the court will consider a subsequent habeas petition only in narrowly-prescribed circumstances. A petitioner who presents new evidence of actual innocence in a state habeas proceeding will not be entitled to a new trial unless s/he can prove his/her innocence by clear and convincing evidence, meaning that the evidence must "unquestionably establish" innocence. Moreover, even if the court determines that there was constitutional error in the inmate's case, it will not grant relief unless the inmate can prove by a preponderance of the evidence that the error was not harmless. By placing this burden on the inmate, Texas sacrifices fairness in order to ensure the finality of judgments. Particularly in those cases where state habeas is the first opportunity to raise a specific claim before the Court of Criminal Appeals, this rule can result in affirmance of a conviction and death sentence simply because of an inmate's inability to raise the claim any earlier, even though—in some cases—the very information undermining the reliability of the proceeding was in the possession of another party and not the inmate.

Texas also has failed to enact any law permitting discovery in capital habeas cases and other Texas laws prohibit the disclosure of certain materials, such as juror questionnaires and prosecutor communications, which may be necessary to develop habeas claims. Without these materials, petitioners may be unable to discover favorable evidence that should have been disclosed at trial. As a result, some Texas death row inmates who were denied relief in state habeas proceedings have later won relief in federal proceedings after federal discovery procedures revealed evidence of misconduct.

In addition, because the court rarely publishes its orders in capital habeas cases, Texas has very little established capital habeas case law. This opacity is problematic for death row petitioners and habeas lawyers in Texas, as there is little case law developed on capital habeas proceedings despite the frequency of death sentences imposed and executions carried out.

Finally, while Texas has established OCW to represent death row inmates in state habeas petitions, counsel may still be appointed from an appointment list in some circumstances, and the qualification standards for these attorneys are woefully inadequate. Moreover, Texas fails to compensate OCW attorneys at a rate commensurate with prosecutors. With respect to list-appointed counsel, some counties impose fee caps and low hourly rates, which may discourage attorneys from fully investigating all of an inmate's claims.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death row inmate, it is imperative that clemency decision-makers evaluate all of the factors bearing on the appropriateness of the death sentence without regard to constraints that may limit a court's or jury's decision-making. In this Chapter, the Assessment Team reviewed Texas's laws,

procedures, and practices concerning the clemency process, including, but not limited to, the Texas Board of Pardons and Paroles, the Governor's process of clemency decision-making, and inmates' access to counsel, and assessed whether they comply with the ABA's policies.

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

Clemency	
ABA Recommendation	**Compliance Level**
Recommendation #1: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the determination.	Not in Compliance
Recommendation #2: If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with petitioners.	Not in Compliance
Recommendation #3: The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.	Not in Compliance
Recommendation #4: The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not the appropriate punishment.	Insufficient Information
Recommendation #5: Clemency decision-makers should consider any pattern of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death row inmate.	Insufficient Information
Recommendation #6: Clemency decision-makers should consider the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about the inmate's guilt.	Insufficient Information
Recommendation #7: Clemency decision-makers should consider an inmate's possible rehabilitation or performance of positive acts while on death row.	Not in Compliance
Recommendation #8: Death row inmates should be represented by counsel and such counsel should have qualifications consistent with the *ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases*.	Not in Compliance
Recommendation #9: Prior to clemency hearings, counsel should be entitled to compensation, access to investigative and expert resources, and provided with sufficient time to develop claims and to rebut the State's evidence.	Not in Compliance
Recommendation #10: Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant clemency.	Not in Compliance
Recommendation #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.	Not in Compliance

In death penalty cases, the Texas Board of Pardons and Paroles (Board) considers applications for the various forms of clemency that a death row inmate may request. If a majority of the Board makes a written recommendation for clemency, the Governor may choose to accept the recommendation. Without such a recommendation from the Board, the Governor lacks the

power to grant clemency. The Governor may, however, issue a 30-day stay once per death row inmate.

Since 1976 through August 1, 2013, Texas has granted clemency to two death row inmates facing imminent execution in two cases. The death sentences of twenty-eight juvenile offenders were commuted in Texas after the U.S. Supreme Court's decision in *Roper v. Simmons* prohibiting the execution of juvenile offenders. Two additional offenders' sentences were commuted in light of the U.S. Supreme Court's prohibition of the execution of persons with mental retardation in *Atkins v. Virginia*. In addition, there have been a number of commutations granted in Texas for "judicial expediency," in which a commutation of sentence was "given by the executive because courts had vacated, or were likely to vacate, the death sentence, and a commutation would save the time and expense of going through a new sentencing proceeding."

A 2005 study comparing Texas' clemency process to the processes of 38 other states found that Texas has "distinctive procedural rules that place unnecessary obstacles in the paths of those who seek pardon and commutation recommendations from the Board of Pardons and Paroles." For example, Texas is the only state in the United States that allows the Board of Pardons and Paroles to make clemency decisions without first meeting as a body. In place of a meeting or a public hearing, Board members receive information for a particular case, assembled by the Board staff. This information provides the basis for Board members' votes, which they may call or fax into the Board's office.

Notably, this practice may not only result in the Board providing a minimal review in some cases, but, in the aggregate, it may also be a cause for the extraordinarily high denial rate of clemency petitions in Texas. As of August 1, 2013, Texas has executed 503 inmates in the modern death penalty era and has commuted the sentence of only two inmates facing imminent execution. Comparatively, the state with the second highest number of executions after Texas—Virginia—has executed 110 inmates while commuting the sentence of eight inmates.

When making clemency decisions, it appears as though the Board and Governors have generally assumed that the merits of a case have already been reached by the courts. Further, Texas death row inmates are not guaranteed counsel for clemency proceedings and it appears that death row inmates may not be given adequate time for the preparation of clemency applications. Finally, it does not appear that clemency decisions are sufficiently insulated from political considerations or impacts in Texas. For example, members of the Board are appointed by the Governor who may remove any Board member at any time, for any reason.

Chapter Ten: Capital Jury Instructions

In capital cases, jurors possess the "awesome responsibility" of deciding whether another person will live or die. Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed. Sometimes, however, jury instructions are poorly written and poorly conveyed, leading to confusion among jurors as to the applicable law and the extent of their responsibilities. In this Chapter, the Assessment Team reviewed Texas's laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA's policies.

A summary of Texas's overall compliance with the ABA's policies on capital jury instructions is illustrated in the following chart.

Capital Jury Instructions	
ABA Recommendation	**Compliance Level**
Recommendation #1: Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.	Not in Compliance
Recommendation #2: Jurors should receive written copies of "court instructions" (referring to the judge's entire oral charge) to consult while the court is instructing them and while conducting deliberations.	Partial Compliance
Recommendation #3: Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.	Partial Compliance
Recommendation #4: Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.	Partial Compliance
Recommendation #5: Trial courts should not place limits on a juror's ability to give full consideration to any evidence that might serve as a basis for a sentence less than death.	Not in Compliance
Recommendation #6: Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.	Not in Compliance
Recommendation #7: In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.	Not Applicable

A Texas capital case proceeds in marked contrast to capital cases in other jurisdictions. In most states, jurors must weigh aggravating and mitigating circumstances to determine whether a defendant convicted of capital murder should receive the death penalty. In Texas, jurors are first asked to determine whether the defendant represents a future danger to society; only after deciding unanimously that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" will the jury consider whether any evidence in mitigation supports a sentence less than death. As a result of this structure, the defendant's alleged future dangerousness is placed "at the center of the jury's punishment decision."

The "future dangerousness" special issue is problematic in several respects. First, there is no precise explanation of the special issue's key terms. Jurors are left to comprehend "probability," "criminal acts of violence," and "society" so broadly that a death sentence would be deemed warranted in virtually every capital murder case. Second, the "future dangerousness" special

issue too often turns on unreliable scientific evidence and the undue persuasive effect of highly-questionable expert testimony.

The form and substance of capital-case jury selection also may improperly increase a prospective juror's inclination to sentence the defendant to death. Trial courts may not provide jurors with an accurate view of the kind of evidence that likely will be presented as mitigation in the instant capital case. Moreover, the prosecution, which interviews prospective jurors after the trial court, may suggest to jurors ways to diminish or reinterpret mitigating evidence, effectively informing the prospective jurors that they may disregard evidence that favors a sentence less than death. Expanding jurors' perceptions of what constitutes "future dangerousness" while limiting their understanding of what qualifies as mitigation is likely to produce a jury predisposed to sentence *any* capital defendant to death.

Furthermore, the explicit requirements of the Texas Code of Criminal Procedure may mislead capital jurors with respect to each juror's individual capacity to impose a sentence of life without possibility of parole. The Code bars all parties from informing a juror or prospective juror of what would transpire were the jury to disagree on the answer to the special issues, which conceals from these jurors their individual capacity to impose a sentence less than death.

The State of Texas also has not formally adopted pattern jury instructions for use in capital cases, and, in practice, instructions vary from trial court to trial court. No state-sponsored effort has been undertaken to evaluate the coherency of these instructions, which is especially disconcerting given that a study by the Capital Jury Project showed that a significant number of Texas capital jurors failed to understand important aspects of the capital sentencing law upon which they were instructed. For instance, 73% of interviewed Texas jurors who served on capital cases erroneously believed that the jury had to be unanimous on a finding of mitigating evidence, and 40% did not realize that they could consider any evidence as mitigating at all. Forty-five percent of these jurors believed that death was required if the defendant's crime was "heinous, vile or depraved," while 68.4% believed that death was required if the defendant would be "dangerous in the future." As a matter of federal and state law, however, a finding of future dangerousness can never suffice to require the death penalty.

While trial courts may respond meaningfully to jurors' requests for clarification of instructions, Texas law permits trial courts to refuse to clarify legal concepts that are of the utmost importance during the penalty phase of a capital case. Trial courts may be reluctant to offer clarifying instructions for fear of reversal on appeal.

In addition, although Texas trial courts must provide clear jury instructions concerning the alternative punishment of life without parole, the courts retain broad discretion to disallow parole practices testimony proffered by the defense. Texas courts may permit the prosecution to emphasize a capital defendant's parole *ineligibility* in an attempt to persuade the jury that, in the absence of the "incentive" of parole to regulate the defendant's behavior, s/he would be more likely to commit acts of violence in the penitentiary. Prosecutors also have attempted to undermine the permanency of a life without parole sentence by stressing the law's mutability.
Finally, Texas jurors are not instructed that, even if the defendant is found to be a future danger, and even if the jury does not find sufficient evidence in mitigation, jurors still may return a

sentence less than death. Texas law also does not permit jurors to consider mercy or residual doubt about the defendant's guilt in determining whether to sentence a defendant to death.

Chapter Eleven: Judicial Independence and Vigilance

In some states, judicial elections, appointments, and confirmations are influenced by consideration of judicial nominees' or candidates' purported views of the death penalty or of judges' decisions in capital cases. In addition, judges' decisions in individual cases sometimes are, or appear to be, improperly influenced by electoral pressures. This increases the possibility that judges will be selected, elevated, and retained by a process that ignores the larger interests of justice and fairness, focuses narrowly on the issue of capital punishment, and undermines society's confidence that individuals in court are guaranteed a fair hearing. In this Chapter, the Assessment Team reviewed Texas's laws, procedures, and practices on the election and appointment of judges and on judicial decision-making processes and assessed whether they comply with the ABA's policies.

A summary of Texas's overall compliance with the ABA's policies on judicial independence and vigilance is illustrated in the following chart.

Judicial Independence and Vigilance	
ABA Recommendation	**Compliance Level**
Recommendation #1: States should examine the fairness of their processes for the appointment and election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.	Partial Compliance
Recommendation #2: A judge who has made any promise—public or private—regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.	Insufficient Information
Recommendation #3: Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak for themselves.	Not in Compliance
Recommendation #4: A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.	Insufficient Information
Recommendation #5: A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.	Insufficient Information
Recommendation #6: Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases. Trial courts should conduct, at a reasonable time prior to a criminal trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under the applicable discovery rules, statutes, ethical standards, and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations.	Partial Compliance

In the last decade, the State of Texas has not taken any significant steps to examine the fairness of its judicial selection and election processes, despite prominent voices that have called for reform. For example, in his 2011 State of the Judiciary address, the Chief Justice of the Texas Supreme Court lamented Texas's system of "elect[ing] judges on a partisan basis" and "urge[d] the Legislature to send the people a constitutional amendment that would allow judges to be selected on their merit."

The most persistent criticisms of Texas's election processes, however, have focused on the need of sitting judges to raise funds for oftentimes expensive campaigns. The results from one survey of Texas judges—a survey conducted by the State Bar of Texas's Committee on Legal Services to the Poor in Criminal Matters in the late 1990's—suggests that there is merit to these concerns: In assigning attorneys to represent indigent defendants, 35% of judges responding to the survey "sometimes consider[ed] whether the attorney is a political supporter," and 30% of the responding judges considered whether an attorney "ha[d] contributed to their campaign."

To a limited extent, however, the State of Texas has examined this system for choosing judges. In 1998, the Texas Office of Court Administration (OCA) published *Public Trust and Confidence in the Courts and the Legal Profession in Texas*. Although a majority of the OCA survey respondents either strongly or somewhat agreed that "they would be treated fairly if they had a case pending in Texas courts," the study also found that 83% of Texas adults felt that campaign contributions to judges have a "very significant" (43%) or "somewhat significant" (40%) influence on a judge's decision-making. In a companion study published in 1999, 80% of interviewed lawyers agreed that campaign contributions have at least some influence on judges. The study also found, however, that 70% of the Texas adults surveyed supported Texas's existing system of electing judges.

Because Texas judges presiding over capital cases run for election in partisan contests, this increases the likelihood that those judges' personal views on the death penalty and past rulings in specific cases will be raised for political purposes—whether in favor of or in opposition to a particular candidate. As a result, fair-minded judges may be perceived as biased simply because of the dictates of electoral politics. Importantly, due to the nature of a capital offense and its effect on the community, death penalty cases are more likely than other types of cases to play an outsize role in judicial elections. The contentiousness of past campaigns illustrates this problem and raises concerns that the public will become misinformed as to which qualities are essential to and representative of a fair-minded judge. On the various occasions in which the death penalty became part of judicial campaign rhetoric—for both trial and appellate court elections—it does not appear that bar association or community leaders spoke out in defense of the judges who were criticized for their decisions in capital cases—a defense that may have helped clarify for the public whether the criticism was accurate or misguided.

It remains unclear whether defendants have sought recusal due to judges or judicial candidates' comments regarding prospective capital cases and how those requests have been handled by the Texas Court of Criminal Appeals. Further impeding analysis regarding possible censure of or sanctions imposed on judicial candidates is the lack of transparency regarding the State Commission on Judicial Conduct's proceedings. The Sunset Advisory Commission's 2012 review concluded that the State Commission on Judicial Conduct's "largely closed process

makes it difficult for the public to know if the Commission is appropriately responding to citizen complaints against judges." Furthermore, "as a judicial branch agency, the [Judicial Conduct] Commission is not subject to the Open Meetings, Administrative Procedure, or Public Information acts."

State judges become familiar with their obligations under the Texas Code of Judicial Conduct, as well as with the responsibilities of defense counsel and prosecutors, through a variety of required and voluntary judicial education programs. The Court of Criminal Appeals has promulgated rules of judicial education that require all new district court judges complete at least 30 hours of instruction in the administrative duties of office and substantive, procedural and evidentiary laws. Judges also must satisfy a continuing education requirement of sixteen hours each year. To assist judges in fulfilling these training requirements, the Texas Center for the Judiciary annually hosts a College for New Judges, a week-long program that covers the role of a judge, judicial ethics, courtroom management, and other subjects. In addition, the Center also has hosted, as recently as 2012, a "Criminal Justice" conference that included a session on "Recognizing Ethical Violations by Attorneys," as well as an "Actual Innocence" conference promoted as "offer[ing] insight into ensuring an innocent person is not convicted in [the participant's] court." Notably, however, while Texas law imposes requirements on counsel who seek appointment to death penalty cases, there is no provision of law requiring that judges in front of whom counsel will appear be trained to handle the unique and complex issues raised in a death penalty case. The occurrences of ineffective lawyering and unfair prosecutorial conduct in capital cases raise questions, however, as to whether judges take enough precautions to ensure the fairness of the proceedings.

Chapter Twelve: Racial and Ethnic Minorities

To counter the impact of race in the administration of the death penalty, the ways in which race and ethnicity affect the system must be identified, and strategies must be devised to eliminate discriminatory practices. In this Chapter, the Assessment Team examined Texas's laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA's policies.

A summary of Texas's overall compliance with the ABA's policies on racial and ethnic minorities and the death penalty is illustrated in the following chart.

Racial and Ethnic Minorities	
ABA Recommendation	**Compliance Level**
Recommendation #1: Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.	Not in Compliance
Recommendation #2: Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases. The data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.	Partial Compliance

Racial and Ethnic Minorities (Cont'd)	
ABA Recommendation	**Compliance Level**
Recommendation #3: Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.	Not in Compliance
Recommendation #4: Where patterns of racial discrimination are found in any phase of the death penalty's administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.	Not in Compliance
Recommendation #5: Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce this law, jurisdictions should permit defendants and inmates to establish prima facie cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If a prima facie case is established, the State should have the burden of rebutting it by substantial evidence.	Not in Compliance
Recommendation #6: Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of the death penalty's administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.	Partial Compliance
Recommendation #7: Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during voir dire.	Partial Compliance
Recommendation #8: Jurisdictions should require jury instructions that it is improper for jurors to consider any racial factors in their decision-making and that jurors should report any evidence of racial discrimination in jury deliberations.	Partial Compliance
Recommendation #9: Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision-making could be affected by racially discriminatory factors.	Insufficient Information
Recommendation #10: States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the State proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.	Not in Compliance

As the Assessment Team recognizes in this Chapter, it is difficult to obtain accurate, reliable data on the effect of race on capital cases. Nevertheless, determining whether racial discrimination affects the criminal justice system—and capital cases, in particular—is essential to determining whether Texas's system provides due process and ensures equal protection of the law.

The existing research underscores the importance of Texas undertaking an objective and thorough evaluation of whether patterns of racial discrimination exist in the administration of the state's death penalty. A 2008 study by social scientists, for example, found that racial factors influence outcomes in Harris County capital cases. The study found that if 100 black defendants and 100 white defendants were indicted for capital murder in Harris County, 5 black defendants would be sentenced to the ultimate state sanction because of race. Likewise, if 100 defendants murdered white victims and 100 defendants murdered black victims, 5 defendants would be

sentenced to the ultimate state sanction because the victim is white. Independent analysis of the effect of race or ethnicity on capital case outcomes is impeded, however, by the lack of a uniform, statewide system for collecting data on charging, prosecution, and conviction in all capital-eligible cases.

Anecdotal data from more recent cases causes concern about the treatment of racial and ethnic minorities in Texas's capital punishment system. The Houston Chronicle noted in 2011 that "[t]he last white man to join death row from Harris County was a convicted serial killer in 2004," and that, "[s]ince then, 12 of the last 13 men newly condemned to die have been black." As of April 2011, over 40% of Texas's death row population was black, representing one of the highest minority populations sentenced to death in the country. Episodes of discrimination in jury selection have also been documented over the last three decades in Texas, indicating the ineffectiveness of *Batson v. Kentucky* at preventing racially discriminatory use of jury strikes.

Regarding preventing and remedying identified discrimination, some law enforcement and judges are educated on the inappropriateness of considering race in the administration of the criminal justice system. It is unclear, however, the extent to which prosecutors and defense counsel receive such education. Only select actors in Texas's criminal justice system, such as law enforcement, could expect to face meaningful sanctions for carrying out their duties on the basis of racial considerations. Several published court cases in Texas also indicate that claims of racial discrimination will be rejected on appellate review—whether direct or collateral—due to a capital defendant's failure to properly preserve the claim. As discussed in other chapters of this Report, however, it remains difficult to determine Texas's responsiveness to some of the concerns raised in this Chapter—specifically related to an inmate's ability to raise directly claims of racial discrimination during state habeas proceedings—due to the Texas Court of Criminal Appeals disinclination to publish findings of fact and conclusions of law in capital habeas cases.

Chapter Thirteen: Mental Retardation and Mental Illness

Mental Retardation

In *Atkins v. Virginia*, the U.S. Supreme Court held that it is unconstitutional to execute offenders with mental retardation. However, *Atkins* did not define the parameters of mental retardation, nor did the decision explain what process capital jurisdictions should employ to determine if a capital defendant or death row inmate has mental retardation. Without a sound definition and clear procedures, the execution of persons with mental retardation remains possible. In this Chapter, the Assessment Team reviewed Texas's laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA's policies.

A summary of Texas's overall compliance with the ABA's policies on mental retardation is illustrated in the following chart.

Mental Retardation	
ABA Recommendation	**Compliance Level**
Recommendation #1: Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities (AAIDD). Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.	Not in Compliance
Recommendation #2: All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.	Partial Compliance
Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.	Partial Compliance
Recommendation #4: For cases commencing after the United States Supreme Court's decision in *Atkins v. Virginia* or the State's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.	Not in Compliance
Recommendation #5: Where the defense has presented a substantial showing that the defendant may have mental retardation, the burden of disproving mental retardation should be placed on the prosecution. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.	Partial Compliance
Recommendation #6: During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.	Partial Compliance
Recommendation #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.	Partial Compliance

The Texas Legislature has not enacted a statute banning the application of the death penalty to persons with mental retardation. Instead, the State's definition of mental retardation is based on the Texas Court of Criminal Appeals' decision in *Ex parte Briseno*. *Briseno* purports to apply the clinically-accepted definition of mental retardation for determining whether a defendant is ineligible for the death penalty. In practice, however, the decision has supplanted the clinical definition with seven factors—known as the *Briseno* factors—that Texas courts have repeatedly used to determine whether a defendant has mental retardation. The *Briseno* factors are not supported by any medical authority and instead rely on popular misconceptions regarding how persons with mental retardation behave. For instance, the factors place great weight on the defendant's ability to lie and respond coherently to questions, while ignoring gauges of adaptive behavior that clinicians use to diagnose mental retardation. In some cases, the *Briseno* factors have been used to override compelling clinical evidence of mental retardation. Texas's continued use of *Briseno* to assess mental retardation creates an unacceptable risk that persons with mental retardation will receive the death penalty or be executed.

In addition, Texas trial courts do not typically permit a claim of mental retardation to be decided by the trial court in a pretrial hearing. Instead, the issue is usually decided by the jury during penalty phase deliberation. There are several drawbacks to this system. It wastes judicial resources by requiring a long and costly capital trial for a defendant who may not be eligible for the death penalty. It also forces jurors to consider evidence of mental retardation at the same time they are considering evidence related to the crime and other aggravating and mitigating evidence, increasing the risk of juror confusion.

Finally, while Texas trial courts typically apply a preponderance of the evidence standard when determining whether a defendant has mental retardation, defendants who raise a mental retardation claim in a subsequent habeas petition must prove mental retardation by clear and convincing evidence. While Texas has an understandable interest in the finality of judgments with respect to most habeas claims, an elevated standard of proof should not be applied to a claim that the defendant is categorically ineligible for the death penalty under the United States Constitution.

Mental Illness

The Assessment Team also reviewed Texas's laws, procedures, and practices pertaining to mental illness in connection with the death penalty and assessed whether they comply with relevant ABA's policies. Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial, it may provide a defense to the murder charge, and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, or jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability and life experience, tragic consequences often follow for the defendant.

A summary of Texas's overall compliance with the ABA's policies on mental illness is illustrated in the following chart.

Mental Illness	
ABA Recommendation	**Compliance Level**
Recommendation #1: All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, jailers, and prison authorities, should be trained to recognize mental illness in capital defendants and death row inmates.	Partial Compliance
Recommendation #2: During police investigations and interrogations, special steps should be taken to ensure that the Miranda rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.	Partial Compliance
Recommendation #3: The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions," and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.	Partial Compliance

Mental Illness (Cont'd)	
ABA Recommendation	**Compliance Level**
Recommendation #4: Trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the State. Similarly, prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the State.	Partial Compliance
Recommendation #5: Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well-trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.	Partial Compliance
Recommendation #6: The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.	Not in Compliance
Recommendation #7: The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this Recommendation.	Not in Compliance
Recommendation #8: To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law (see Recommendations #6–7 as to when it should do so), jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.	Not in Compliance
Recommendation #9: Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation.	Not in Compliance
Recommendation #10: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of their mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.	Partial Compliance
Recommendation #11: The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel in connection with such proceedings, and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.	Not in Compliance

Mental Illness (Cont'd)	
ABA Recommendation	**Compliance Level**
Recommendation #12: The jurisdiction should provide that a death row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.	Partial Compliance
Recommendation #13: Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.	Insufficient Information

Texas law does not adequately protect defendants who suffer from mental illness and disorders from wrongful conviction or execution. For instance, Texas has not prohibited the death penalty for offenders with mental disabilities similar to mental retardation, such as dementia or traumatic brain injury, but which manifest after the age of eighteen. Texas also does not prohibit application of the death penalty on persons with severe mental disorders that significantly impair their ability to control their conduct. Because Texas's insanity defense is also very narrowly defined, persons suffering from severe disorders such as schizophrenia are still eligible for the capital punishment, even if their actions were based on delusions caused by their illness.

Nor does Texas require jurors to be specifically instructed that a mental disorder or disability is a mitigating, not an aggravating factor; that evidence of mental disability should not be relied upon to conclude that the defendant represents a future danger to society; and to distinguish between the affirmative defense of insanity and a defendant's subsequent reliance on similar evidence to demonstrate a mental disorder or disability as a mitigating factor. This is especially worrying given the underlying problems with Texas's capital sentencing scheme and the repeated use of unqualified experts to prove that a defendant is a future danger to society.

Texas does not require state habeas proceedings to be stayed when the petitioner's mental disorder or disability significantly impairs his/her ability to assist with his/her case. This creates a risk that habeas claims will go overlooked, as these claims are often factually intensive and require the petitioner to be able to communicate pertinent facts to his/her attorney. There is also no provision of Texas law that permits a "next friend" to pursue available remedies on a death row inmate's behalf if the inmate wishes to forgo further legal proceedings as a result of a mental disorder or disability that significantly impairs his/her capacity to make a rational decision.

Finally, while Texas has enacted a statute outlining the procedure for determining whether an inmate is mentally incompetent for execution, that statute is inadequate. It requires the inmate to present substantial evidence of incompetency *before* mental health experts are appointed, effectively requiring the inmate to prove s/he suffers from a mental disorder before being granted resources to investigate that disorder. The statute also does not describe when an inmate is

entitled to a competency hearing, and the statutory definition of incompetence for execution does not fully comport with the definition required by the U.S. Supreme Court.

Some actors in the Texas criminal justice system are required to complete training on issues related to mental retardation and mental illness. Most notably, Texas law enforcement officers are required to complete a special mental health training course. However, prosecutors and trial judges, who must make important decisions regarding defendants who may have a mental disability or disorder, are not required to receive any training in this area.

Provision of defense services in Texas has improved substantially in recent years. However, capital defense counsel are also not required to receive any training on recognizing mental disabilities and disorders in their clients, nor are they entitled to the appointment of investigators or mitigation specialists. While individual capital and public defender organizations have enacted some training standards, a large number of capital defendants in Texas are represented by list-qualified appointed counsel who are not beholden to any such training requirements.

CHAPTER ONE

AN OVERVIEW OF TEXAS'S CAPITAL PUNISHMENT SYSTEM

I. DEMOGRAPHICS OF THE TEXAS DEATH ROW

A. Historical Perspective

Since Texas reinstated the death penalty in 1974, it has sentenced 1,062 defendants to death[1] and executed 503 inmates.[2] In the modern death penalty era, Texas has executed more inmates than any other capital jurisdiction in the United States and accounts for almost 40% percent of the executions that have taken place nationwide.[3] Per capita, Texas has the second highest rate of executions of all death penalty jurisdictions in the United States.[4]

The prevalence of Texas death sentences and executions, however, has declined from their highest numbers in the late 1990s. For example, Texas sentenced to death forty-eight defendants in 1999—the highest number of defendants sentenced to death since reinstatement of the death penalty in 1974.[5] By contrast, eight defendants were sentenced to death in the State in both 2010 and 2011.[6]

Of the 254 counties in Texas, 120 have sentenced at least one defendant to death.[7] Harris County, which includes the city of Houston, has sentenced 283 persons to death, 115 of whom have been executed; this is more death sentences and executions than any state, excluding Texas, in the country.[8]

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[1] *Total Number of Offenders Sentenced to Death from each County*, TEX. DEP'T CRIM. JUSTICE (last updated Aug. 1, 2013), http://tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited Aug. 27, 2013).

[2] *Executions*, TEX. DEP'T CRIM. JUSTICE (last updated Aug. 1, 2013), http://www.tdcj.state.tx.us/stat/dr_executions_by_year.html (last visited Aug. 27, 2013).

[3] NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), DEATH ROW U.S.A. 7 (Fall 2011), *available at* http://www.naacpldf.org/files/publications/DRUSA_Fall_2011.pdf [hereinafter NAACP, DEATH ROW USA FALL 2011]. The state with the second-highest number of executions is Virginia at 110 executions as of July 22, 2013. *See State-by-State Database* (drop down box select "Virginia"), DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state_by_state (last visited Apr. 1, 2013). The modern death penalty era refers to death sentences and executions imposed under revised death penalty statutes adopted by many states, including Texas, following the U.S. Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972) (finding the death penalty unconstitutional as applied in 1972).

[4] *State Execution Rates*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-execution-rates (based on 2010 Census data) (last visited Apr. 1, 2013). Texas's 2010 population was 25,145,561 and as of Aug. 1, 2011, Texas had executed 472 inmates, establishing an execution rate of .188 per 10,000 people. *Id.*

[5] *Death Sentences in the United States From 1977 By State and By Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited July 23, 2013).

[6] *Id. But see id.* (as of July 23, 2013, Texas has sentenced nine people to death in 2013). *See also Executions*, TEX. DEP'T CRIM. JUSTICE (last updated July 19, 2013), http://www.tdcj.state.tx.us/stat/dr_executions_by_year.html (last visited July 23, 2013). There has also been a general decline in the number of executions. In 2000, Texas executed forty inmates; in 2012, the state executed fifteen. *Id.*

[7] *Total Number of Offenders Sentenced to Death from each County*, TEX. DEP'T CRIM. JUSTICE (last updated July 30, 2013), http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited July 23, 2013).

[8] *Id; Top 15 Counties by Executions Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-county#overall (last visited Aug. 27, 2013) (updated through Jan. 1,

Of the 503 individuals executed by Texas as of August 23, 2013, four were women.[9] Two hundred-twenty-three of the executed individuals were white, 190 were African-American, eighty-six were Latino, two were Asian, and two were Native American.[10] For inmates executed by Texas through August 23, 2013, the following chart presents a breakdown of the race of the inmate and race of the victim.[11]

		Race of Defendant					
		White	Black	Latino	Asian	Other	**Total**
Race of Victim	White	204 (40.6%)	107 (21.3%)	36 (7.2%)	-	2 (0.4%)	**349 (69.4%)**
	Black	3 (0.6%)	57 (11.3%)	2 (0.4%)	-	-	**62 (12.3%)**
	Latino	12 (2.4%)	17 (3.4%)	45 (8.9%)	-	-	**74 (14.7%)**
	Asian	2 (0.4%)	8 (1.6%)	2 (0.4%)	2 (0.4%)	-	**14 (2.8%)**
	Other	2 (0.4%)	1 (0.2%)	1 (0.2%)	-	-	**4 (0.8%)**
	Total	**223 (44.3%)**	**190 (37.8%)**	**86 (17.1%)**	**2 (0.4%)**	**2 (0.4%)**	**503**

In addition, Texas has executed eleven inmates confirmed as foreign nationals, more than any other state.[12]

Prior to the 2005 U.S. Supreme Court decision in *Roper v. Simmons*, which declared the death penalty for juveniles unconstitutional, Texas had executed thirteen inmates who had committed crimes while under the age of eighteen.[13] In response to the *Roper* decision, twenty-eight death row inmates who were under age eighteen at the time of their offense subsequently had their sentences commuted to life in prison.[14]

Finally, twelve Texas inmates have been released from death row due to evidence of their innocence.[15] Clemency has been granted on humanitarian grounds to two inmates.[16]

2013); *Total Number of Offenders Sentenced to Death from each County*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited July 23, 2013).

[9] *Executed Offenders*, TEX. DEP'T CRIM. JUSTICE (last updated Aug. 1, 2013), http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited Aug. 23, 2013).

[10] *Id.*

[11] *Id.*

[12] *Confirmed Foreign Nationals Executed Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/foreign-nationals-part-ii#executed (last visited Aug. 23, 2013). Executed inmates' home countries include, among others, Canada, Cuba, the Dominican Republic, Honduras, and Mexico. *Id.*

[13] NAACP, DEATH ROW USA FALL 2011, *supra* note 3, at 9; Roper v. Simmons, 543 U.S. 551 (2005).

[14] Lisa Falkenberg, *Perry forced to commute teens' death sentences*, HOUS. CHRON., Jun. 23, 2005, http://www.chron.com/disp/story.mpl/metropolitan/3237385.html (last visited Apr. 3, 2013).

[15] *The Innocence List*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last visited Aug. 27, 2013). In order to be included on the Death Penalty Information Center's

B. A Current Profile of Texas's Death Row

As of August 2013, the Texas death row houses 278 inmates, of which 269 are male and nine are female.[17] Of the male inmates, 107 are African-American, 77 are white, 81 are Latino, and four are classified as "other."[18] Of the female inmates, five are white, three are African-American, and one is Latina.[19] There are 21 non-U.S. citizens on death row in Texas, twelve of whom are Mexican nationals.[20] A Texas inmate spends an average of 10.6 years on death row before s/he is executed, the second shortest amount of time from conviction to execution among capital jurisdictions in the U.S.[21]

"Innocence List,"

[a] defendant must have been convicted, sentenced to death and subsequently either-

a. Been acquitted of all charges related to the crime that placed them on death row, or
b. Had all charges related to the crime that placed them on death row dismissed by the prosecution, or
c. Been granted a complete pardon based on evidence of innocence. *Id*.

[16] *See Clemency*, DEATH PENALTY INFO. CTR. (June 18, 2012), http://www.deathpenaltyinfo.org/clemency#process (last visited Aug. 27, 2013). In addition, there were a number of commutations granted in Texas for "judicial expediency," in which a commutation of sentence was "given by the executive because courts had vacated, or were likely to vacate, the death sentence, and a commutation would save the time and expense of going through a new sentencing proceeding." Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 292 (1993) (noting that between 1976 and 1992, there have been thirty-six death sentence commutations in Texas for judicial expediency purposes). For a discussion on clemency practices in Texas, see Chapter Nine on Clemency.

[17] *Gender and Racial Statistics of Death Row Offenders*, TEX. DEP'T CRIM. JUSTICE (last updated Aug. 1, 2013), http://www.tdcj.state.tx.us/death_row/dr_gender_racial_stats.html (last visited Aug. 23, 2013).

[18] *Id*.

[19] *Id*.

[20] *Citizenship of Offenders on Death Row*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_citizenship.html (last visited Aug. 27, 2013).

[21] *Death Row Facts*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_facts.html (last visited Aug. 27, 2013); *Executions Per Death Sentence*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-death-sentence (last visited Aug. 27, 2013).

II. THE STATUTORY EVOLUTION OF THE TEXAS DEATH PENALTY SCHEME

The Texas capital sentencing scheme has undergone a number of amendments since the death penalty was reinstated in 1974. Many of those changes are described in detail below as several individuals sentenced to death and executed were sentenced under varying Texas capital sentencing schemes since *Furman*—some of which were later found unconstitutional by the United States Supreme Court.

*A. Texas's Post-*Furman *Death Penalty Scheme*

In 1972, the U.S. Supreme Court held in *Furman v. Georgia* that the death penalty, as applied under Texas and Georgia law, constituted cruel and unusual punishment and, therefore, violated the Eighth and Fourteenth Amendments to the U.S. Constitution.[22] *Furman* effectively imposed a nationwide moratorium on the death penalty and invalidated every capital sentencing statute in the country.[23] Although the *Furman* Court did not produce a majority opinion on the rationale for the decision, some of the Justices reasoned that unbridled discretion granted to jurors in the decision to impose the death penalty resulted in unconstitutionally arbitrary death sentences that were imposed due to racial biases.[24] Following *Furman*, the Texas Legislature reinstated the death penalty in 1974 under a new statutory framework designed to provide jurors with more guidance in determining whether to impose the death penalty.[25] The U.S. Supreme Court upheld this framework in 1976.[26] Under this scheme, if the prosecution chooses to pursue the death penalty against a defendant, the trial is bifurcated into a guilt determination phase and a punishment phase.[27]

1. Capital Murder Statute

In order for a Texas defendant to be convicted of capital murder in the guilt phase, the jury must find that s/he intentionally or knowingly caused the death of an individual and that one or more statutory aggravating elements is present.[28] If the jury does not find an aggravating element to be present, the defendant will not be eligible for the death penalty.[29]

When Texas reinstated the death penalty in 1974, the Texas Legislature created five death-eligible offenses.[30] The Legislature has since modified and expanded the number of aggravating elements constituting capital murder, most recently in 2011. Under the current statutory

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[22] Furman v. Georgia, 408 U.S. 238, 239 (1972). A Texas case, *Branch v. Texas*, was consolidated with the *Furman* decision. *Id.*

[23] *Introduction to the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/part-i-history-death-penalty (last visited Apr. 3, 2013).

[24] *See, e.g.*, *Furman*, 408 U.S. at 249–51 (Douglas, J., concurring).

[25] 1973 Tex. Gen. Laws p. 1122.

[26] *See* Jurek v. Texas, 428 U.S. 262 (1976).

[27] 1973 Tex. Gen. Laws p. 1125.

[28] TEX. PENAL CODE ANN. § 19.03 (2013).

[29] *Id.*

[30] 1973 Tex. Gen. Laws p. 1122.

framework, a defendant is eligible for the death penalty if s/he "intentionally or knowingly cause[d] the death of an individual" and one of the following aggravating elements is present:

(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman (enacted 1974);
(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation, or terroristic threat (enacted 1974, amended 1983, 1993, and 2003);
(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration (enacted 1974);
(4) the person committed the murder while escaping or attempting to escape from a penal institution (enacted 1974);
(5) the person, while incarcerated in a penal institution, murders another:
    (a) who is employed in the operation of the penal institution; or
    (b) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;
(6) the person:
    (a) while incarcerated for [murder or capital murder], murders another; or
    (b) while serving a sentence of life imprisonment or a term of 99 years for [aggravated kidnapping, aggravated sexual assault, or aggravated robbery], murders another (enacted 1993);
(7) the person murders more than one person:
    (a) during the same criminal transaction; or
    (b) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct
(8) the person murders an individual under ten years of age; [and/or]
(9) the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.[31]

2. Sentencing Alternatives

Under Texas's original post-*Furman* death penalty scheme, the alternative sentence in capital cases was a life sentence with the possibility of parole after serving a minimum term of years established by the Texas Legislature.[32] In 2005, however, the Texas legislature amended the

[31] TEX. PENAL CODE ANN. § 19.03(a)(1) (2013).
[32] TEX. PENAL CODE § 19.03 (2005); TEX. CODE CRIM. PROC. art. 37.07 (2005); TEX. GOV'T CODE § 508.046, 508.145 (2005) (amended in 2005 from a term of life imprisonment without the possibility of parole for thirty-five years to a term of life imprisonment without the possibility of parole).

statute such that the only available alternative sentence in capital cases is life without possibility of parole.[33]

3. Special Issues Submitted to the Jury in the Sentencing Phase

If a Texas jury finds the existence of at least one statutory aggravating element in the guilt phase—in addition to finding the defendant guilty of intentional murder—the trial proceeds to the sentencing phase, during which the jury must decide whether to sentence the defendant to death or life in prison.[34] During the sentencing phase, "evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty."[35] Once both parties have presented evidence, the court submits special issues to the jury that it must answer in determining whether to sentence the defendant to death.[36]

The Texas sentencing phase procedure has been subjected to legal challenges, resulting in amendments to the sentencing phase process since the re-enactment of Texas's death penalty in 1974.

a. 1974 Capital Sentencing Special Issues

Under the 1974 sentencing scheme, the jury was required to answer two or three questions with either a "yes" or "no" answer during the sentencing phase of a death penalty trial: [37]

> (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
> (2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.[38]

If the jury answered "yes" to all of the questions, the trial court was required to sentence the defendant to death.[39] If the jury answered "no" to any of the questions, then the court sentenced the defendant to life in prison.[40] A "yes" required a unanimous vote by the jury.[41] A "no" required agreement of only ten members of the jury, and the jurors did not have to agree on their reasons for answering "no."[42]

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33 2005 Tex. Sess. Law Serv. Ch. 787.
34 TEX. CODE CRIM. PROC. ANN. art. 37.071 (2013).
35 *Id.*
36 *Id.*
37 1973 Tex. Gen. Laws p. 1125.
38 *Id.*
39 1973 Tex. Gen. Laws p. 1126.
40 *Id.*
41 *Id.*
42 *Id.*

In 1976, the U.S. Supreme Court found these three sentencing questions to be constitutional in *Jurek v. Texas*, holding that the "continuing threat to society" question allowed juries to consider mitigating circumstances against imposing the death penalty.[43] The Texas Court of Criminal Appeals indicated it would "interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show."[44] The U.S. Supreme Court also found that by

> narrowing its definition of capital murder, Texas ha[d] essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function.[45]

b. Amendments to the Death Penalty Sentencing Questions

In the 1989 case *Penry v. Lynaugh*, the U.S. Supreme Court reversed its decision in *Jurek* and declared the Texas death penalty scheme unconstitutional because it did not permit the jury, as required by *Lockett v. Ohio* and *Eddings v. Oklahoma*, to consider and weigh all aspects of the defendant's crime and background as potentially mitigating factors when deciding whether to impose a death sentence.[46] In *Eddings*, the Court made "clear that it is not enough simply to allow the defendant to present mitigating evidence to the [jury]," for the jury "must also be able to consider and give effect to that evidence in imposing sentence."[47] In *Penry*, the Court specifically found that the second of the three special issues did "not provide a vehicle for the jury to give mitigating effect to [the defendant's] evidence of mental retardation and childhood abuse."[48] The Texas Legislature responded in 1991 by amending the special issues as follows:

> (1) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
> (2) In cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party . . . , whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.
> (3) Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background,

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43 Jurek v. Texas, 428 U.S. 262 (1976).
44 *Id*. at 272.
45 *Id*. at 276.
46 Penry v. Lynaugh, 492 U.S. 302 (1989), *citing* Lockett v. Ohio 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).
47 *Penry*, 492 U.S. at 319.
48 *Penry*, 492 U.S. at 324.

> and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[49]

Under this amended procedure, the trial court will impose the death penalty if the jury unanimously answers "yes" to the first issue (and second issue if it is raised) and "no" to the third issue.[50] A "no" answer to the first or second issue requires agreement of only ten members of the jury, and jurors do not have to agree on their reasons for answering "no."[51] Similarly, a "yes" answer to the third issue requires agreement of only ten members of the jury, and jurors do not have to agree on their reasons for answering "yes."[52]

B. Juror Oath Requirement

Texas's 1974 capital sentencing scheme stated that "[a] prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."[53] Trial courts would typically excuse prospective jurors who were unwilling to swear this oath.[54] In 1980, however, the U.S. Supreme Court held that this oath requirement was unconstitutional because it "exclude[d] jurors whose only fault was to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected."[55] The Court had previously held that prospective jurors may be excluded from service only if their views on capital punishment render them unable "to follow the law or abide by their oaths."[56]

C. Restrictions on the Texas Death Penalty

1. Treatment of Mentally Retarded Offenders

In 2002, the U.S. Supreme Court held that the application of the death penalty to mentally retarded offenders is unconstitutional cruel and unusual punishment.[57] Texas, however, has not established a procedure for determining whether a defendant or death row inmate is mentally retarded.

2. Age Restriction on Capital Punishment

In 1974, the Texas legislature required a defendant to have been at least seventeen years old at the time the crime was committed in order to be eligible to receive the death penalty.[58] In 2005,

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49 1991 Tex. Sess. Law Serv. Ch. 838; TEX. CODE CRIM. PROC. art. 37.071 (1991).
50 TEX. CODE CRIM. PROC. ANN. art. 37.071 (2013).
51 *Id*.
52 *Id*.
53 TEX. PENAL CODE § 12.31(b) (1974).
54 *See* Adams v. Texas, 448 U.S. 38, 42 (1980).
55 *Id.* at 50.
56 *Id.* at 48 (citing Witherspoon v. Illinois, 391 U.S. 510, 522 n. 21 (1968)).
57 Atkins v. Virginia, 536 U.S. 304 (2002).
58 1973 Tex. Gen. Laws p. 898.

the U.S. Supreme Court declared the death penalty for juveniles unconstitutional.[59] The Texas legislature responded that same year by raising the minimum age requirement to eighteen years old at the time the crime was committed to be eligible to receive the death penalty.[60]

[59] Roper v. Simmons, 543 U.S. 551 (2005).
[60] 2005 Tex. Sess. Law Serv. Ch. 787.

III. The Progression of a Texas Death Penalty Case from Arrest to Execution

Death Penalty Progression Chart

A. The Pretrial Process

1. Indictment, Initial Appearance, and Arraignment

As with any felony case, a capital prosecution in Texas begins with an indictment issued by a grand jury.[61] After the grand jury has considered all evidence presented, a vote is taken as to the presentment of an indictment.[62] For an indictment to be returned, at least nine of the twelve grand jurors must concur.[63]

In all felony cases, the defendant must be arraigned at least two days after s/he is served with a copy of the indictment.[64] The purpose of the arraignment is to secure the defendant's identity and enter the defendant's plea.[65] The defendant may enter a plea of guilty or not guilty.[66] If the defendant refuses to enter a plea, a plea of not guilty will be entered by the court on the defendant's behalf.[67] If the defendant chooses to enter a plea of guilty, the court must first establish that the defendant is mentally competent to understand the nature of the plea and that the plea is freely and voluntarily given.[68]

2. Appointment of Counsel

If the defendant is indigent, counsel will be appointed to represent him/her.[69] If the county has a public defender office, counsel may be appointed according to the office's established guidelines for the appointment of counsel in death penalty cases.[70] If the county does not have a public defender office, the presiding judge of the district court where the capital murder case is filed will appoint two attorneys, one of whom must be qualified under standards adopted by a local selection committee.[71] In adopting appointment and qualification standards for capital trial counsel, the local selection committee must follow the minimum requirements established by the Texas Code of Criminal Procedure.[72] Counsel will be appointed for trial "as soon as practicable

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[61] TEX. CODE CRIM. PROC. ANN. art. 1.05 (2013).

[62] TEX. CODE CRIM. PROC. ANN. art. 20.19 (2013).

[63] *Id.*

[64] TEX. CODE CRIM. PROC. ANN. art. 26.01, 26.03 (2013). "No arraignment shall take place until the expiration of at least two entire days after the day on which a copy of the indictment was served on the defendant, unless the right to a copy of indictment or the delay is waived, or the defendant is on bail." TEX. CODE CRIM. PROC. ANN. art. 26.03 (2013).

[65] TEX. CODE CRIM. PROC. ANN. art. 26.02 (2013).

[66] TEX. CODE CRIM. PROC. ANN. art. 26.12, 26.13 (2013).

[67] TEX. CODE CRIM. PROC. ANN. art. 26.12 (2013).

[68] TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (2013). "No plea of guilty or plea of nolo contendere shall be accepted by the court unless it appears that the defendant is mentally competent and the plea is free and voluntary." *Id.* "[U]nless an issue is made of an accused's present insanity or mental competency at the time of the plea the court need not make inquiry or hear evidence on such issue." Kuyava v. State, 538 S.W.2d 627, 628 (Tex. Crim. App. 1976).

[69] TEX. CODE CRIM. PROC. ANN. art. 26.052(b) (2013).

[70] TEX. CODE CRIM. PROC. ANN. art. 26.052(b) (2013).

[71] TEX. CODE CRIM. PROC. ANN. art. 26.052(c)–(d)(1), (e) (2013).

[72] TEX. CODE CRIM. PROC. ANN. art. 26.04 (procedures for appointing counsel), 26.052 (appointment of counsel in death penalty case), 11.071 (representation by counsel for writ of habeas corpus) (2013). *See generally* Chapter Six on Defense Services.

after charges are filed," unless the prosecution gives notice it is not seeking the death penalty.[73]

3. Pretrial Hearings

In any criminal case, the court may order a pretrial hearing upon its own motion or in response to a motion by either party.[74] A pretrial hearing is used to determine the following matters:

(1) Arraignment of the defendant and/or appointment of counsel for defendant, if necessary;
(2) Pleadings of defendant;
(3) Special pleas;
(4) Exceptions to the indictment or information;
(5) Motions for continuance;
(6) Motions to suppress evidence;
(7) Motions for change of venue;
(8) Discovery;
(9) Entrapment; and
(10) Motion for appointment of an interpreter.[75]

The defendant must be given sufficient notice of a pretrial hearing to raise or file all matters in preparation for the hearing.[76] Notice is deemed sufficient when the defendant or the defendant's attorney are present for an announcement in open court, are personally served, or are alerted by mail prior to the hearing date.[77] Preliminary matters not raised or filed seven days before the hearing date will not be considered, unless the court finds good cause.[78] In a capital case, the court will often order multiple pretrial hearings on different issues.[79]

4. Change of Venue and Disqualification of Judge

a. Change of Venue

In any felony case or misdemeanor case punishable by confinement, change of venue can be initiated in one of four ways: (1) by the trial court on its own motion, (2) by the prosecution, (3) by the defense, or (4) by agreement of the parties.

The trial court may order a change of venue if it finds there cannot be a fair and impartial trial in the county in which the defendant is charged.[80] A change of venue to any county in the judicial district or an adjoining judicial district requires the trial judge to give due notice to the defendant

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[73] TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (2013). For a discussion of the provision of defense counsel in Texas death penalty cases, see Chapter Six on Defense Services.
[74] TEX. CODE CRIM. PROC. ANN. art. 28.01(1) (2013).
[75] *Id.*
[76] TEX. CODE CRIM. PROC. ANN. art. 28.01(2) (2013).
[77] TEX. CODE CRIM. PROC. ANN. art. 28.01(3) (2013).
[78] TEX. CODE CRIM. PROC. ANN. art. 28.01(2) (2013).
[79] *See, e.g.*, Routier v. State, 112 S.W.3d 554, 559 (Tex. Crim. App. 2003) (noting that "pretrial hearings" were held); Sells v. State, 121 S.W.3d 748, 762–63 (Tex. Crim. App. 2003) (referencing "pretrial hearings").
[80] TEX. CODE CRIM. PROC. ANN. art. 31.01 (2013).

and the prosecution and to state the grounds requiring the change.[81] To change the venue to any county beyond an adjoining district, the judge must give ten days notice to the parties.[82]

The prosecution can petition the court in writing for a change of venue if,

> by reason of existing combinations or influences in favor of the accused, or on account of the lawless condition of affairs in the county, a fair and impartial trial as between the accused and the State cannot be safely and speedily had; or whenever [the prosecution] represent[s] that the life of the prisoner, or of any witness, would be jeopardized by a trial in the county in which the case is pending.[83]

If the trial court finds the claim valid, the court will order a change of venue to any county in the district or the adjoining district.[84]

The defendant can petition the court in writing for a change of venue if "there exists in the county where the prosecution is commenced so great a prejudice against [the defendant] that he cannot obtain a fair and impartial trial;" and that "there is a dangerous combination against [the defendant] instigated by influential persons, by reason of which he cannot expect a fair trial."[85] The defendant's written motion must be accompanied by affidavits from at least two credible residents of the county where s/he is being prosecuted.[86] If the court finds the claim to be true and sufficient, it can order a change of venue.[87] Additionally, the court may order a change of venue in cases where the defendant stipulates s/he will plead guilty.[88]
Finally, if both parties agree, the court can order the proceedings transferred to another district in the interest of "convenience and justice."[89]

b. Disqualification of Judge

In Texas, a judge is not permitted to hear any case in which s/he might be the injured party, has previously been counsel for either party, or is related within the third-degree to either party.[90] A change of venue is not necessary when a district court judge is disqualified.[91] Instead, the presiding judge of the administrative judicial district in which the case is pending must assign a qualified judge to hear the case.[92]

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81 *Id.*
82 *Id.*
83 TEX. CODE CRIM. PROC. ANN. art. 31.02 (2013).
84 *Id.*
85 TEX. CODE CRIM. PROC. ANN. art. 31.03(a)(1)–(2) (2013).
86 TEX. CODE CRIM. PROC. ANN. art. 31.03(a) (2013).
87 *Id.*
88 TEX. CODE CRIM. PROC. ANN. art. 31.03(c) (2013).
89 TEX. CODE CRIM. PROC. ANN. art. 31.03(b) (2013).
90 TEX. CODE CRIM. PROC. ANN. art. 31.01 (2013). *See also* TEX. R. CIV. P. 18b(2) (requiring a judge to recuse herself in any proceeding in which her "impartiality might reasonably be questioned" or she "has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding").
91 TEX. CODE CRIM. PROC. ANN. art. 30.02 (2013).
92 TEX. CODE CRIM. PROC. ANN. art. 30.02 (2013).

5. Discovery

Upon motion by the defendant and order of the court in any criminal case, the prosecution must produce and permit the inspection and copying of any designated documents, papers, written statement of the defendant that is not work product, books, accounts, letters, photographs, and objects that are not privileged over which the prosecution has control.[93] In 2013, Texas enacted the Michael Morton Act, substantially expanding prosecutorial disclosure obligations.[94] Significantly, this new law—which goes in to effect on January 1, 2014—will require prosecutors to also disclose police reports and witness statements to defense counsel.[95] The prosecution also has an affirmative duty under the U.S. Constitution to disclose exculpatory information to the defendant prior to trial.[96]

6. Prosecutor's Decision to Seek the Death Penalty

The prosecution has complete discretion to seek the death penalty in any capital murder case.[97] The Texas Court of Criminal Appeals has held that prosecutors are not required to provide a defendant with specific notice of intent to seek the death penalty.[98] The Court held that an indictment for capital murder is sufficient notice of intent to seek the death penalty because death is prescribed as the maximum sentence by Texas statute.[99]

B. The Capital Trial

In a capital murder case where the prosecution is seeking the death penalty, the trial is bifurcated into two phases.[100] The first phase determines whether the defendant is guilty of the offense.[101] To be convicted of capital murder in Texas, a defendant must intentionally or knowingly cause the death of an individual, and one or more of the statutory aggravating elements must be present.[102]

If the defendant is convicted of capital murder in the first phase, the second phase determines whether the defendant will be sentenced to death or life imprisonment without parole.[103]

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[93] TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (2013).

[94] S.B. 1611, 83rd Leg., Reg. Sess. (Tex. 2013), *available at* http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/SB01611F.pdf#navpanes=0.

[95] *Id.*

[96] *Id.*. *See also* Brady v. Maryland, 373 U.S. 83 (1963); Thomas v. State, 841 S.W.2d 399, 407 (Tex. Crim. App. 1992); *Ex parte* Mitchell, 977 S.W.2d 575, 578 (Tex. Crim. App. 1997).

[97] Ladd v. State, 3 S.W.3d 547, 574 (Tex. Crim. App. 1999).

[98] Russeau v. State 171 S.W.3d 871, 885–86 (Tex. Crim. App. 2005); Rayford v. State 125 S.W.3d 521, 533 (Tex. Crim. App. 2003).

[99] *Russeau*, 171 S.W.3d at 885–86; *Rayford*, 125 S.W.3d at 533.

[100] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (2013) (describing the penalty phase for a defendant found guilty of capital murder at trial).

[101] TEX. PENAL CODE ANN. § 19.03(c) (2013).

[102] The statutory aggravating elements are listed in the previous section of this Chapter. *See supra* note 31 and accompanying text.

[103] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (2013).

1. Capital Jury Selection

All accused persons in criminal prosecutions have the right to a public trial by an impartial jury.[104] A defendant charged with capital murder may not waive his/her right to a jury trial if the prosecution is seeking the death penalty.[105]

In a capital trial, the jury is composed of twelve jurors and two alternates.[106] Both the prosecution and the defendant are entitled to fifteen peremptory challenges during jury selection.[107] If two or more defendants are being tried together, the prosecution is entitled to eight peremptory challenges for each defendant, and each defendant is entitled to eight peremptory challenges.[108]

During jury selection, the trial court presents prospective jurors with "questions concerning the principles . . . of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion."[109] Upon request, the state and the defense are entitled to examine each juror individually and apart from the entire panel.[110]

Either the prosecution or the defense may challenge a potential juror for cause if s/he

(1) is not a qualified voter in the state; however, failure to register is not a disqualification;
(2) has been convicted of a misdemeanor theft or a felony;
(3) is under indictment or legal accusation of a misdemeanor theft or a felony;
(4) is insane;
(5) has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render the juror unfit for jury service, or that the juror is legally blind and the court in its discretion is not satisfied that the juror is fit for jury service in that particular case;
(6) is a witness in the case;
(7) served on the grand jury that found the indictment;
(8) served on a petit jury in a former trial of the same case;
(9) has a bias or prejudice in favor of or against the defendant;
(10) has an established conclusion as to the guilt or innocence of the defendant that would influence the juror in finding a verdict; or
(11) cannot read or write.[111]

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[104] TEX. CONST. art. I, § 10.
[105] TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (2013).
[106] TEX. CODE CRIM. PROC. ANN. art. 35.26(b) (2013).
[107] TEX. CODE CRIM. PROC. ANN. art. 35.15(a) (2013).
[108] TEX. CODE CRIM. PROC. ANN. art. 35.15(a) (2013). In addition to the answers a juror provides during jury selection, the trial court may consider other evidence when assessing a for-cause challenge. TEX. CODE CRIM. PROC. ANN. art. 35.18 (2013).
[109] TEX. CODE CRIM. PROC. ANN. art. 35.17(2) (2013).
[110] *Id.*
[111] TEX. CODE CRIM. PROC. ANN. art. 35.16(a) (2013).

If both parties consent and the for-cause challenge is not based on the second, third, or fourth grounds listed above, the grounds for challenge may be waived and the person may serve on the jury.[112] Additionally, the prosecution may challenge a juror for cause if the juror

(1) has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty;
(2) is related within the third degree to the defendant; or
(3) has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment.[113]

The defense may also challenge a potential juror for cause if the juror is related to the person injured by the commission of the offense, is related to any prosecutor in the case, or "has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation" of the punishment.[114]

2. Guilt Determination Phase

After the jury is impaneled and sworn in, the prosecution must make an opening statement explaining the facts the State expects to prove.[115] Defense counsel may also make an opening statement.[116] The prosecution then offers testimony in order to prove the defendant is guilty of the capital offense beyond a reasonable doubt.[117] At the close of the prosecution's case, the defendant may, but is not required to, present evidence in support of his/her defense.[118] Both parties have an opportunity to offer rebuttal testimony.[119] At the conclusion of the testimony, both parties may make closing statements to the jury.[120]

The jury is the exclusive judge of the facts but is governed by the law as instructed by the trial court.[121] Both parties are given reasonable time to propose written instructions to the jury and to object to the proposed instructions.[122] The court may, in its discretion, incorporate suggested amendments. Prior to closing arguments, the court will dictate and submit written instructions to the jury.[123]

In rendering a verdict, the jury must unanimously agree that the defendant is either guilty or not guilty of the offense.[124] If unanimous, the verdict is read aloud by the judge, foreman, or the

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112 TEX. CODE CRIM. PROC. ANN. art. 35.16(a), 35.19 (2013).
113 TEX. CODE CRIM. PROC. ANN art. 35.16(b) (2013).
114 *Id.*
115 TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(3) (2013).
116 TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(2) (2013).
117 TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(4) (2013).
118 TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(4)–(5) (2013).
119 TEX. CODE CRIM. PROC. ANN. art. 36.01(a)(7) (2013).
120 TEX. CODE CRIM. PROC. ANN. art. 36.02 (2013).
121 TEX. CODE CRIM. PROC. ANN. art. 36.13 (2013).
122 TEX. CODE CRIM. PROC. ANN. art. 36.15, 36.16 (2013).
123 TEX. CODE CRIM. PROC. ANN. art. 36.16 (2013).
124 TEX. CODE CRIM. PROC. ANN. art. 37.07(2)(a) (2013).

clerk.[125] Both parties are entitled to request a poll of the jury.[126] The defendant must be present for the reading of the verdict unless willfully or voluntarily absent.[127] If the jury finds the defendant guilty of capital murder, the trial proceeds to the sentencing phase.[128]

3. Sentencing Phase

The purpose of the capital sentencing phase is for the jury to determine whether the defendant, having been convicted of capital murder, should be sentenced to death or life imprisonment without possibility of parole.[129] After a verdict of "guilty" is announced, the sentencing phase begins in the trial court as soon as practicable.[130] The same jury that determined guilt will determine whether to sentence the defendant to death or life imprisonment without parole.[131]

Both parties may present evidence pertaining to any matter relevant to the appropriate sentence.[132] This may include evidence of the defendant's background, character, and the circumstances of the offense.[133] The prosecution also may present evidence on the "future dangerousness" of the defendant; however, the prosecution may not offer evidence "to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct."[134]

After the sentencing phase evidence is presented, the trial court submits the following special issue to the jury:

> (1) [W]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . . .[135]

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[125] TEX. CODE CRIM. PROC. ANN. art. 37.04 (2013).
[126] TEX. CODE CRIM. PROC. ANN. art. 37.05 (2013).
[127] TEX. CODE CRIM. PROC. ANN. art. 37.06 (2013).
[128] TEX. CODE CRIM. PROC. ANN. art. 37.07(2)(b) (2013).
[129] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (2013).
[130] *Id.*
[131] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(2) (2013).
[132] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (2013).
[133] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1), 2(b) (2013).
[134] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(2) (2013). If the prosecution seeks to introduce evidence of previous bad acts, it must inform the defense upon request. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (2013).
[135] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (2013).

Additionally, in cases where the jury charge during the guilt determination phase allowed the jury to find the defendant guilty as a *party* to the crime that caused the victim's death, the following question is submitted to the jury:

> (2) [W]hether the defendant actually caused the death of the deceased or intended to kill the deceased or anticipated another human life would be taken.[136]

The jury must respond with either a "yes" or a "no," thereby indicating whether the prosecution proved each question beyond a reasonable doubt.[137] To respond "yes," the jury must agree unanimously.[138] To respond "no," at least ten jurors must agree that the prosecution failed to prove the question beyond a reasonable doubt. Jurors do not need to agree on the basis for their reasonable doubt.[139] If the jurors answer "no" to either issue, or if they do not reach the required consensus on either issue, the trial court will sentence the defendant to life imprisonment without parole.[140] Neither the court, the attorney representing the state, the defendant, nor the defendant's counsel may inform a juror or a prospective juror of the effect of a failure to respond to each question with either a "yes" or a "no."[141]

If the jurors unanimously answer the first question (or both questions if the defendant is charged as a party) in the affirmative, the trial court will submit a final issue to the jury:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.[142]

In answering each of the three issues, the jury must consider all evidence from both phases of the trial.[143] This includes evidence regarding the defendant's character and background, as well as the circumstances of the crime that "militate for or mitigate against imposition of the death penalty."[144] The jury also is instructed that a defendant sentenced to life imprisonment is ineligible for parole.[145]

If ten or more jurors answer the third issue in the affirmative or if the jury is unable to reach a unanimous decision, the defendant will be sentenced to life imprisonment without parole.[146]

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[136] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (2013). The second question is submitted in cases where the jury was allowed to find the defendant guilty under Sections 7.01 and 7.02 of the Penal Code. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(2) (2013).
[137] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(c) (2013).
[138] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)(2) (2013).
[139] *Id.*
[140] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(g) (2013).
[141] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (2013).
[142] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013).
[143] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d)(1) (2013).
[144] *Id.*
[145] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(2)(b) (2013).
[146] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(g) (2013).

Jurors may not be informed what happens if they fail to come to a consensus on whether there were sufficient mitigating circumstances to warrant life in prison without parole instead of the death penalty.[147]
If the jury unanimously answers "no" to the final special issue, the defendant will be sentenced to death.[148]

C. Motion for a New Trial, Direct Appeal, and Review by the U.S. Supreme Court

1. Motion for a New Trial

Following a conviction and the imposition of a death sentence, the defendant may challenge his/her conviction or death sentence by filing a motion for a new trial in the court where s/he was tried.[149] The court must grant a new trial if it finds "a meritorious ground" for a new trial.[150] The court also may grant a new penalty phase if the grounds for retrial only affect punishment.[151]

2. Direct Appeal to the Texas Court of Criminal Appeals

A defendant sentenced to death in Texas is entitled to a direct appeal of his/her conviction and sentence to the Texas Court of Criminal Appeals, the highest criminal court in the state.[152] A death-sentenced defendant is not required to file notice of appeal, but the clerk of the trial court must file a notice of conviction in the Court of Criminal Appeals within thirty days of sentencing.[153] The trial record, including all documents filed in the trial court, evidence presented, and written record of the trial testimony, is filed with the Court of Criminal Appeals.[154] The parties also may file supplemental briefs.[155]

After a death sentence is imposed, appellate counsel will be appointed as soon as practicable.[156] The court may not appoint the same attorney that represented the defendant at trial, unless the attorney and the defendant agree to such representation on the record, or the court finds good cause.[157] In all criminal cases heard by the Court of Criminal Appeals, "at least two counsel for the defendant shall be permitted oral argument if desired by the appellant."[158]

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[147] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (2013).
[148] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(g) (2013).
[149] TEX. R. APP. PROC. 21.4.
[150] TEX. R. APP. PROC. 21.9(a).
[151] TEX. R. APP. PROC. 21.9(a). If a new penalty phase is granted, the defendant remains guilty of capital murder. TEX. R. APP. PRO. 21.9(c).
[152] TEX. R. APP. PROC. 25.2(b). Fourteen Texas Courts of Appeals retain intermediate appellate jurisdiction in civil and non-capital criminal cases. *See Texas Courts Online*, Tex. CTS. OF APPEALS, http://www.courts.state.tx.us/courts/ coa.asp (last visited Aug. 20, 2013).
[153] TEX. R. APP. PROC. 25.2(b). Notice of appeal is unnecessary in death penalty cases. TEX. R. APP. PROC. 25.2(b).
[154] *See generally* TEX. R. APP. PROC. 25.2.
[155] TEX. CODE CRIM. ANN. PROC. art. 44.33 (2013).
[156] TEX. CODE CRIM. PROC. ANN. art. 26.052(j) (2013).
[157] TEX. CODE CRIM. PROC. ANN. art. 26.052(k) (2013).
[158] TEX. CODE CRIM. PROC. ANN. art. 44.33 (2013).

Upon review, the Court of Criminal Appeals may affirm or reverse the conviction, the sentence, or both.[159] The Court of Criminal Appeals must resentence the defendant to life imprisonment without parole if there is "legally insufficient evidence to support an affirmative answer to an issue submitted to the jury."[160] Additionally, a death sentence must be reduced to life without parole if the court finds "reversible error that affects the punishment stage" and the prosecuting attorney files a motion requesting the sentence be reduced to life without parole.[161] If the court finds errors affecting the penalty stage, and the prosecuting attorney does not request the sentence be reduced, the defendant will receive a new sentencing phase hearing.[162]

3. Discretionary Review by the U.S. Supreme Court

If the Texas Court of Criminal Appeals affirms the conviction and sentence of death on direct appeal, the appellant has ninety days after the decision is entered to file a petition for a writ of certiorari with the U.S. Supreme Court.[163] The decision to grant a writ of certiorari is entirely within the Court's discretion.[164] If the Court grants the writ, its review will be limited to alleged federal constitutional errors and misapplication of federal law.[165] If the Court chooses to review the case, it may "affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review," and may also remand for further proceedings if necessary.[166]

D. State Habeas Corpus Relief

1. Appointment of Counsel

Texas's post-conviction procedure is known as habeas corpus.[167] Capital habeas corpus proceedings are concurrent with direct appeal proceedings.[168] Thus, immediately after a Texas capital defendant is convicted and sentenced to death, the convicting court must "determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus."[169] If the convicting court makes both of these findings in the affirmative, it must appoint counsel from the Texas Office of Capital Writs "[a]t the earliest practical time," not to exceed thirty days from the date the findings are made.[170] If the Office of

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159 *See generally* TEX. CODE CRIM. PROC. ANN. art. 44.251 (2013).
160 TEX. CODE CRIM. PROC. ANN. art. 44.251(a) (2013).
161 TEX. CODE CRIM. PROC. ANN. art. 44.251(b)(1), 44.251(b)(2) (2013). "Time specified" means within thirty days after (1) the date the opinion is handed down; (2) the date the court disposes of a timely request for rehearing; or (3) the date the U.S. Supreme Court disposes of a timely filed petition for writ of certiorari, whichever is later. TEX. CODE CRIM. PROC. ANN. art. 44.251(b)(2) (2013).
162 TEX. CODE CRIM. PROC. ANN. art. 44.251(c) (2013).
163 28 U.S.C. §§ 1257, 2101(c) (2013).
164 *Id.*
165 28 U.S.C. § 1257 (2013).
166 28 U.S.C. § 2106 (2013). 28 U.S.C. § 2244(d)(2) (2013).
167 TEX. CODE CRIM. PROC. ANN. art. 11.071, §1 (2013).
168 *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a) (2013). *See also* James Harrington, *Texas's New Habeas Corpus Procedure for Death-Row Inmates: Kafkaesque-and Probably Unconstitutional*, 27 ST. MARY'S L.J. 69, 89 (1995–96).
169 TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(b) (2013).
170 TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(b)–(c) (2013).

Capital Writs "does not accept or is prohibited from accepting an appointment . . . the convicting court shall appoint counsel from a list of competent counsel."[171] The Texas Office of Capital Writs was established in 2010 to represent Texas death row inmates in state habeas corpus proceedings.[172] An inmate also may elect to represent him/herself, but the convicting trial court must determine after a hearing on the record that the decision was intelligent and voluntary.[173]

2. Application and Review by the Convicting Court

A death row inmate must file an application for a writ of habeas corpus in the convicting court within 180 days of appointing counsel, or within forty-five days of when the state's original brief is filed on direct appeal, whichever is later.[174] The convicting court may also grant the inmate a single ninety-day extension "for good cause shown and after notice and an opportunity to be heard by" the prosecution.[175] If the inmate files an untimely application, the convicting court must forward the application to the Texas Court of Criminal Appeals.[176] The Court of Criminal Appeals will then dismiss the application, and all grounds for habeas corpus relief will be considered waived, unless counsel can "show cause as to why the application was untimely filed or not filed before the filing date."[177]

Assuming the application is timely filed, "a writ of habeas corpus, returnable to the [C]ourt of [C]riminal [A]ppeals, shall issue by operation of law."[178] The prosecution must file its answer to the application within 120 days of receiving notice of the issuance of the writ.[179] The convicting court may grant the prosecution an additional sixty-day extension upon a showing of "particularized justifying circumstances for the extension."[180]

After the prosecution answers the application, the convicting court has twenty days to determine if "controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination."[181] If the court finds that no such issues exist, both parties must file proposed findings of fact and conclusions of law within a period of time set by the court, not to exceed thirty days from the date the order of determination is issued.[182] The convicting court must then issue its findings and conclusions

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[171] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(f) (2013).

[172] OFFICE OF CAPITAL WRITS, http://www.ocw.texas.gov/ (last visited July 22, 2013). Prior to the establishment of the Office of Capital Writs, the court was required to appoint "competent counsel." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(c) (2009). The statute further directed the Court of Criminal Appeals to "adopt rules for the appointment" of counsel in habeas corpus proceedings. "The rules must require that an attorney appointed as lead counsel under this section not have been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case." *Id.*

[173] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(a) (2013).

[174] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a) (2013).

[175] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(b) (2013).

[176] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(d) (2013).

[177] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4A(a) (2013).

[178] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 6(a) (2013).

[179] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 7(a) (2013).

[180] *Id.*

[181] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(a) (2013).

[182] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(b) (2013).

within fifteen days after the parties' proposals are filed, or forty-five days after the court issued the order of determination, whichever comes first.[183]

If, however, the convicting court finds in its order of determination that unresolved factual issues do exist, "the court shall enter an order . . . designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection."[184] An evidentiary hearing must be held within thirty days after the court issues this order, unless the court finds good cause to grant a single thirty-day extension.[185] The clerk of court must file a transcript of the hearing within thirty days after the close of the hearing.[186] Both parties must then file proposed findings of fact and conclusions of law within thirty days after the transcript is filed.[187] Finally, the convicting court must make its findings and conclusions within fifteen days after the parties' proposals are filed, or forty-five days after the hearing transcript is filed, whichever comes first.[188]

Only one habeas corpus application is permitted "unless the [subsequent] application contains sufficient specific facts establishing that"

(1) the claims and issues in the subsequent application could not have been presented in the initial application, or the factual or legal basis for the claim was unavailable when the initial application was filed;
(2) by a preponderance of the evidence, but for a violation of the U.S. Constitution, no rational juror could have found the applicant guilty beyond a reasonable doubt; or
(3) by clear and convincing evidence, but for a violation of the U.S. Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury.[189]

3. Appeal of Convicting Court Decision on State Habeas

The Texas Court of Criminal Appeals must "expeditiously review an application for a writ of habeas corpus" and may request further briefing and oral argument on issues by the defense or the prosecution.[190] After the Court reviews the record, it will enter judgment remanding the defendant to custody or ordering his/her release.[191]

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[183] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(c) (2013).
[184] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9(a) (2013).
[185] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9(b) (2013).
[186] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9(d) (2013).
[187] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9(e) (2013).
[188] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(c) (2013).
[189] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a) (2013).
[190] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 11 (2013).
[191] *Id.*

E. Federal Habeas Corpus

A Texas death row inmate wishing to challenge his/her conviction and sentence as a violation of federal law may file a petition for a writ of habeas corpus with the appropriate federal judicial district.[192] In order to obtain relief on the petition for a writ of habeas corpus, the inmate must have raised relevant federal claims in state court, as the failure to exhaust all state remedies available on direct appeal and during state post-conviction proceedings are grounds to dismiss the petition.[193] Generally, an inmate under a death sentence imposed by a state court is permitted one year to file a petition for habeas corpus from the date on which (1) the judgment became final, (2) the state impediment that prevented the petitioner from filing was removed, (3) the U.S. Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review, or (4) the underlying facts of the claim could have been discovered through due diligence.[194]

Federal law imposes a number of procedural restrictions on the federal courts' ability to review a death-sentenced inmate's claims on the merits. For example, if the inmate challenges the state court's determination on a factual issue, s/he has the burden of rebutting, by clear and convincing evidence, the federal law presumption that state court factual determinations are correct.[195] If the petitioner raises a claim that a Texas court previously determined on the merits, the inmate will not be granted relief unless s/he proves that the state court adjudication of the claim either: (1) resulted in a decision contrary to, or was an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court, or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[196]

Furthermore, the federal district court may not hold an evidentiary hearing on a claim in which a petitioner failed to develop the underlying facts in the state court proceedings unless (1) the claim relies upon a new rule of constitutional law, made retroactive to cases on collateral review by the U.S. Supreme Court, that was previously unavailable, or the claim relies upon a factual predicate that could not have been previously discovered through the exercise of due diligence; *and* (2) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.[197]

If the court decides that an evidentiary hearing is unnecessary, it will rule on the petition without additional evidence.[198] Based on the evidence presented, the judge may grant the petitioner a

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[192] 28 U.S.C. §§ 2254, 2241(d) (2013); U.S. DIST. CT. R. GOVERNING § 2254 CASES 3(a); FED. R. APP. PROC. 22(a).

[193] 28 U.S.C. § 2254(b)(1) (2013). Under certain circumstances, a federal district court can stay a petition that raises both exhausted and unexhausted constitutional violations to allow the petitioner an opportunity to present his unexhausted claims in state court. *See* Rhines v. Weber, 544 U.S. 269 (2005).

[194] 28 U.S.C. § 2244(d)(1) (2013).

[195] 28 U.S.C. § 2254(e)(1) (2013).

[196] 28 U.S.C. § 2254(d) (2013).

[197] 28 U.S.C. § 2254(e)(2) (2013); Williams v. Taylor, 529 U.S. 420, 432 (2000) ("Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner of the prisoner's counsel").

[198] U.S. DIST. CT. R. GOVERNING § 2254 CASES 8.

new trial, a new sentencing phase, or a new direct appeal; order the petitioner released from state custody; or deny relief altogether.[199]

If an inmate seeks to appeal an adverse decision by the district court, s/he must request a certificate of appealability from either a federal district or circuit court judge.[200] A judge may issue a certificate of appealability only for those claims on which the petitioner has made a substantial showing of the denial of a constitutional right.[201]

F. Clemency

In Texas, when an individual is convicted of a crime and confined to prison, the Governor has the power to grant clemency in the form of a reprieve, commutation, or pardon upon a written recommendation from a majority vote of the Board of Pardons and Paroles.[202] The Governor is also empowered to grant one temporary stay of execution in any capital case for up to thirty days.[203] If the Governor grants clemency, s/he must file a statement of reasons with the Office of the Secretary of the State.[204] Since 1976, two death row inmates facing imminent execution have been granted clemency in Texas.[205]

G. Execution

The trial court in which the defendant was convicted sets the execution date, typically after the Court of Criminal Appeals denies relief on direct appeal.[206] If the inmate files subsequent appeals, the execution date may be stayed by the court with jurisdiction over the appeal.[207] The first execution date must be at least ninety-one days after the date the execution is ordered by the convicting court.[208] The convicting court may modify or withdraw an execution date if it determines additional proceedings are necessary to review an untimely filed writ of habeas corpus or a motion for forensic testing of DNA evidence.[209]

After an inmate is sentenced to death, a warrant for his/her execution is entered within ten days.[210] The warrant is issued to the director of the Department of Corrections in Huntsville,

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[199] 28 U.S.C. §§ 2241, 2243 (2013) (providing that a district court may, in granting the writ, "dispose of the matter as law and justice require").

[200] 28 U.S.C. § 2253(c)(1) (2013); FED. R. APP. PROC. 22(b)(3).

[201] 28 U.S.C. § 2253(c)(2) (2013).

[202] TEX. CODE CRIM. PROC. ANN. art. 48.01 (2013).

[203] TEX. CODE CRIM. PROC. ANN. art. 48.01 (2013).

[204] TEX. CODE CRIM. PROC. ANN. art. 48.02 (2013).

[205] *Clemency*, DEATH PENALTY INFO CTR., http://www.deathpenaltyinfo.org/clemency (last visited Jul. 19, 2013). Then-Governor George W. Bush granted clemency in 1998 to Henry Lee Lucas and Governor Rick Perry granted clemency in 2007 to Kenneth Foster. *Id.*

[206] TEX. CODE CRIM. PROC. art. 43.141 (2012).

[207] *Capital Appeals*, ATT'Y GEN. OF TEX.: GREG ABBOTT, revised May 7, 2010, https://www.oag.state.tx.us/victims/capital_appeals.shtml (last visited Aug. 27, 2013).

[208] TEX. CODE CRIM. PROC. ANN. art. 43.141(c) (2013).

[209] TEX. CODE CRIM. PROC. ANN. art. 43.141(d) (2013).

[210] TEX. CODE CRIM. PROC. ANN. art. 43.15 (2013).

Texas, and must state the fact of conviction, the offense, the court's judgments, and the time set for the execution.[211]

Executions in Texas take place after six o'clock p.m. on the scheduled day and are conducted by lethal injection.[212] The following persons may be present at the execution: The executioner and those necessary to assist in conducting the execution, the Board of Directors of the Department of Corrections, two physicians, the spiritual advisor of the defendant, the chaplains of the Department of Corrections, and the county judge and the sheriff in the county where the Department of Corrections is located.[213] The inmate may request up to five relatives or friends to attend the execution. However, no inmate will be allowed to witness the execution.[214] Since 1996, immediate family members and individuals with a close relationship to the deceased victim have been permitted to attend the execution.[215] Additionally, up to five members of the media may be present.[216]

After the execution is carried out, the Director of the Department of Corrections will order the body embalmed immediately.[217] A relative or a bona fide friend can request the body within forty-eight hours for a fee of up to $25 for mortician's services.[218] The Anatomical Board may also request the body for a fee of up to $25 if a family member or friend has not already done so.[219] If the body is not delivered to the family, a friend, or the Anatomical Board, it will be "decently buried," and the embalming fee will be paid by the county where the defendant was convicted.[220] The Texas Department of Criminal Justice publishes the names, age, race, county of crime, links to information about the crime, and last statement of executed offenders.[221]

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[211] *Id.*
[212] TEX. CODE CRIM. PROC. ANN. art. 43.14 (2013).
[213] TEX. CODE CRIM. PROC. ANN. art. 43.20 (2013).
[214] *Id.*
[215] *Victim Services Division*, TEX. DEP'T CRIM. JUSTICE (June 9, 2010), http://www.tdcj.state.tx.us/divisions/vs/ (last visited Aug. 27, 2013).
[216] *Id.*
[217] TEX. CODE CRIM. PROC. ANN. art. 43.25 (2013).
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Executed Offenders*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_executed_offenders.html (last visited Aug. 27, 2013).

CHAPTER TWO

LAW ENFORCEMENT IDENTIFICATIONS AND INTERROGATIONS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Among individuals proven innocent through DNA testing, eyewitness misidentification and false confessions have been two of the errors associated with their wrongful convictions. In the case of a wrongful conviction for murder, the injustice is twofold: an innocent person is incarcerated and possibly sentenced to death, and a guilty criminal remains free.[1] From 1989 to 2012, 416 previously convicted "murderers" were exonerated nationwide.[2] In about 27% of these cases, there was at least one eyewitness misidentification, and 25% involved false confessions.[3]

Eyewitness Identifications

Numerous studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification.[4] To decrease the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, the American Bar Association promulgated best practices for promoting the accuracy of eyewitness identification.[5] To avoid misidentification, these best practices recommend that the lineup or photospread include foils—participants in the lineup or photospread other than the suspect—chosen for their similarity to the eyewitness's description.[6] Moreover, the administering officer should be unaware of the suspect's identity (conducting what is known as a "double-blind" procedure) and should tell the eyewitness that the perpetrator may not be in the lineup. Law enforcement agencies also should video-record identification procedures, including the eyewitness's statement regarding his or her degree of confidence in the identification.

Custodial Interrogations

Of the 416 murder exonerations, 102 of the exonerees gave false confessions, some of which were the product of police coercion.[7] Other reported reasons for false confessions include

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[1] *See, e.g.*, Richard E. Meyer, *A Tragic Conviction: How Justice System Can Go Wrong*, L.A. TIMES, Mar. 17, 1985, at 1 (detailing the case of Melvin Lee Reynolds, who falsely confessed to the murder of a child in Missouri and was sentenced to life in prison, allowing the actual perpetrator, serial killer Charles Ray Hatcher, to remain free and murder another victim).

[2] *See* Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012*, at 18 (2012), *available at* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf. This number includes manslaughter convictions. *Id.*

[3] *Id.* at 40.

[4] *See, e.g.*, Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. JUST. 36, 37 (Spring 2003).

[5] ABA, BEST PRACTICES FOR PROMOTING THE ACCURACY OF EYEWITNESS IDENTIFICATION PROCEDURES, 2004 Ann. Mtg. (adopted Aug. 9–10, 2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/policy/2000s/2004_AM_111E.authcheckdam.pdf.

[6] *See* C.A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification and the Selection of Distractors for Lineups*, 15 LAW & HUM. BEHAV. 43 (1991).

[7] *See* Gross, *supra* note 2, at 41, 58.

duress, deception, fear of physical harm, ignorance of the law, and lengthy interrogations.[8] Researchers also have found a correlation between a suspect's age and mental health and the probability of a false confession.[9] Electronically recording interrogations from their outset—not just from the point at which the suspect has agreed to confess—can help avoid erroneous convictions. Complete recording is increasing in the United States and around the world. Law enforcement agencies that make complete recordings have found the practice beneficial.[10] Complete recording may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession.

Officer Training

Due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques, it is crucial that law enforcement officers receive ongoing, in-service training that includes review of previous training and instruction in new procedures and methods. Thoroughness in criminal investigations should also be enhanced by utilizing the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,[11] and other law enforcement oversight groups.[12] Jurisdictions also should provide adequate opportunity for citizens and investigative personnel to report serious allegations of negligence or misconduct by law enforcement officers as well as forensic service providers.

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[8] *Id.* at 544–45. *See also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 963–74 (2004).

[9] *See* Gross, *supra* note 2, at 545.

[10] *See* Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1127 (2005) ("In the past few years, the many benefits of complete audio or video recording of custodial interviews have become increasingly apparent to all parties.").

[11] Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

[12] Such organizations include the U.S. Department of Justice, which is empowered to sue police agencies under the Violent Crime Control and Law Enforcement Act of 1994. *See* 42 U.S.C. § 14141 (2011); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies, Inc., (CALEA) is an independent peer group that has accredited law enforcement agencies in all fifty states. The International Association of Chiefs of Police (IACP) is another independent peer group that promulgates model training and policies for use by law enforcement agencies. *See* INT'L ASS'N OF CHIEFS OF POLICE, http://www.theiacp.org/ (last visited Aug. 24, 2013). Similar, state-based organizations exist in many places, as do government-established independent monitoring agencies. *See generally* COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES (CALEA), http://www.calea.org/ (last visited Sept. 4, 2013).

I. FACTUAL DISCUSSION: TEXAS OVERVIEW

The Texas Code of Criminal Procedure delineates thirty-six different entities that qualify as "peace officers" in the State of Texas.[13] The focus of this Report, however, is limited to those entities typically involved in homicide investigations, specifically: (1) county sheriffs' offices; (2) rangers and officers commissioned by the Public Safety Commission and the Director of the Department of Public Safety; and (3) police departments of an incorporated city, town, or village.[14]

A. Establishment and Qualifications of Texas Law Enforcement Offices

1. County Sheriffs

An elected sheriff is principally responsible for law enforcement in each of Texas's 254 counties.[15] Sheriffs serve a term of four years and their "duties, qualifications, perquisites, and fees of office" are governed by statutory law.[16] In addition, the Texas Constitution further provides for the division of counties into precincts, depending on population levels and other factors, and "in each such precinct there shall be elected . . . one Constable, [who] shall hold his office for four years and until his successor shall be elected and qualified."[17] As with county sheriffs, the Texas Constitution empowers the state legislature to establish qualifications for serving as a county constable.[18] The Texas Constitution imposes no duty on either sheriffs or constables; instead, the duties of those offices are prescribed by the state legislature.[19]

The state legislature has established minimum requirements for serving as a sheriff or constable.[20] Under Texas law, a sheriff must (1) possess "a high school diploma or a high school equivalency certificate" and (2) be eligible to be licensed as a law enforcement officer under the

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[13] TEX. CODE CRIM. PROC. ANN. art. 2.12 (2013).

[14] The Assessment Team submitted surveys regarding policy and practice to twenty-two country sheriff's offices, twenty-three police departments, and the Texas Ranger Division of the Department of Public Safety.

[15] TEX. CONST. art. V, § 23. Texas's counties are created by the state legislature pursuant to the Texas Constitution. *See* TEX. CONST. art. IX, § 1. The Texas Constitution further recognizes these counties "as legal subdivisions of the State." TEX. CONST. art. XI, § 1. *See also* Bexar County v. Linden, 220 S.W. 761, 763 (1920) (describing the distinctions between municipalities and counties).

[16] TEX. CONST. art. V, § 23.

[17] TEX. CONST. art. V, § 18(a). Pursuant to the Texas Constitution, "[t]he office of Constable [was] abolished in Mills County, Reagan County, and Roberts County." *Id.* at § 18(e). The "powers, duties, and records of [those] offices [were] transferred to the County Sheriff." *Id.* The office of constable also may be declared "dormant" under certain conditions pursuant to article V, section 18 of the Texas Constitution. *See id.* at § 18(h).

[18] TEX. CONST. art. V, § 18(f).

[19] TEX. CONST. art. V, § 23 (requiring the state legislature to prescribe the duties of the office of sheriff); *accord id.* at § 18(a) (establishing the office of constable but prescribing no duties to it). *But see* TEX. CONST. art. III, § 56(a) ("The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law . . . regulating the fees, or extending the powers and duties of . . . constables . . . ."). *See also* GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED COMPARATIVE ANALYSIS 449 (1977) ("In sum, then, a county has only whatever powers of government are given to it by the legislature. As counties become more urban, the legislature obviously has to add to their powers.").

[20] *See* TEX. LOC. GOV'T CODE ANN. §§ 85.0011 (2013) (prescribing qualifications for sheriffs), 86.0021 (2013) (prescribing qualifications for constables).

Texas Occupations Code.[21] Specifically, an individual who is under eighteen or who has been convicted of a felony may not receive a law enforcement officer's license.[22] In addition, Texas requires that county sheriffs become licensed peace officers by the Texas Commission on Law Enforcement within two years of taking office.[23]

Texas law also empowers sheriffs, in counties "with a population of 210,000 or more," to establish a county police force, which must consist of at least six appointed police officers.[24] The sheriff makes all appointments to the county police force, subject to the approval of the commissioners court.[25] While the authority of a county police officer is that of a deputy sheriff, Texas law specifies that "[a] [county] police officer . . . shall devote *all* time spent on duty to performing that service [of patrolling the highways of the county located outside the corporate limits of the county seat] and to matters related to that service."[26]

2. Rangers and Officers Commissioned by the Department of Public Safety

In addition to sheriffs and constables, the state legislature created, within the Department of Public Safety (DPS), the Texas Rangers division.[27] An officer of the Texas Rangers possesses all "powers and duties of sheriffs performing similar duties, except that the officer may make arrests, execute process in a criminal case in any county and, if specially directed by the judge of a court of record, execute process in a civil case."[28] According to the Texas Rangers' website, "the 150 Rangers authorized by the Texas Legislature are posted across Texas in six companies with headquarters in Houston, Garland, Lubbock, McAllen, El Paso, and Waco/San Antonio with an administrative headquarters office in Austin."[29]

The qualifications for receiving a commission as an officer of the Texas Rangers are: "(1) at least eight years of experience as a full-time, paid peace officer, including at least four years of experience in the department; and (2) be a commissioned member of" DPS.[30]

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[21] TEX. LOC. GOV'T CODE ANN. § 85.0011 (2013).

[22] TEX. OCC. CODE ANN. §§ 1701.309 (2013) (establishing age requirement), 1701.312 (2013) (establishing felony conviction disqualifier). An individual who is eighteen or older but under twenty-one must satisfy an additional requirement to obtain a law enforcement officer's license: S/he must have either "(1) completed and received credit for at least 60 hours of study at an accredited college or university or received an associate degree from an accredited college or university; or (2) received an honorable discharge from the United States armed forces after at least two years of service." TEX. OCC. CODE ANN. § 1701.309 (2013). This additional requirement does not apply to a licensee who has reached the age of twenty-one. *Id.*

[23] TEX. OCC. CODE ANN. § 1701.302(a) (2013).

[24] TEX. LOC. GOV'T CODE § 85.006(a) (2013) ("The commissioners court shall determine the [size of the county police force number], which must be at least six, of police officers to be appointed. The sheriff shall appoint one of the officers as chief of the county police. The appointments are subject to approval by the commissioners court").

[25] TEX. LOC. GOV'T CODE ANN. § 85.006(a) (2013).

[26] TEX. LOC. GOV'T CODE ANN. § 85.006(c) (2013) (emphasis added).

[27] TEX. GOV'T CODE ANN. § 411.021 (2013) ("The Texas Rangers are a major division of the [D]epartment [of Public Safety] consisting of the number of rangers authorized by the legislature.").

[28] TEX. GOV'T CODE ANN. § 411.022(a) (2013).

[29] *Welcome from Texas Ranger Headquarters, Austin, Texas*, TEX. RANGER HALL OF FAME AND MUSEUM, http://www.texasranger.org/today/rangerstoday.htm (last visited Sept. 5, 2013).

[30] TEX. GOV'T CODE ANN. § 411.0221(a) (2013).

3. Marshals or Police Officers of an Incorporated City, Town, or Village

Texas law also provides for municipalities to establish police departments and forces.[31] All police officers must pass an entrance exam and complete the minimum training requirements established by the Texas Commission on Law Enforcement.[32] Police officers have "the powers, rights, duties and jurisdiction granted to or imposed on a peace officer" as well as "other powers and duties prescribed by the governing body."[33]

B. Law Enforcement Training

Texas law and the Texas Commission on Law Enforcement Officer Standards and Education require all applicants for peace officer licensure to satisfy minimum training standards and to pass a licensing examination.[34] In Texas, county sheriffs, Rangers, and police officers are all considered peace officers.[35] Thus, these officers are required by law to complete the initial training as well as forty hours of continuing education programs every two years.[36] Specifically, part of the continuing education programs must "cover recent changes to the laws of this state and of the United States."[37] These trainings are generally facilitated by the Texas Commission on Law Enforcement,[38] which is authorized to contract with other entities to carry out particular programs.[39]

In addition, Texas created the Bill Blackwood Law Enforcement Management Institute of Texas, which is charged with the training of "police management personnel."[40] Pursuant to Texas law, the Bill Blackwood Institute has developed, adopted, and disseminated "to all law enforcement agencies in [Texas] a model policy and associated training materials regarding the administration of photograph and live lineup identification procedures."[41] The Bill Blackwood Institute has joined with the Texas Police Chiefs Association to offer educational programs for law enforcement agencies across the state on a model policy and procedures for eyewitness identification."[42]

The Texas Criminal Justice Integrity Unit established by the Court of Criminal Appeals has also facilitated training on conducting lineups and photo spreads and on non-suggestive techniques

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[31] TEX. LOC. GOV'T CODE ANN. § 341.001(a).
[32] TEX. LOC. GOV'T CODE ANN. § 143.023 (2013)
[33] TEX. LOC. GOV'T CODE ANN. § 341.001(e).
[34] TEX. OCC. CODE ANN. § 1701.307(a)(2) (2013); 37 TEX. ADMIN. CODE § 217.1(a)(16) (2013). *See also* TEX. OCC. CODE ANN. § 1701.301 (2013) (requiring licensure in order to be appointed a peace officer).
[35] TEX. CODE CRIM. PROC. ANN. art. 2.12 (2013).
[36] TEX. OCC. CODE ANN. § 1701.351(a) (2013).
[37] *Id.* at (a-1).
[38] TEX. OCC. CODE ANN. § 1701.151(2) (2013).
[39] *Id.* at (5).
[40] TEX. EDUC. CODE ANN. § 19.64 (2013).
[41] TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(b) (2012) (emphasis added).
[42] *LEMIT Trains Law Enforcement on Texas Eyewitness ID Practices*, SAM HOUS. STATE UNIV. COLL. OF CRIM. JUSTICE NEWS, Apr. 24, 2012, http://shsucj.blogspot.com/2012/04/lemit-trains-texas-law-enforcement-on.html (last visited Sept. 3, 2013).

for interviewing witnesses.[43] These trainings have been attended by prosecutors, law enforcement, and defense counsel.[44]

C. Law Enforcement Accreditation Programs

Texas law does not require that law enforcement offices be accredited by any entity. However, thirty-three offices have voluntarily pursued and received accreditation by the Commission on Accreditation for Law Enforcement Agencies (CALEA), an accreditation organization that operates internationally.[45] Among the several requirements for accreditation, CALEA requires that law enforcement offices promulgate agency guidelines governing disciplinary procedures as well as establish procedures respecting complaints received against the agency or an employee of the agency.[46] Specifically, CALEA Standard 52.1.1 requires the adoption of a written direction mandating that "*all* complaints against the agency or its employees *be investigated*," including anonymous complaints.[47] While some of Texas's largest law enforcement agencies—like the Harris County Sherriff's Office—are accredited by CALEA, other Texas jurisdictions from which many capital cases originate do not appear to be accredited.[48]

D. Laws and Procedures Governing Eyewitness Identifications

1. Federal Constitutional Law

Pretrial eyewitness identification procedures conducted by law enforcement officers, such as those taking place during lineups, must comport with the constitutional guarantee of due process.[49] In *Neil v. Biggers*, the U.S. Supreme Court held that a due process violation occurs and suppression of an out-of-court pretrial identification is required when (1) the identification procedure employed by law enforcement was unnecessarily suggestive, and (2) considering the totality of the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.[50]

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[43] Email from Sadie C. Fitzpatrick, Research Att'y to Judge Barbara Hervey, Tex. Ct. of Crim. Appeals, to Sarah Turberville, Dir., Death Penalty Due Process Rev. Project, Am. Bar Ass'n (Feb. 25, 2013) (on file with author).

[44] *Id.*

[45] *Client Database Search*, COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, http://www.calea.org/content/calea-client-database (last visited May 11, 2013) (using "Search by Location" function and designating "US" and "TX" as search criteria). The total includes nine university/college law enforcement agencies. *Id.*

[46] COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 26-1 to -3 (5th ed. 2006) (emphasis added) [hereinafter CALEA STANDARDS].

[47] COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 52-1 (5th ed. 2006) (emphasis added).

[48] *Client Database Search*, COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, http://www.calea.org/content/calea-client-database (last visited May 11, 2013) (using "Search by Location" function and designating "US" and "TX" as search criteria). For example, the Dallas and Houston municipal police departments are not accredited by CALEA. *Id.*

[49] *See* Neil v. Biggers, 409 U.S. 188, 196–99 (1972).

[50] *Biggers*, 409 U.S. at 196–99.

If a court finds that a pretrial identification procedure was unnecessarily suggestive, courts consider the following factors in determining whether there was a substantial likelihood of irreparable misidentification: (1) the opportunity of the eyewitness to view the criminal at the time of the crime, (2) the eyewitness's degree of attention, (3) the accuracy of the eyewitness's prior description of the criminal, (4) the level of certainty demonstrated by the eyewitness at the confrontation, and (5) the length of time between the crime and the confrontation.[51]

2. Texas Law

Texas has adopted the *Biggers* standard for determining the admissibility of pretrial eyewitness identifications.[52] In addition, however, Texas follows the approach of a majority of jurisdictions who adopt an "independent source rule" that permits eyewitnesses to make identifications *in court*, even if a pretrial procedure was so suggestive as to require suppression, so long as the courtroom identification has a source "independent" of the prior procedure.[53]

Additionally, the Texas Legislature recently amended the Code of Criminal Procedure to require all law enforcement agencies to "adopt, implement, and as necessary amend a detailed written policy regarding the administration of photograph and live lineup identification procedures."[54] The law further provides that these policies must be based on "credible field, academic, or laboratory research on eyewitness memory," as well as on "relevant policies, guidelines, and best practices designed to reduce erroneous eyewitness identifications and to enhance the reliability and objectivity of eyewitness identifications."[55] Agency and model policies relative to this new provision of Texas law are discussed in more detail in the Analysis portion of this Chapter.[56]

E. Laws and Procedures Governing Custodial Interrogations and Confessions

Custodial interrogations are governed by the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.[57] In *Miranda v. Arizona*, the U.S. Supreme Court held that the Fifth Amendment protection from self-incrimination requires law enforcement officers to inform a suspect of his/her right to remain silent and right to an attorney prior to a custodial interrogation.[58] Courts must consider the totality of the circumstances to determine whether a suspect is "in custody," but "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[59] "Interrogation" is defined as "express questioning" as well as "any words or actions on the part

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[51] *Id.* at 199–200.

[52] *See, e.g.*, Gamboa v. State, 296 S.W.3d 574, 582 (Tex. Crim. App. 2009) (citing Neil v. Biggers, 409 U.S. 188, (1972)).

[53] *See, e.g.*, Buxton v. State, 699 S.W.2d 212, 216 (Tex. Crim. App. 1985) ("[A]ssuming arguendo, that the lineup was suggestive, the in-court identification was shown to have been independent of the lineup.").

[54] TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(a) (2012). This article applies to "a law enforcement agency of [the State of Texas] or of a county, or other political subdivision of [the] state that employs peace officers who conduct photograph or live lineup identification procedures in the routine performance of the officers' official duties." *Id.* at art. 38.20, § 2.

[55] *Id.* at art. 38.20, § 3(c)(1).

[56] *See supra* note 93 and accompanying text.

[57] *See* Miranda v. Arizona, 384 U.S. 436, 478–79 (1966); United States v. Gouveia, 467 U.S. 180, 187–88 (1984).

[58] *Miranda*, 384 U.S. at 478–79.

[59] California v. Beheler, 463 U.S. 1121, 1125 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).

of the police . . . that the police should know are reasonably likely to elicit an incriminating response."[60] A suspect may waive his/her *Miranda* rights, provided that waiver is knowingly and intelligently made.[61] However, if an officer interrogates a suspect after that suspect effectively invokes his/her rights, or if the suspect is not informed of his/her rights, any statements made during the interrogation may be suppressed.[62] A related Sixth Amendment protection provides once a defendant has been formally charged with a crime by way of indictment, arraignment, or the like, statements deliberately elicited from that defendant regarding the charged crime cannot be admitted against that defendant in the state's case in chief.[63]

In addition, the constitutional guarantee of due process requires that, to be admissible, a defendant's confession must be voluntary.[64] The court must consider the totality of the circumstances to determine whether the defendant's statements "were the product of his free and rational choice."[65] However, "[c]oercive police activity is a necessary predicate to finding that a confession is not 'voluntary' within the meaning of the Due Process Clause."[66] The court will consider such factors as the length and location of the interrogation, the number of law enforcement officers in attendance, the presence or absence of legal counsel, and whether the confession was written by the defendant when determining whether law enforcement used coercive tactics.[67]

Texas statutory and case law substantially tracks federal constitutional requirements for the admissibility of custodial interrogations, with one important exception. Under the Texas Code of Criminal Procedure, "[n]o oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless" the statement is electronically recorded.[68]

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[60] Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

[61] *Miranda*, 384 U.S. at 479.

[62] *Id.* at 478–79; *see also Missouri v. Seibert*, 542 U.S. 600, 618–19 (2004) (Kennedy, J., concurring) (reviewing exceptions to exclusion including admissibility for impeachment and where public safety concerns precluded warnings). *But see* Berghuis v. Thompkins, 130 S. Ct. 2250, 2264 (2010) ("[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.").

[63] *See generally* Kansas v. Ventris, 129 S. Ct. 1841 (2009).

[64] Schneckloth v. Bustamonte, 412 U.S. 218, 225–26 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

[65] Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968).

[66] Colorado v. Connelly, 479 U.S. 157, 167 (1986).

[67] *See id.* at 163–64, 163 n.1 (discussing and providing examples of "the crucial element of police overreaching").

[68] TEX. CRIM. PROC. CODE ANN. art. 38.22 (2013)

II. ANALYSIS

A. Recommendation #1

Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the American Bar Association's *Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures* (*Best Practices*) (which has been reproduced below, in relevant part and with slight modifications.

1. **General Guidelines for Administering Lineups and Photospreads**
   a. **The guidelines should require, whenever practicable, that the person who conducts a lineup or photospread and all others present (except for defense counsel, when his/her presence is constitutionally required) should be unaware of which of the participants is the suspect.**
   b. **The guidelines should require that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.**

2. **Foil Selection, Number, and Presentation Methods**
   a. **The guidelines should require that lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.**
   b. **The guidelines should require that foils should be chosen for their similarity to the witness's description of the perpetrator, without the suspect's standing out in any way from the foils and without other factors drawing undue attention to the suspect.**

3. **Recording Procedures**
   a. **The guidelines should require that, whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness's confidence statements and any statements made to the witness by the police.**
   b. **The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.**
   c. **The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.**

4. **Immediate Post-lineup or Photospread Procedures**
   a. **The guidelines should require that police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the "right man"—the person believed by law enforcement to be the culprit.**

The U.S. Supreme Court has long recognized that eyewitness identification is highly error-prone. As it stated in *United States v. Wade*, "[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identifications."[69] Error is sometimes attributable to honest mistake, resulting from the fallibility of human perception and memory. But law enforcement procedures can, and frequently do, exacerbate the fragility of eyewitness evidence. Four decades ago the Court stated that "'influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.'" These concerns find support in the growing number of DNA exoneration cases involving individuals wrongly convicted on the basis of eyewitness identification. According to the Innocence Project, eyewitness misidentification has played "a role in nearly 75% of convictions overturned through DNA testing."

While the Due Process Clause of the Fifth and Fourteenth Amendments has been interpreted to prohibiting undue suggestion in conducting eyewitness identification procedures, a growing body of legal and social science research has demonstrated that constitutional scrutiny systematically fails to root out erroneous identifications. First, in applying the two-part test announced in *Neil v. Biggers*, as described above, courts who do find that undue suggestion was used on an identification procedure must determine whether the identification is nevertheless "reliable" based on the totality of the circumstances.[70] But the factors used by courts to assess the overall "reliability" of an identification obtained with suggestive procedures are not in fact good indicators of a witnesses' accuracy. For example, courts frequently rely on a witness's confidence concerning the accuracy of his/her own identification, but social science research has demonstrated that individuals are systematically overconfident, and that their memories are frequently tainted in ways that witnesses lack the capacity to perceive.[71] The *Biggers* test excludes consideration of factors that research has established as raising the risk of erroneous identification, such as youth of a witness or a difference in the race of the witness and the perpetrator.[72] Finally, the Due Process Clause is simply unavailable as a check on the reliability of eyewitness identifications, however flawed, so long as law enforcement did not engage in undue suggestion, as the Court held in *Perry v. New Hampshire*.[73]

A review of state cases in the National Registry of Exonerations reveals that in Texas, from 1989 through 2012, at least forty-seven people whose convictions were based in significant part on eyewitness identification were later exonerated following DNA testing or the discovery of new

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[69] United States v. Wade, 388 U.S. 218, 228 (1967)
[70] Neil v. Biggers, 409 U.S. 188, 196–99 (1972).
[71] *See, e.g.*, Dan Simon, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 115 (2012).
[72] *See* Brandon Garrett, CONVICTING THE INNOCENT 62–77 (2011).
[73] 132 S.Ct. 716 (2012).

evidence.[74] Ten of those individuals had been sentenced to death.[75] Although many cases illustrate the tragic consequences which stem from eyewitness misidentification, Steven Phillips' and Timothy B. Cole's cases offer particularly compelling examples of the faulty nature of identifications and the serious consequences that flow from misidentification.

Steven Phillips

In 1982 and 1983, Phillips was convicted in a Dallas County court of burglary and rape stemming from the same incident, and was sentenced to thirty years in prison.[76] Identified as the perpetrator in nine other criminal cases and reportedly fearing that a third trial would lead to a life sentence, he pled guilty to charges related to those cases in exchange for an additional sentence of ten years.[77] Notably, many of the victims who had identified Phillips had mentioned the perpetrator's "striking blue eyes," although Phillips' eyes are green.[78] Phillips' photograph also had been circulated in the media before many of the eyewitnesses made their identifications.[79]

In 2008, DNA testing exonerated Phillips, but the DNA testing also found a match to the actual perpetrator named Sidney Alvin Goodyear, a man "convicted of at least 16 other sexual assaults and related offenses in several states during the time Phillips was wrongfully incarcerated for Goodyear's assaults in Dallas."[80] Thus, the costs of wrongfully convicting Phillips were not limited to the defendant and his family. As a result, the State of Texas compensated Phillips—as it has eighty-eight other exonerees—for the twenty-five years he spent in prison for crimes he had not committed.[81]

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[74] The forty-seven exonerees are Randall D. Adams, Gilbert Alejandro, Gilbert Amezquita, Michael Blair, A.B. Butler, Jr., Kevin Byrd, Charles Chatman, Timothy B. Cole, Cornelius Dupree, Jerry Lee Evans, Larry Fuller, James Curtis Giles, Donald Wayne Good, Andrew Gossett, Michael Anthony Green, Andre Haygood, Raymond Jackson, Morris S. Jones, Johnnie Lindsey, Thomas McGowan, Richard Miles, Brandon Moon, Steven Phillips, Johnny Pincack, David Shawn Pope, Anthony Robinson, George Rodriguez, Ben Salazar, Christopher Shun Scott, Claude Simmons, Jr., Billy James Smith, Richard Sturgeon, Josiah Sutton, Jesse Talamantez, Ronald Gene Taylor, Ricky Dale Thomas, Victor Larue Thomas, Keith Turner, James Waller, Patrick Waller, Gregory Wallis, Nathaniel Ward, Mark Webb, David Lee Wiggins, James Curtis Williams, James Lee Woodard, and Rickey Dale Wyatt. For case descriptions, see NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited July 13, 2013).

[75] *Id.*

[76] *Profile: Steven Phillips*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/ Steven_Phillips.php (last visited July 13, 2013).

[77] *Id.*

[78] Diane Jennings, *Dallas Man Freed from Prison after 25 Years*, DALLAS MORNING NEWS, Aug. 6, 2008.

[79] *Profile: Steven Phillips*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Steven_ Phillips.php (last visited July 13, 2013).

[80] *Id.* "Dallas County prosecutors now believe Goodyear committed all 11 crimes that sent Phillips to prison." Diane Jennings, *Appeals Court Overturns Conviction of DNA Exoneree*, AP ALERT, Oct. 2, 2008.

[81] *See also* Mike Ward, *Tab for Wrongful Convictions in Texas: $65 Million and Counting*, AM.-STATESMAN (Austin, Tex.), Feb. 10, 2013 (noting that, as of February 2013, the State of Texas has paid over $65 million to defendants who were wrongfully convicted).

Timothy B. Cole

In March 1985, Michele Mallin, a student at Texas Tech, was abducted and raped by a black male wearing a yellow shirt and sandals.[82] She later identified Timothy B. Cole, a twenty-six-year-old Army veteran and business student, as the perpetrator after viewing an unusual and suggestive photospread. Of the six photographs presented, Cole's was the only color photograph, the only Polaroid photograph, and the only photograph depicting the subject facing the camera.[83] Charged with and convicted of aggravated sexual assault,[84] Cole would later die in prison "unaware that another man had confessed to Mallin's rape and that his confessions had been ignored."[85] He also would become "the first Texan to be posthumously exonerated of a crime through DNA testing."[86] Although the compensation received by Steven Phillips and his fellow exonerees is necessary to correct the miscarriages of justice in those cases, such recompense is not available to every exoneree whose conviction rested on eyewitness misidentification.

In 2009, ten years after Cole's death, the Texas Legislature enacted reforms increasing compensation paid to exonerees. The legislature also established the Timothy Cole Advisory Panel on Wrongful Convictions "to assist the Task Force on Indigent Defense . . . in conducting a study and preparing a report regarding the prevention of wrongful convictions."[87] Many of the recommendations from that panel pertain to the very practices that led to Cole's wrongful conviction—namely, eyewitness identification procedures.

Texas Laws and Policies on Eyewitness Identification Procedures

In November 2008, The Justice Project (TJP) published a study titled *Eyewitness Identification Procedures in Texas*, a study partly compelled by the fact that at that time, "82% of [Texas]'s 38 DNA exonerations involved mistaken eyewitness identification."[88] In its survey of 1,034 law enforcement agencies in Texas, TJP received responses from 750 agencies and found that only eighty-eight respondents had written policies governing blind administration, cautionary instructions during identifications, composition fairness of the live or photographic lineup, or documentation of the lineup procedure.[89] Moreover, many of these written policies were inadequate.[90] For example, although an agency may have promulgated a written policy on cautionary instructions, that policy did not require the administrator to instruct the eyewitness "that the perpetrator may not be included in the photographic or live lineup."[91]

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[82] Tony Freemantle, *A Human Tragedy: Exonerees*, HOUS. CHRON., Jan. 20, 2013, at 2.

[83] *Id.*; *Profile: Timothy B. Cole*, NAT'L REGISTRY OF EXONEREES, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3114 (last visited July 13, 2013).

[84] *See* Cole v. State, 735 S.W.2d 686 (Tex. App. 1987), *rev'd* 839 S.W.2d 798 (Tex. Crim. App. 1990).

[85] Tony Freemantle, *A Human Tragedy*, HOUS. CHRON., Jan. 20, 2013, at 2.

[86] TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 1 (2010), *available at* http://www.txcourts.gov/tidc/pdf/FINALTCAPreport.pdf.

[87] *See* H.B. 498, 81st Leg. Reg. Sess. (Tex. 2009) (establishing the Commission).

[88] THE JUSTICE PROJECT, EYEWITNESS IDENTIFICATION PROCEDURES IN TEXAS 1 (2008) (on file with author).

[89] *Id.* at 1. Notably, the best practices at the core of TJP's study substantially overlap with the ABA's *Best Practices*. *Compare id.* at 2–3 (regarding cautionary instructions, composition fairness, blind administration, and comprehensive documentation), *with* Recommendation #1, *supra*.

[90] *See id.* at 8–10.

[91] *Id.* at 2.

In response to these findings, the Timothy Cole Advisory Panel on Wrongful Convictions recommended several changes in Texas law.[92] The Texas Legislature thereafter amended the Code of Criminal Procedure to require all law enforcement agencies to "adopt, implement, and as necessary amend a detailed written policy regarding the administration of photograph and live lineup identification procedures."[93] To fulfill this requirement, an agency may adopt a model policy—one formulated by the Bill Blackwood Law Enforcement Management Institute of Texas (Bill Blackwood Institute), an arm of Sam Houston State University—or it may adopt its own policy, provided that policy conforms with standards specified in the Texas Code of Criminal Procedure.[94]

Generally, an eyewitness identification policy must be based on "credible field, academic, or laboratory research on eyewitness memory," as well as on "relevant policies, guidelines, and best practices designed to reduce erroneous eyewitness identifications and to enhance the reliability and objectivity of eyewitness identifications."[95] The Texas Code of Criminal Procedure also specifies several topics that must be addressed in the policy, including:

> (1) Foil selection;
> (2) Instructions for the eyewitness prior to the lineup or photospread identification procedure;
> (3) Documenting and preserving the results, including the eyewitness's statements, regardless of the outcome; and
> (4) Procedures for administering the lineup or photospread to an illiterate person or a person with limited English language proficiency.[96]

With respect to lineups, the policies also must address procedures for assigning an administrator who is unaware of which member of the lineup is the suspect; with respect to photospreads, the policies must address procedures for assigning an administrator "who is capable of administering a photograph array in a blind manner or in a manner consistent with other proven or supported best practices designed to prevent opportunities to influence the witness."[97]

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[92] *See* TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 5–9 (2010), *available at* http://www.txcourts.gov/tidc/pdf/FINALTCAPreport.pdf. *See also* Brandi Grissom, *Eyewitness ID Reform Headed to Perry's Desk*, TEX. TRIB., May 18, 2011, http://www.texastribune.org/texas-legislature/82nd-legislative-session/eyewitness-id-reform-headed-to-perrys-desk (last visited Sept. 3, 2013).

[93] TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(a) (2012). This article applies to "a law enforcement agency of [the State of Texas] or of a county, or other political subdivision of [the] state that employs peace officers who conduct photograph or live lineup identification procedures in the routine performance of the officers' official duties." *Id.* at art. 38.20, § 2.

[94] *Id.* at art. 38.20, § 3(a). The Texas Police Chiefs Association (TPCA) subsequently developed its own version of a model eyewitness identification policy based, in part, on the policy developed by the Bill Blackwood Institute. Tex. Police Chiefs Ass'n, *Eyewitness Identification Policy Completed*, TEX. LAW ENFORCEMENT BEST PRACTICES RECOGNITION PROGRAM UPDATE, Vol. 4, No. 2, at 7 (Apr. 2012). "The TPCA version was written at the direction of the membership in order to create a version consistent with the style and format used in the current Sample Policy Manual." *Id.*

[95] TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(c)(1).

[96] *Id.* at art. 38.20, § 3(c)(2)(A)–(D).

[97] *Id.* at art. 38.20, § 3(c)(2)(E)–(F). The Code does not require that an administrator of a lineup identification procedure be "blind" if such an arrangement would be impractical. *See id.* at art. 38.20, § 3(c)(2)(E).

The *Model Policy on Eyewitness Identification* (*Model Policy*) drafted by the Bill Blackwood Institute has many features in keeping with Recommendation #1. For example, the *Model Policy* emphasizes that "[v]ideo documentation (with audio) is the preferred method" for documenting an identification procedure,[98] and that an eyewitness making an identification should be pressed on his/her certainty and his/her responses documented "using the witness's own words."[99] These *Model Policy* details largely correspond to the third sub-part of Recommendation #1. A law enforcement agency that adopts the *Model Policy* would, in fact, have procedures that align with the ABA's *Best Practices*.

Ultimately, a law enforcement agency is not required to adopt the *Model Policy*. The Assessment Team requested details on the eyewitness identification policies adopted by several sheriff's offices and police departments throughout Texas, but it received responses only from the two agencies.[100] Those responses, while helpful, cannot alone establish Texas's compliance with Recommendation #1. Nevertheless, as there is considerable merit to the *Model Policy*, the Assessment Team concludes that the State of Texas is in partial compliance with Recommendation #1.

Recommendation

Texas has, by way of the Bill Blackwood Institute, developed sound policies for reducing the risk of eyewitness misidentifications. Because, however, it is not mandatory for a law enforcement agency to adopt the Institute's *Model Policy*, peace officers conducting lineups and photospreads may continue to follow procedures that fall short of both the *Model Policy* and Recommendation #1.

Given the recent required adoption of a written policy on eyewitness identification procedures, Texas should require a progress report on agencies' progress toward adoption of best practices concerning the administration of eyewitness identifications. The Assessment Team also encourages all agencies to at least adopt the *Model Policy*'s provisions, which provide a minimum standard for conducting identifications.

While the State of Texas should be commended for adding Article 38.20 to the Texas Code of Criminal Procedure, the Assessment Team notes that the article explicitly states that "a failure to conduct a photograph or live lineup identification procedure in substantial compliance with the model policy or any other policy adopted under this article or with the minimum requirements of this article does not bar the admission of eyewitness identification testimony in the courts of this state."[101] In addition, Texas did not adopt an important and related recommendation from the

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[98] BILL BLACKWOOD LAW ENFORCEMENT MGMT. INST. OF TEX., MODEL POLICY ON EYEWITNESS IDENTIFICATION 4, 11, 17, 23 (2012).

[99] *Id.* at 9, 15, 20, 25.

[100] The Assessment Team submitted surveys regarding policy and practice to twenty-two country sheriff's offices, twenty-three police departments, and the Texas Ranger Division of the Department of Public Safety. It received responses only from the Fort Worth Police Department and the Nueces County Sheriff's Office. The Fort Worth Police Department's policy on eyewitness identifications, for example, appears to incorporate some, but not all, of the Model Policy's requirements. Ft. Worth Police Dep't, SOP 92 (Sept. 1, 2012) (on file with author).

[101] TEX. CODE CRIM. PROC. ANN. art. 38.20, § 5(b) (2013).

Timothy Cole Advisory Panel on Wrongful Convictions: "The State of Texas should permit evidence of compliance or noncompliance with the model policy to be admissible in court."[102] Accordingly, new legislation also should include remedies for agencies' noncompliance with state-sanctioned identification procedures.[103] These remedies need not entail automatic exclusion of the eyewitness's identification. For example, to support a claim of eyewitness misidentification, defense counsel should be permitted to offer as evidence an agency's failure to comply with required procedures. Conversely, in instances in which law enforcement has comported with the *Model Policy* in conducting an identification in a particular case, the prosecution should be able to offer it as evidence of admissibility of the identification. In addition, when evidence of compliance or noncompliance with required procedures has been presented at trial, the court should instruct the jury that it may consider such evidence when determining the reliability of the eyewitness identification. A third remedy would permit the court to consider failure to comply with required procedure whenever it adjudicates motions to suppress such identifications.[104] A fourth remedy would be authorizing funds for and admitting expert testimony on the consequences of departing from procedures.

Further, the Assessment Team strongly recommends that Texas law enforcement agencies adopt policies limiting the extent to which peace officers may use showups.[105] Showups need not be completely prohibited, however, because the procedure can be appropriate in certain circumstances—for example, when an identification is necessary to obtain probable cause for an arrest after a crime occurs.[106] Nonetheless, in the limited circumstances in which officers are permitted to conduct showups they should follow procedures that minimize the suggestiveness of the identification.

Given Texas's documented history of misidentifications leading to wrongful conviction, adherence to the procedures described above are likely to guard against future miscarriages of justice due to outmoded methods of identification.

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[102] TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 5 (2010).

[103] *See, e.g.*, OHIO REV. CODE § 2933.83(C) (2013) (describing three remedies for failure to comply with Ohio's eyewitness identification statute short of automatic exclusion); N.C. GEN. STAT. § 15A-284.52(d) (2013) (describing three remedies for failure to comply with North Carolina's eyewitness identification statute short of automatic exclusion).

[104] *See* Recommendation #7 on jury instructions on eyewitness identifications, *infra* notes 148–157 and accompanying text.

[105] *See* State v. Henderson, 27 A.3d 872, 903 (N.J. 2011) (noting that a special master appointed to examine the validity of New Jersey's eyewitness identification practices stated that showups are a "'useful—and necessary—technique when used under appropriate circumstances,'" but that they "carry their 'own risk of misidentifications'" and that lineups are a preferred identification procedure).

[106] A showup is an identification procedure in which the eyewitness directly confronts the suspect alone. Showups clearly circumvent any policy regarding the selection and presentation of foils, as foils are not used in a showup. The suspect also may be in police custody or in handcuffs at the showup, suggesting to the eyewitness that s/he is looking at the person who law enforcement believe to be the "right man."

B. Recommendation #2

Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.

The Texas Code of Criminal Procedure requires the Bill Blackwood Institute to "develop, adopt, and disseminate to all law enforcement agencies in [Texas] a model policy *and associated training materials* regarding the administration of photograph and live lineup identification procedures."[107] As for the training itself, the Bill Blackwood Institute joined with the Texas Police Chiefs Association (TPCA) "to offer 'Train the Trainer' programs for law enforcement agencies across the state on a model policy and procedures for eyewitness identification."[108] Three training sessions were hosted by the Institute in Huntsville, Plano, and Austin.[109] TPCA also has offered training "to discuss the requirement of the law [concerning eyewitness identification procedures], policy considerations and the best practices concerning eyewitness identification."[110]

Training on conducting lineups and photospreads and on non-suggestive techniques for interviewing witnesses also has been facilitated by the Texas Criminal Justice Integrity Unit (TCJIU), established by the Court of Criminal Appeals in response to "the growing number of wrongful convictions throughout Texas."[111] In 2010, TCJIU sponsored a seminar on forensic science at the Texas State Capitol Auditorium to discuss, among other subjects, the science behind eyewitness identifications and suspect confessions.[112] "Judges, defense attorneys, prosecutors, scientists, legislators, [and] law enforcement" were "encouraged to attend," and tuition was free for all registrants.[113] TCJIU also partnered with the Texas Commission on Law Enforcement Office Standards and Education (TCLEOSE) "to add eyewitness evidence training to the Basic Peace Office Course curriculum, and [to] assist[] TCLEOSE in developing a training course on eyewitness identification procedures modeled after the National Institute of Justice's Eyewitness Evidence Guide."[114]

As periodic training is made available to law enforcement officers and prosecutors regarding proper procedures for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses, the State of Texas complies with Recommendation #2.

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[107] TEX. CODE CRIM. PROC. ANN. art. 38.20, § 3(b) (2013) (emphasis added).

[108] *LEMIT Trains Law Enforcement on Texas Eyewitness ID Practices*, SAM HOUS. STATE UNIV. COLL. OF CRIM. JUST. NEWS, Apr. 24, 2012, *available at* http://shsucj.blogspot.com/2012/04/lemit-trains-texas-law-enforcement-on.html.

[109] *LEMIT Trains Police on Photo and Live Lineups*, SAM HOUS. STATE UNIV. COLL. OF CRIM. JUST. NEWS, June 26, 2012, *available at* http://shsucj.blogspot.com/2012/06/lemit-trains-police-on-photo-and-live.html.

[110] *Eyewitness Training*, TEX. POLICE CHIEFS ASS'N, http://www.texaspolicechiefs.org/eyewitness-training (last visited Sept. 5, 2013).

[111] Email from Sadie C. Fitzpatrick, Research Att'y to Judge Barbara Hervey, Tex. Ct. of Crim. Appeals, to Sarah Turberville, Dir., Death Penalty Due Process Review Project, Am. Bar Ass'n (Feb. 25, 2013) (on file with author).

[112] *Tex. Crim. Just. Integrity Unit*, TEX. FORENSIC SCI. SEMINAR (Oct. 7–8, 2012) (on file with author).

[113] *Id.* at 1.

[114] Email from Sadie C. Fitzpatrick, *supra* note 111.

C. Recommendation #3

> **Law enforcement agencies and prosecutor offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.**

The Texas Code of Criminal Procedure states explicitly that each law enforcement agency "shall review its [eyewitness identification] policy . . . and shall modify that policy as appropriate."[115] Likewise, the Bill Blackwood Institute "shall review the model policy [on eyewitness identifications] and [related] training materials . . . and shall modify the policy and materials as appropriate."[116] Both reviews must be conducted at least once within a two-year span.[117] Accordingly, the State of Texas complies with Recommendation #3.

D. Recommendation #4

> **Video-record the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where video-recording is impracticable, audio-record the entirety of such custodial interrogations.**

According to the Innocence Project, "[i]n about 25% of DNA exoneration cases [in the U.S.], innocent defendants made incriminating statements, delivered outright confessions or pled guilty."[118] Specific to Texas, a review of state cases in the National Registry of Exonerations reveals that, from 1989 through 2012, at least five people offered confessions to law enforcement yet later were exonerated following DNA testing or the discovery of new evidence.[119]

In one case, Christopher Ochoa confessed and plead guilty to the rape and murder of twenty-year old Nancy Priest.[120] He also agreed to testify against his friend and fellow suspect, Richard Danzinger.[121] Both men were subsequently convicted and sentenced to life in prison, though DNA and other corroborating evidence later proved their innocence.[122] When later asked why he had falsely confessed to the crime, Ochoa stated that his interrogation "came with threats that if I didn't tell them the truth, I was going to go to death row because it was a capital murder. I was going to die on death row. Ultimately[. . .] I was just worn down and I told them what they wanted to hear."[123] Ochoa was released after serving twelve years in prison for a crime he did

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[115] TEX. CODE CRIM. PROC. ANN. art. 38.20, § 4(b) (2012).
[116] TEX. CODE CRIM. PROC. ANN. art. 38.20, § 4(a) (2012).
[117] TEX. CODE CRIM. PROC. ANN. art. 38.20, § 4 (2012).
[118] *False Confessions*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Aug. 18, 2013).
[119] The five exonerees are Stephen Brodie, Lacresha Murray, Christopher Ochoa, Michael Scott, and Robert Springsteen. For case descriptions, *see* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited July 13, 2013).
[120] *See Chris Ochoa*, INNOCENCE PROJECT, May 4, 2007, http://www.innocenceproject.org/Content/Christopher_Ochoa.php (last visited July 29, 2013).
[121] *Id.*
[122] *Id.*
[123] *Chris Ochoa*, INNOCENCE PROJECT, May 4, 2007, http://www.innocenceproject.org/Content/Christopher_Ochoa.php (last visited July 29, 2013).

not commit.[124] While Danzinger was also exonerated after the additional evidence came to light, his release was delayed in order to arrange the care he required for the permanent brain damage he suffered after being severely beaten in prison.[125]

Given the risk that an innocent person will confess to a crime, it is imperative for law enforcement officers to fully video-record a suspect's interrogation, including any questioning that precedes the formal confession and the suspect's waiver of his/her *Miranda* rights. A video-recording provides the court, jury, and prosecutor with the best means to determine whether a confession is credible, including whether law enforcement engaged in any coercive tactics in obtaining a confession.

Despite these benefits, Texas law does not require law enforcement agencies to record the entirety of custodial interrogations of crime suspects.[126] While oral or sign language statements "made as a result of custodial interrogation" must be audio- or video-recorded to be admissible as evidence,[127] law enforcement agencies "overwhelmingly rely" on written rather than oral statements.[128] In its 2009 survey of 1,034 Texas law enforcement agencies, The Justice Project found that, of the 441 responses it received, "380 departments indicated that they either routinely record custodial interrogations, record interrogations for certain classes of felonies, or record interrogations at the discretion of the lead investigator."[129]

In a similar vein, the Timothy Cole Advisory Panel on Wrongful Convictions noted the following in its 2010 *Report to the Texas Task Force on Indigent Defense*:

> [A] review of the recording policies of the largest counties and municipalities indicated that over half provided no written policies or procedures on electronic recording of custodial interrogations beyond statutory requirements. By contrast, policies for departments in Amarillo, Austin, Corpus Christi, Dallas, El Paso, Houston, Irving, Pasadena, and San Antonio provide for more robust recording of interrogations.[130]

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[124] *Id.*

[125] *See* Rob Warden, *Bluhm Legal Clinic Center on Wrongful Convictions: Richard Danzinger*, NW. LAW, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/tx/richard-danzinger.html (last visited July 29, 2013).

[126] TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 19 (Aug. 2010); Alan M. Gershel, *A Review of the Law in Jurisdictions Requiring Electronic Recording of Custodial Interrogations*, 16 RICH. J.L. & TECH. 9, 18 (2010).

[127] *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, § 3(a) (2012).

[128] TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 19 (Aug. 2010). Whereas oral statements are addressed in Section 3 of Article 38.22, Texas Code of Criminal Procedure, written statements are addressed in Sections 1 and 2. *See* TEX. CODE CRIM. PROC. ANN. art. 38.22, §§ 1–2 (2012), *amending* 2013 Tex. Sess. Law Serv. Ch. 679 (H.B. 2090) (eff. Sept. 1, 2013).

[129] THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS IN TEXAS: A REVIEW OF CURRENT STATUTES, PRACTICES, AND POLICIES 2 (2009) (on file with author). The Assessment Team sought updated information from many of these same entities but only received responses from the Fort Worth Police Department and Nueces County Sheriff's Office.

[130] TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 22 (Aug. 2010). *See also* THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS IN TEXAS: A REVIEW OF CURRENT STATUTES, PRACTICES, AND POLICIES 5–7 (2009) (on file with author) (summarizing recording policies from the most populous municipalities and counties in Texas).

Because Texas statutory law and the internal policies of many of Texas's law enforcement agencies do not require video- or audio-recording of the entirety of custodial interrogations of crime suspects, the State of Texas only partially complies with Recommendation #4.

Recommendation

The Assessment Team recommends that Texas adopt legislation to require all law enforcement agencies to video- or audio-record the entirety of custodial interrogations; for serious felony investigations—especially those which may lead to capital charges—noncustodial interrogations and interviews with cooperative witnesses also should be recorded. Such measures would help to conserve resources that might otherwise be spent on litigating the admissibility of confessions. To develop this legislation, the Texas Legislature ought to enlist the aid of the Bill Blackwood Law Enforcement Management Institute of Texas, which developed the state's model eyewitness identification policy in 2012. In addition, the State of Texas could draw on the experience of other states and jurisdictions that have implemented interrogation recording statutes.[131]

Broadly, the statute should require Texas law enforcement officers investigating serious felonies to record interrogations of and interviews with suspects and witnesses. With respect to interrogations, recordings should include the reading of *Miranda* rights, a suspect's waiver of any of these rights, all questioning by law enforcement, and the suspect's final statement. Exceptions should be permitted in exigent circumstances, as when a suspect expresses his/her desire not to be recorded or makes a sudden utterance. A failure to record should not be in violation of the statute whenever law enforcement officials make a good faith attempt to record but equipment failures arise. These limited exceptions ensure that the vast majority of interrogations will be recorded while also protecting public safety in those instances when a recording requirement would be imprudent or infeasible.

To promote the complete recording of custodial interrogations, the statute must provide defendants with a remedy whenever law enforcement officials violate the statute by failing to make the recording. The remedy need not be exclusion of all unrecorded statements. For example, North Carolina's interrogation recording statute provides that an officer's failure to comply with the statute "shall be considered by the court in adjudicating motions to suppress a statement of the defendant made during or after a custodial interrogation."[132] Noncompliance with that statute also is "admissible in support of claims that the defendant's statement was involuntary or is unreliable."[133] Thirdly, the North Carolina law requires the court to instruct the jury "that it may consider credible evidence of compliance or noncompliance" with the statute in determining whether the defendant's confession was "voluntary and reliable."[134]

A model interrogation recording statute, proposed by former U.S. Attorney Thomas P. Sullivan and Andrew W. Vail, attorneys who have extensively studied different jurisdictions' approach to recording custodial interrogations, would allow unrecorded confessions to be admitted into

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[131] *See, e.g.*, N.C. GEN. STAT. § 15A-211 (2012); MD. CODE CRIM. PRO. § 2-402 (2012).
[132] N.C. GEN. STAT. § 15A-211 (2012)(f)(1).
[133] N.C. GEN. STAT. § 15A-211 (f)(2) (2013).
[134] N.C. GEN. STAT. § 15A-211 (f)(3) (2013).

evidence but require a jury instruction regarding officers' failure to comply with the statute.[135] The authors developed this remedy after consulting with more than 600 law enforcement officers on the issue.[136] A newer model interrogation recording statute, drafted by the National Conference of Commissioners on Uniform State Laws and adopted in July 2013, also allows unrecorded interrogations and confessions to be introduced into evidence within discretion of the court, to be followed by "cautionary instructions" to the jury upon the defendant's request.[137]

Adopting a remedy for failure to record similar to the North Carolina regime, Sullivan and Vail, or Uniform State Laws proposals would provide a stronger incentive for officers to comply with the law without risking automatic exclusion of any unrecorded custodial interrogation.

E. Recommendation #5

Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.

As discussed under Recommendation #1, the State of Texas has, through the Bill Blackwood Law Enforcement Management Institute of Texas (Bill Blackwood Institute), developed a comprehensive model eyewitness identification policy.[138] That policy was a byproduct of the

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[135] Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interrogations as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY 215, 221 (2009).

[136] *Id.* at 220 n.24. The proposed Sullivan and Vail instruction reads as follows:

> The law of this state required that the interview of the defendant by law enforcement officers which took place on [insert date] at [insert place] was to be electronically recorded, from beginning to end. The purpose of this requirement is to ensure that you jurors will have before you a complete, unaltered, and precise record of the circumstances under which the interview was conducted, and what was said and done by each of the persons present.
>
> In this case, the interviewing law enforcement agents failed to comply with that law. They did not make an electronic recording of the interview of the defendant. No justification for their failure to do so has been presented to the court. Instead of an electronic recording, you have been presented with testimony as to what took place, based upon the recollections of law enforcement personnel [and the defendant].
>
> Accordingly, I must give you the following special instructions about your consideration of the evidence concerning that interview.
>
> Because the interview was not electronically recorded as required by our law, you have not been provided the most reliable evidence as to what was said and done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices.
>
> Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that what was said and done has been accurately reported by the participants, including testimony as to statements attributed by law enforcement witnesses to the defendant.

Id. at 226.

[137] NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM ELECTRONIC RECORDATION OF CUSTODIAL INTERROGATIONS ACT (July 21, 2013), *available at* http://www.uniformlaws.org/shared/docs/electronic%20recordation%20of%20custodial%20interrogations/ueroci_am10_notstyled.pdf.

[138] *See supra* notes 98–99 and accompanying text.

report of the Timothy Cole Advisory Panel on Wrongful Convictions (Panel) to the Task Force on Indigent Defense, the latter having been tasked by the legislature with "conduct[ing] a study regarding . . . procedures that may be implemented to prevent future wrongful convictions."[139] Training on the *Model Policy* was supported by a $40,000 grant from the Texas Court of Criminal Appeals, which "pa[id] for training materials and to allow law enforcement officers to attend the sessions at no cost."[140]

The Timothy Cole Panel's *Report to the Texas Task Force on Indigent Defense* did not limit itself to eyewitness identification procedures, however, and included recommendations regarding custodial interrogations, discovery procedures, and post-conviction proceedings.[141] In particular, the *Report* recommended that the State of Texas "[a]dopt a mandatory electronic recording policy, from delivery of *Miranda* warnings to the end, for custodial interrogations in certain felony crimes," which "should include a list of exceptions to recording and the judicial discretion to issue a jury instruction in the case of an unexcused failure to record."[142] The Texas Legislature has yet to authorize the drafting of a model policy regarding the recording of custodial interrogations, and it has not passed legislation that would require law enforcement to make such recordings.[143] Importantly, however, the Texas Criminal Justice Integrity Unit, under the auspices of the Court of Criminal Appeals, "makes recommendations to eliminate improper interrogations and to protect against false confessions," and for example, featured Dr. Richard Leo, Associate Professor of Law at the University of San Francisco, to present on false confessions in June 2009.[144]

Accordingly, the State of Texas only partially complies with Recommendation #5.

Recommendation

Texas should ensure that individual law enforcement agencies have the funding necessary to implement the reforms to eyewitness identification and interrogation procedures discussed throughout this Chapter. With respect to interrogation procedures, specifically, the Assessment Team reiterates its support for a statewide model policy that would require full recordation of all custodial interrogations in potential capital cases. To effectuate this policy, the State should help to defray the costs associated with these reforms. It should be noted, however, that many of

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[139] *See* H.B. 498, 81st Leg., Reg. Sess. (Tex. 2009).

[140] *LEMIT Trains Law Enforcement on Texas Eyewitness ID Practices*, SAM HOUS. STATE UNIV. COLL. OF CRIM. JUST. NEWS, Apr. 24, 2012, *available at* http://shsucj.blogspot.com/2012/04/lemit-trains-texas-law-enforcement-on.html. *See also* Cindy George, *Officers Getting Training on Eyewitness ID Policy*, HOUS. CHRON., Apr. 25, 2012.

[141] TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE ii (2010).

[142] *Id.*

[143] A bill introduced in November, 2012 would require law enforcement agencies to "make a complete, contemporaneous, audio or audiovisual electronic recording of any custodial interrogation[. . .] of a person suspected of committing or charged with the commission" of certain offenses, including capital murder. *See* S.B. 87, 83d Leg. Reg. Sess. (Tex. 2013) (last action: ref'd to Crim. Justice Comm. on Jan 28, 2013).

[144] Email from Sadie C. Fitzpatrick, Research Att'y to Judge Barbara Hervey, Tex. Ct. of Crim. Appeals, to Sarah Turberville, Dir., Death Penalty Due Process Rev. Project, Am. Bar Ass'n (Feb. 25, 2013) (on file with author).

these reforms could be implemented at little cost while greatly enhancing the accuracy of criminal investigations and efficiency of criminal adjudications.[145]

F. Recommendation #6

Courts should have the discretion to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy.

The Texas Court of Criminal Appeals held unanimously that "psychology is a legitimate field of study and that the study of the reliability of eyewitness identification is a legitimate subject within the area of psychology."[146] Accordingly, in Texas expert testimony on the factors affecting eyewitness accuracy may be permitted, provided "the party offering the scientific expert testimony demonstrate[s], by clear and convincing evidence, that such testimony 'is sufficiently reliable and relevant to help the jury in reaching accurate results.'"[147]

Because Texas trial courts have the discretion to allow a properly qualified expert to testify on the factors affecting eyewitness accuracy, the State of Texas complies with Recommendation #6.

<u>Recommendation</u>

Although the state is in compliance with this Recommendation, the availability of expert services for defense counsel to present testimony on the reliability of eyewitness testimony is problematic: defense counsel in death penalty cases, as described throughout Chapter Six on Defense Services, must be provided the needed resources in order to present this kind of evidence in the first instance. The Assessment Team also urges trial courts to take seriously the social science consensus demonstrating that factors affecting accuracy of identification are often outside ken of jury.

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[145] *See* THE JUSTICE PROJECT, ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS IN TEXAS: A REVIEW OF CURRENT STATUTES, PRACTICES, AND POLICIES 3 (2009) (on file with author) (observing that "[d]igital audio recorders can be purchased for well under $100 and only require a computer for storage").

[146] Tillman v. State, 354 S.W.3d 425, 435 (Tex. Crim. App. 2011). This is in contrast to previous Texas rulings, which held that expert testimony regarding the reliability of eyewitnesses was not admissible when the testifying expert has "no specific knowledge concerning the testimony of the witnesses in [the case at hand]." *See, e.g.*, Pierce v. State, 777 S.W.2d 399, 414–16 (Tex. Crim. App. 1989); Yarborough v. State, Nos. 01-04-01076-CR, 01-04-01077-CR, 2006 WL 181615, at *5–6 (Tex. App. Jan. 26, 2006).

[147] *Id.* (quoting Kelly v. State, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992)).

G. Recommendation #7

> **Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy. If, in relevant cases, the court finds a sufficient risk of misidentification based on cross-racial factors, judges should have available model jury instructions that inform juries that the cross-racial nature of the identification may affect the reliability of an eyewitness identification.**[148]

Recent social scientific research demonstrates a number of factors that influence eyewitness identification accuracy, ranging from the length of time the eyewitness observed the suspect to the type of identification procedure used by law enforcement.[149] When jurors are required to gauge the reliability of an eyewitness identification during deliberations, an instruction from the court explaining these factors may help to improve their decision-making by ensuring that it is well-informed. Such an instruction may include an explanation of "system variables," which are those factors controlled by the State that affect the reliability of an eyewitness identification. Among these factors are:

(1) Whether the law enforcement agency complied with written eyewitness identification procedures adopted pursuant to law;
(2) Whether the eyewitness spoke to anyone besides the law enforcement agency about the identification; and
(3) Whether the eyewitness made no choice or chose a different suspect or filler during an identification procedure.

Jurors also may be instructed on "estimator variables," which are those factors beyond the control of the criminal justice system and based on the particular facts of the identification. These include:

(1) The length of time the witness had to observe the event;
(2) The distance between the witness and the perpetrator;
(3) The lighting conditions at the time of the event;
(4) Whether the witness was under the influence of alcohol or drugs;
(5) The age of the witness;
(6) Whether the perpetrator was wearing a disguise;

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[148] The ABA Criminal Justice Section's Committee on Rules of Criminal Procedure, Evidence, and Police Practices recommends a model jury instruction on cross-racial identification as follows:

> In this case, the identifying witness is of a different race than the defendant. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race that the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

See ABA, RECOMMENDATION 104D, 2008 Ann. Mtg., *available at* http://www.abanet.org/moratorium/policy/2000s/2008_AM_OneHundredFourD.pdf.

[149] *See generally* Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. JUST. 36, 37 (Spring 2003). *See also* State v. Henderson, 27 A.3d 872 (N.J. 2011).

(7) Whether the suspect had different facial features at the time of the identification;
(8) The length of time that elapsed between the crime and the identification;
(9) The degree of attention the eyewitness paid to the perpetrator during the event; and
(10) The accuracy of any descriptions of the suspect provided by the eyewitness before the identification procedure occurred.[150]

This research also indicates that cross-racial identifications are especially likely to be unreliable.[151] As described by the ABA:

> persons of one racial or ethnic group may have more difficulty distinguishing among individual faces of another group than among faces of their own group. An inaccurate identification due to this so-called "own race" effect may result in higher wrongful conviction rates when defendants are of different races than the witnesses who identify them.[152] Studies show that persons who primarily interact within their own racial group, especially if they are in the majority group, will better perceive and process the subtlety of facial features of persons within their own racial group than persons of other racial groups.[153]

Whether the perpetrator is of a different race of the victim may be an additional estimator variable on which the jury may be instructed.

Because "science reveals that memory and eyewitness identification evidence present certain complicated issues," it is the "court's obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial."[154] Despite these social scientific findings, Texas courts have held that "a charge on mistaken identity is an improper comment on the weight of the evidence and should not be given."[155] Thus, the State of Texas does not comply with Recommendation #7.

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[150] State v. Henderson, 27 A.3d 872, 904–10 (N.J. 2011). *See also* Perry v. New Hampshire, 132 S.Ct. 716, 721 (2012) (observing that the reliability of a lineup, showup, or photograph array may be tested "through the rights and opportunities generally designed for that purpose, notably, . . . jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt").

[151] *See generally* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984).

[152] ABA, REPORT TO RECOMMENDATION 104D, 2008 Ann. Mtg., *available at* http://www.abanet.org/moratorium/policy/2000s/ 2008_AM_OneHundredFourD.pdf (citing Elizabeth F. Loftus, James M. Doyle, and Jennifer E. Dysart, *Eyewitness Testimony: Civil and Criminal* 103 (4th ed. 2007) ("It is well established that there exists a comparative difficulty in recognizing individual members of a race different from one's own"); Roy S. Malpass & Jerome Kravitz, *Recognition of Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330, 333 (1969); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972 (1988)).

[153] *Id.* (citing Sheri Lynn Johnson, *Cross-racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 934 (1984); Otto H. Maclin, *Racial Categorization of Faces*, 7 PSYCHOL. PUB. POL'Y & L. 98 (2001)).

[154] *Henderson*, 27 A.3d at 924.

[155] Roberson v. State, 852 S.W.2d 508, 511 (Tex. Crim. App. 1993) (per curiam). *See also* Ramirez v. State, No. 04-12-00084-CR, 2012 WL 6618194, at *1 (Tex. App. Dec. 19, 2012); Williams v. State, Nos. 01-95-00675-CR, 01-95-00676-CR, 1997 WL 431150, at *3 (Tex. App. July 31, 1997) (citations omitted). In *Williams*, the defendant had requested the following jury charge:

Recommendation

Importantly, jurors can view eyewitness identification testimony to be compelling, notwithstanding the now-known fallibility of such evidence. Accordingly, the Assessment Team recommends that, when appropriate in an individual case, Texas courts instruct jurors on possible factors to consider in gauging the accuracy of an eyewitness identification, including system and estimator variables like those described above. In appropriate cases, if the court finds a sufficient risk of misidentification based on cross-racial factors, the court should also include the cross-racial nature of the identification as a factor for jurors to consider in determining the accuracy of the identification.

Several other states have adopted jury instructions on general eyewitness identification accuracy.[156] Some jurisdictions also instruct the jury that they are permitted to consider the

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> In weighing the reliability of identification testimony, you should consider the totality of the circumstances including the following:
>
> (1) Whether the witness had a good opportunity to observe the perpetrator in good lighting and for a substantial period of time during the offense.
> (2) Whether the witness paid close attention to the appearance of the perpetrator during the commission of the crime.
> (3) Whether the witness gave a detailed description of the perpetrator's appearance and clothing, and the suspect matched that description.
> (4) Whether the witness was certain about the accuracy of his identification.
> (5) Whether the lineup occurred a short time after the offense.

Id. Proposed jury instructions advising jurors to disregard impermissibly suggestive identifications also have been denied. *See* McAllister v. State, 28 S.W.3d 72 (Tex. App. 2000).

[156] States that use a cautionary instruction as to the reliability of eyewitness identification testimony include Alabama, *see* Brooks v. State, 380 So.2d 1012, 1014 (Ala. App. Ct. 1980) ("[a] requested identification instruction which deals realistically with the shortcomings and trouble spots of the identification process should be given where the principle has not been covered by the court's oral charge"); California, *see* People v. Hall, 616 P.2d 826, 835 (Cal. 1980), *overruled on other grounds* People v. Newman, 981 P.2d 98, 104 n.6 (Cal. 1999) (refusal to give a requested instruction "deal[ing] with identification in the context of reasonable doubt" was error); Connecticut, *see* State v. Ledbetter, 881 A.2d 290, 318 (Conn. 2005) (requiring a cautionary jury instruction warning the jury of the risks of misidentification if certain conditions are met); Georgia, *see* Brodes v. State, 614 S.E.2d 766, 769 (Ga. 2005) ("[t]he creation of the pattern jury instruction regarding the assessment of reliability of eyewitness identification testimony reflects the studied conclusion that judicial guidance to the jury on the topic of eyewitness identification is warranted"); Kansas, *see* State v. Warren, 635 P.2d 1236, 1244 (Kan. 1981) (requiring a cautionary jury instruction warning the jury of the risks of misidentification if certain conditions are met); Massachusetts, *see* Commonwealth v. Rodriguez, 391 N.E.2d 889, 302 (Mass. 1979) ("a defendant who fairly raises the issue of mistaken identification might well be entitled to instructions [as to the possibility of mistaken identification]"); Michigan, *see* People v. Storch, 440 N.W.2d 14, 16 n.1 (Mich. App. Ct. 1989) (quoting approvingly a cautionary jury instruction warning the jury of the risks of misidentification), Minnesota, *see* State v. Burch, 170 N.W.2d 543, 553–54 (Minn. 1969) ("where requested by defendant's counsel, we think the court should instruct on the factors the jury should consider in evaluating an identification and caution against automatic acceptance of such evidence"); Montana, *see* State v. Hart, 625 P.2d 21, 31 (Mont. 1981) ("[a cautionary jury instruction warning the jury of the risks of misidentification] may be proper, if not mandatory, in certain cases"); New Jersey, *see Henderson*, 27 A.3d at 925–26 (requesting the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current charge on eyewitness identifications and submit them to the state supreme court for its review); North Carolina, *see* State v. Kinard, 283 S.E.2d 540, 543 (N.C. App. Ct. 1981) ("[i]f the evidence strongly suggests the likelihood of irreparable misidentification, the identification issue would become a substantial feature of the case, and the trial judge is required, even in the absence of a request, to properly instruct the jury as to the detailed factors that enter into the totality of the circumstances relating to identification"); Pennsylvania, *see*

cross-racial nature of an identification as a factor when gauging eyewitness accuracy.[157] In addition, other jurisdictions—such as the federal courts—use a cautionary jury instruction when evidence deemed to be highly probative, but also problematic in many respects, is presented.[158]

Furthermore, there is no social science basis for believing that on in-court identification could be independent from a previously suggestive identification.[159] Thus, Texas should not adhere to its existing "independent source rule," which permits eyewitnesses to make identifications *in court*, even if a pretrial procedure was so suggestive as to require suppression. If a court has made a finding that there was a pretrial identification that was suggestive and unreliable, then no subsequent identification should be permitted in court.

H. Recommendation #8

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

Recommendation #9

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

Texas law and the Texas Commission on Law Enforcement Officer Standards and Education require all applicants for peace officer licensure to satisfy minimum training standards and to

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Commonwealth v. Washington, 927 A.2d 586, 603–04 (Pa. 2007) (quoting approvingly a cautionary jury instruction warning the jury of the risks of misidentification); Utah, *see* State v. Long, 721 P.2d 483, 492 (Utah 1986) ("trial courts shall give [a cautionary jury] instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense"). *See also* State v. Smith, No. 48-2009-CF-005719-O (Fl. 9th Jud. Cir. Feb. 24, 2011) (order permitting cautionary jury instruction on gauging eyewitness identification accuracy) (on file with author).

[157] *See* CALJIC No. 2.92 (7th ed. 2003) (California) (including the cross-racial nature of an identification as part of a "laundry list" of factors to be considered by the jury in determining the believability of the eyewitness); State v. Long, 721 P.2d 483, 494–95, n.8. (Utah 1986) (instructing that "[i]dentification by a person of a different race may be less reliable than identification by a person of the same race."); New Jersey v. Cromedy, 727 A.2d 457 (N.J. 1999) (instructing the jury to consider the fact that an identifying witness is not of the same race as the perpetrator and whether that fact might have had an impact on the accuracy of the witness' identification); New Jersey Model Criminal Jury, Charges, 2002 WL 32976451 (Revised Oct. 1999) (same); Commonwealth v. Hyatt, 647 N.E.2d 1168, 1171 (Mass. 1995) (stating the jury may consider whether an identification of a person by a person of a different race may be less reliable than an identification of a person of the same race); Commonwealth v. Engram, 686 N.E.2d 1080, 1082 (Mass. App. 1997) (same).

[158] *See, e.g.*, FIFTH CIRCUIT MODEL JURY INSTRUCTIONS-CRIMINAL, *General and Preliminary Instruction* 1.14 ("The testimony of an alleged accomplice, and/or the testimony of one who provides evidence against a defendant as an informer for pay, for immunity from punishment, or for personal advantage or vindication, *must always be examined and weighed by the jury with greater care and caution* than the testimony of ordinary witnesses.") (emphasis added).

[159] *See* Sandra Guerra Thompson, *Eyewitness Identifications and State Courts As Guardians Against Wrongful Conviction*, 7 OHIO ST. J. CRIM. L. 603, 627-28 (2010) ("Based on scientific studies about memory distortion, a strong argument can be made that an earlier suggestive identification procedure will permanently distort any later identification by the same witness, including an in-court identification.").

pass a licensing examination.[160] Duly licensed peace officers who neglect their duties may be subject to court proceedings pursuant to the Texas Code of Criminal Procedure,[161] and a corresponding duty is imposed upon "attorney[s] representing the State" to "bring to the notice of the grand jury any act of violation of law or neglect or failure of duty upon the part of any officer."[162]

In the case of peace officers employed by the Department of Public Safety (DPS), these statutory provisions are augmented by the Texas Government Code, which requires DPS to "maintain a system to promptly and efficiently act on complaints filed with the department"[163] and to "make information available describing its procedures for complaint investigation and resolution."[164] DPS fulfills these requirements through departmental policy and maintenance of its website.[165] Peace officers not employed by DPS also are subject to complaint procedures, but these procedures vary from agency to agency.[166] For example, whereas the Houston Police Department and Harris County Sheriff's Office specify online those agencies' complaint procedures,[167] the procedures adopted by other agencies appear to be less transparent.[168]

Regarding discipline procedures, law enforcement agencies accredited by the Commission on Accreditation for Law Enforcement Agencies requires the promulgation of agency guidelines governing disciplinary procedures, and the contents of these guidelines must specifically address

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[160] TEX. OCC. CODE ANN. § 1701.307(a)(2) (2013); 37 TEX. ADMIN. CODE § 217.1(a)(16) (2013). *See also* TEX. OCC. CODE ANN. § 1701.301 (requiring licensure in order to be appointed a peace officer).

[161] TEX. CODE CRIM. PROC. ANN. art. 2.03(a) (2013). Broadly, a peace officer's duty under Texas law is "to preserve the peace within the officer's jurisdiction." TEX. CODE CRIM. PROC. ANN. art. 2.13(a) (2013). To that end, a peace officer must

> (1) . . . interfere without warrant to prevent or suppress crime;
> (2) execute all lawful process issued to the officer by any magistrate or court;
> (3) give notice to some magistrate of all offenses committed within the officer's jurisdiction, where the officer has good reason to believe there has been a violation of the penal law; and
> (4) arrest offenders without warrant in every case where the officer is authorized by law, in order that they may be taken before the proper magistrate or court and be tried.

TEX. CODE CRIM. PROC. ANN. art. 2.13(b) (2012).

[162] *Id. See also id.* at art. 3.03 (defining the general term *officers* to include both magistrates and peace officers).

[163] TEX. GOV'T CODE ANN. § 411.0195(a) (2012).

[164] *Id.* at § 411.0195(b).

[165] *See Complaint Investigation and Resolution*, OFFICE OF INSPECTOR GEN., TEX. DEP'T OF PUB. SAFETY, http://www.dps.texas.gov/OIG/index.htm (last visited May 6, 2013) (noting eight actions that must be taken, pursuant to "Department policy," to investigate "a formal complaint or an Administrative Inquiry"); *How to File a Complaint*, OFFICE OF INSPECTOR GEN., TEX. DEP'T PUB. SAFETY, http://www.dps.texas.gov/OIG/complaint.htm (last visited May 6, 2013).

[166] *See* TEX. GOV'T CODE ANN. §§ 614.021–614.023 (2013). All peace officers presumptively fall within the ambit of these statutes—*see id.* at § 614.021(a)(3)—but the statute explicitly exempts "peace officer . . . appointed or employed by a political subdivision that is covered by a meet and confer or collective bargaining agreement . . . if that agreement includes provisions relating to the investigation of, and disciplinary action resulting from, a complaint against a peace officer." *Id.* at § 614.021(b).

[167] *See Internal Affairs Division*, HOUS. POLICE DEP'T, http://www.houstontx.gov/police/contact/iad.htm (last visited May 10, 2013); *HCSO Internal Affairs Division*, HARRIS CNTY. SHERIFF'S OFFICE, http://www.harriscountyso.org/file_a_complaint.aspx (last visited May 10, 2013).

[168] *See, e.g.*, *Field Operations*, NUECES CNTY. SHERIFF'S OFFICE, http://www.co.nueces.tx.us/sheriff/field.asp (last visited May 10, 2013) (providing a one-paragraph description of the internal affairs division and, with regard to complaints, stating only: "[We] urge you to file an Internal Affairs report so that we can start an investigation. If there is any wrong-doing found, we will immediately correct the situation and take appropriate action.").

personnel conduct, the procedures and criteria of the disciplinary system implemented to enforce that conduct, the role of supervisory and command staff relative to disciplinary actions, and appeal procedures.[169] Presumably, the thirty-three Texas law enforcement agencies accredited by CALEA have adopted conforming guidelines, as required.[170] CALEA's accreditation program standards also require agencies to establish procedures respecting complaints received against the agency or an employee of the agency. For example, CALEA Standard 52.1.1 requires the adoption of a written direction mandating that "*all* complaints against the agency or its employees *be investigated*," including anonymous complaints.[171] The Assessment Team could not determine whether the other several hundred law enforcement agencies within Texas provide adequate opportunity for citizens and investigative personnel to report misconduct in investigations.

Accordingly, the Assessment Team is unable to determine whether the State of Texas complies with Recommendations #8 and #9.

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[169] COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 26-1 to -3 (5th ed. 2006) (emphasis added) [hereinafter CALEA STANDARDS].

[170] *Client Database Search*, COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, http://www.calea.org/content/calea-client-database (last visited May 11, 2013) (using "Search by Location" function and designating "US" and "TX" as search criteria). The total includes nine university/college law enforcement agencies. *Id.*

[171] COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 52-1 (5th ed. 2006) (emphasis added).

CHAPTER THREE

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

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

DNA testing is a useful law enforcement tool that can help establish and confirm guilt, or eliminate suspects in an investigation. Furthermore, some wrongfully-convicted inmates may be able to prove their innocence through DNA testing and analysis. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence[1] collected during a criminal investigation is preserved and made available to defendants and convicted persons seeking to establish their innocence.[2] Since then, all fifty states have adopted laws concerning post-conviction DNA testing, although many of these laws are limited in scope.[3] In addition, standards for preserving biological evidence and allowing post-conviction DNA testing vary widely among jurisdictions.

In response to these varied standards, as well as reports of errors and misconduct in public and private DNA testing facilities, the ABA adopted the *ABA Criminal Justice Standards on DNA Evidence* in 2006.[4] The standards provide a detailed procedure for procurement, testing, use, and preservation of and entitlement to biological evidence. When a defendant has been convicted of a murder, rape, or other serious offense, these standards require that any available biological material be retained in a manner that will preserve the DNA evidence for as long as the defendant remains incarcerated. At the post-conviction stage, the standards permit a person convicted of a serious crime to request testing or retesting of biological evidence, as long as the person meets certain pleading criteria. Once the testing is complete, the standards entitle the petitioner to a hearing to determine the available remedies based upon the test results. If the person is indigent and files for DNA testing, counsel should be appointed.

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[1] "Biological evidence" is defined as evidence that is

> provided by specimens of a biological origin that are available in a forensic investigation. Such specimens may be found at the scene of a crime or on a person, clothing, or weapon. Some . . . come from the crime scene or from an environment through which a victim or suspect has recently traversed. Other biological evidence comes from specimens obtained directly from the witness or suspect, such as blood, semen, saliva, vaginal secretions, sweat, epithelial cells, vomitus, feces, urine, hair, tissue, bones, and microbiological and viral agents.

COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 128 (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf [hereinafter NAS REPORT 2009].

[2] *See* ABA, RECOMMENDATION 115, 2000 Ann. Mtg. (adopted July 10–11, 2000), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/policy/2000s/2000_AM_115.authcheckdam.pdf.

[3] *Post-conviction DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/304.php (last visited Aug. 19, 2013).

[4] *See* ABA, ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE 12 (3d ed. 2007) (Standard 16-6.1(a)–(b)), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/dna_evidence.authcheckdam.pdf.

Without the preservation of material evidence it is extremely difficult for a convicted inmate to prove his/her innocence. Every law enforcement agency should establish written procedures, made available to all personnel and designed to ensure compliance with best practices for collecting, preserving, and safeguarding biological evidence.[5] Agencies should regularly update their procedures as new or improved techniques and methods are developed. The procedures should impose professional standards on all state and local officials responsible for handling or testing biological evidence, and should be enforceable through the agency's disciplinary process.[6]

Training should emphasize the risk of unjust legal consequences due to the loss or compromise of evidence. It also should acquaint law enforcement officers with actual cases where illegal, unethical, or unprofessional behavior led to the arrest, prosecution, or conviction of an innocent person.

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[5] *See* ABA, ABA STANDARDS FOR CRIMINAL JUSTICE, URBAN POLICE FUNCTION 1 (2d ed. 1979) (Standard 1-4.3) ("Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies."); *id.* (Standard 1-5.1) (stating that police should be "made fully accountable" to their supervisors and to the public for their actions).

[6] *See id.* (Standard 1-5.3(a)) (identifying "[c]urrent methods of review and control of police activities").

I. FACTUAL DISCUSSION: TEXAS OVERVIEW

A. Collection and Preservation of DNA Evidence

In Texas, biological evidence collected in the course of a capital felony criminal investigation must be preserved "until the inmate is executed, dies, or is released on parole."[7] The statute defines "biological evidence" as

> (1) the contents of a sexual assault examination kit; or
> (2) any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or any other identifiable biological material that was collected as part of an investigation of an alleged felony offense or conduct constituting a felony offense that might reasonably be used to:
> (a) establish the identity of the person committing the offense or engaging in the conduct constituting the offense; or
> (b) exclude a person from the group of persons who could have committed the offense or engaged in the conduct constituting the offense.[8]

Texas law largely leaves it to each law enforcement agency to develop policies and procedures for collecting and preserving biological evidence, but the Texas Department of Public Safety's *Best Practices for Collection, Packaging, Storage, Preservation, and Retrieval of Biological Evidence* advises agencies on these and related matters.[9]

A governmental entity is permitted to destroy preserved biological evidence so long as it satisfies two requirements. First, the entity must notify by mail "the defendant, the last attorney of record for the defendant, and the convicting court of the decision to destroy the evidence."[10] Second, the notified parties must not object in writing to this decision to destroy the evidence.[11]

B. Pretrial Testing of DNA Evidence in Death Penalty Cases

Defendants and convicted persons must meet different standards to have biological evidence tested. Effective September 1, 2013, Texas's pretrial DNA testing statute has been amended to include a number of provisions specific to capital cases. Under the new law, a defendant tried for a capital offense in which the State is seeking the death penalty is guaranteed DNA testing "on any biological evidence that was collected as part of an investigation of the offense and is in

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[7] TEX. CODE CRIM. PROC. ANN. art. 38.43(c)(2)(A) (2013).

[8] *Id.* at art. 38.43(a).

[9] TEX. DEP'T PUB. SAFETY, BEST PRACTICES FOR COLLECTION, PACKAGING, STORAGE, PRESERVATION, AND RETRIEVAL OF BIOLOGICAL EVIDENCE 1 (eff. Oct. 30, 2012), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/labBP01BestPractice.pdf.

[10] TEX. CODE CRIM. PROC. ANN. art. 38.43(d) (2013).

[11] *Id.* The defendant, attorney of record, and court have ninety days to object in writing. *Id.* The ninety-day window is measured from "(1) the date on which the attorney representing the state, clerk, or other officer receives proof that the defendant received notice of the planned destruction of evidence; or (2) the date on which notice of the planned destruction of evidence is mailed to the last attorney of record for the defendant," whichever date is later. *Id.*

the possession of the state."[12] That testing must be performed at a laboratory accredited by the Texas Department of Public Safety, which also bears the cost for performing the testing.[13] The defendant also may have another accredited laboratory perform additional testing of the evidence, but the defendant is responsible for these costs.[14]

C. Post-trial Testing of Evidence

Pursuant to the new law on pretrial testing of DNA evidence, effective September 1, 2013, a person sentenced to death may also file "one additional motion for forensic testing" after application for a writ of habeas corpus is filed pursuant to Article 11.071 of the Texas Code of Criminal Procedure.[15] Any post-trial testing of biological evidence is subject to the procedural limitations and burdens of proof set forth in the Texas Code of Criminal Procedure and also described in detail in Recommendation #2 of this Chapter.

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[12] TEX. CODE CRIM. PROC. ANN. art. 38.43(i) (2013) (effective Sept. 1, 2013). The new law created sections (i) through (m) of article 38.43 of the Texas Code of Criminal Procedure.

[13] *Id.*

[14] *Id.* at art. 38.43(m).

[15] *Id.* at art. 38.43(*l*).

II. ANALYSIS

A. Recommendation #1

Preserve all biological evidence for as long as the defendant remains incarcerated.[16]

As of August 2013, forty-eight convicted persons have been exonerated through DNA testing in Texas.[17] In each of these cases, the existence and preservation of the biological evidence which was later tested was critical to ensuring the subsequent exoneration and release of the innocent person from prison.

The Texas Code of Criminal Procedure requires governmental entities "charged with the collection, storage, preservation, analysis, or retrieval of biological evidence" to retain and preserve that evidence whenever it is collected in the course of a felony investigation.[18] The mandatory preservation period varies depending on the conviction obtained in the case.[19] If a defendant is convicted of a capital felony, biological evidence must be retained and preserved "until the inmate is executed, dies, or is released on parole."[20]

Counties with populations under 100,000 may send biological evidence to the Department of Public Safety's Houston storage facility for long-term safekeeping.[21] This latter provision only applies to criminal proceedings commencing on or after January 1, 2010.[22]

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[16] *See supra* note 1 and accompanying text. Model legislation of the Innocence Project, which many states—including Texas—have largely followed, defines biological evidence as "the contents of a sexual assault examination kit; and any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids or other identifiable biological material that was collected as part of the criminal investigation or may reasonably be used to incriminate or exculpate any person for the offense." *See* INNOCENCE PROJECT, MODEL LEGISLATION: AN ACT CONCERNING ACCESS TO POST-CONVICTION DNA TESTING 2 (2012), *available at* http://www.innocenceproject.org/docs/model/ Access_to_Post_Conviction_DNA_Testing_Model_Bill.pdf. Such evidence also includes material "catalogued separately (e.g., on a slide, swab or in a test tube) or [that] is present on other evidence (including, but not limited to, clothing, ligatures, bedding or other household material, drinking cups, cigarettes, etc.)." *Id.* The Texas Department of Public Safety's *Best Practices for Collection, Packaging, Storage, Preservation, and Retrieval of Biological Evidence* advises that entities collecting and preserving biological evidence "consider as sources of biological evidence" a wide array of objects, including clothing, ligatures, bedding, drinking containers, and cigarettes, and DPS's *Best Practices* also cautions that its list "is not exhaustive" and that there "are many other possible sources of biological evidence or materials." TEX. DEP'T PUB. SAFETY, BEST PRACTICES FOR COLLECTION, PACKAGING, STORAGE, PRESERVATION, AND RETRIEVAL OF BIOLOGICAL EVIDENCE 1 (eff. Oct. 30, 2012), *available at* http://www.txdps.state.tx.us/ CrimeLaboratory/documents/ labBP01BestPractice.pdf.

[17] *See Search the Profiles*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=TX&cause=&perpetrator=&compensation=&conviction=&x=32&y=0 (last visited Aug. 26, 2013).

[18] TEX. CODE CRIM. PROC. ANN. art. 38.43(b)–(c) (2013).

[19] *See* TEX. CODE CRIM. PROC. ANN. art. 38.43(c)(2)(A)–(E) (2013).

[20] *Id.* at art. 38.43(c)(2)(A).

[21] TEX. GOV'T CODE ANN. § 411.053 (2013); TEX. CODE CRIM. PROC. ANN. art. 38.43(f) (2013). Based on 2010 U.S. Census data, thirty-nine of Texas's 254 counties have populations greater than or equal to 100,000 and, therefore, would not be entitled to use this storage facility. *2010 Census: Population of Texas Counties Arranged in Alphabetical Order*, TEX. STATE LIBRARY AND ARCHIVES COMM., https://www.tsl.state.tx.us/ref/abouttx/ popcnty12010.html (last visited Apr. 5, 2013). Those thirty-nine counties are Bell, Bexar, Brazoria, Brazos, Cameron, Collin, Comal, Dallas, Denton, Ector, El Paso, Ellis, Fort Bend, Galveston, Grayson, Gregg, Guadalupe,

While the State of Texas is commended for enacting these provisions, they are not without significant shortcomings. For example, the statute does not require indefinite preservation of biological evidence in violent felony cases, although the commission of a violent felony in the past can affect the decision to sentence a person to death. Instead, the statute requires preservation until the person dies or is released from prison, irrespective of the probative nature of the biological evidence collected in the case.[23] The statute also fails to specify who is responsible for preserving biological evidence or to require each county to adopt policies to delineate these responsibilities. Anecdotal accounts suggest that the failure to delineate responsibility has led to inadvertent destruction of evidence in at least some cases.[24] The statute also does not specify a remedy for the unlawful destruction of biological evidence.[25]

Finally, prior to 2001 there was no requirement under Texas law that biological evidence in capital cases had to be preserved "until the inmate is executed."[26] Thus, a significant number of current death-sentenced inmates—and many individuals who already have been executed—will not have received the benefit of the preservation statute.

The importance of preserving biological evidence has been powerfully illustrated by the results of biological testing completed in Dallas. That county's conviction integrity unit was established in 2007 to "review[] and re-investigate[] legitimate post conviction claims of innocence."[27] The work of the unit in the past six years has led to thirty-five exonerations, sixteen of which have involved DNA testing.[28] The willingness of a conviction integrity unit to retest evidence, however, is not itself a sufficient condition to ensure that testing occurs, as the Dallas example

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Harris, Hays, Hidalgo, Jefferson, Johnson, Kaufman, Lubbock, McLennan, Midland, Montgomery, Nueces, Parker, Potter, Randall, Smith, Tarrant, Taylor, Tom Green, Travis, Webb, Wichita, and Williamson. *Id.*

[22] H.B. 3594, 2009 Leg., Reg. Sess., at § 4 (Tex. 2009).

[23] TEX. CODE CRIM. PROC. ANN. art. 38.43(c)(2)(B)(2013). The case of John Thompson, prosecuted in 1985 for murder in New Orleans and sentenced to death, demonstrates the import of permitting testing of evidence relative to a capital murder charge or sentencing decision in death penalty cases. *See* Connick v. Thompson, 131 S.Ct. 1350, 1371–76 (2011) (Ginsburg, J., dissenting) (recounting the facts and procedural history of Thompson's case). One month before Thompson's scheduled execution, an investigator hired by Thompson's post-conviction counsel was permitted to search "[d]eep in the crime lab archives" of Orleans Parish; based on the investigator's findings and "a serendipitous series of events," Thompson's advocates discovered evidence that exculpated him from an earlier robbery conviction, which the prosecution had used to elevate the murder charge to a capital case. *Id.* at 1374–75. Subsequently, the Louisiana Court of Appeals reversed Thompson's murder conviction. *Id.* Thompson's defense presented the newly discovered evidence at his murder retrial in 2003, and, "[a]fter deliberating for only [thirty-five] minutes, the jury found Thompson not guilty." *Id.* at 1376.

[24] In Gregg County, one county commissioner discovered that "county officials seemed aware that biological evidence should be preserved; however, none seemed sure about which county official should preserve it." Danielle Badeaux, Note, *The DNA's Over There . . . Right Next to the Jelly: The Problems with the Preservation of Evidence in Texas*, 11 TEX. TECH. ADMIN. L.J. 333, 336–37 (2010). When the county commissioner contacted his peers in other small counties to ask about those counties' preservation policies, he learned that many of them "had no idea who should store [biological] evidence" and, therefore, "they had no actual record of the location of the evidence." *Id.*

[25] Johnston v. State, 99 S.W.3d 698, 702–03 (Tex. App. 2003).

[26] TEX. CODE CRIM. PROC. ANN. art. 38.43(c)(1)(A) (2013); S.B. 3, 2001 Leg., Reg. Sess. (Tex. 2001) (eff. Apr. 5, 2001).

[27] *Conviction Integrity Unit*, DALLAS CNTY. DIST. ATT'Y, http://www.dallasda.co/webdev/division/conviction-integrity-unit/ (last visited Apr. 10, 2013).

[28] *Browse Cases*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Apr. 10, 2013) (search "Texas" for state, "Dallas" for county, and "Y" for DNA).

illustrates. Another circumstance unique to Dallas is that the Southwestern Institute of Forensic Sciences preserved significantly more biological evidence than many other public laboratories in Texas.[29] Thus, while it may be tempting to attribute Dallas County's significant share of exonerations solely to historical and pervasive injustice, a more likely explanation is the preservation of evidence in Dallas County and the county's willingness to re-examine preserved biological evidence.[30] By contrast, the Harris County District Attorney's Office sought re-investigation of convictions through testing of biological evidence, but that office's efforts were hampered as old evidence from convictions was not preserved and thus could not be tested.[31]

Also of great concern are the actions of the former Williamson County District Attorney who resisted DNA testing in the case of Michael Morton—a case in which the results of DNA testing exculpated Mr. Morton—who had also advocated in an online forum for prosecutors that he and his Texas colleagues secure plea agreements whose terms include the destruction of all physical evidence; in so doing, the possibility of "endless" appeals would be precluded because "there [would be] nothing to test or retest."[32]

While the State of Texas is commended for its recent improvements to preserve biological evidence, shortcomings have accompanied these efforts. Accordingly, Texas only partially complies with Recommendation #1.

Recommendation

The Texas Assessment Team recommends that when biological evidence is collected in any violent felony case the State should require indefinite preservation of such evidence. Furthermore, in shaping relief for a death row inmate's possible meritorious legal claims, courts or other actors who are situated to provide equitable relief—such as the Texas Board of Pardons of Paroles—should consider the impact of the State's failure to adhere to existing preservation requirements in determining the scope of that relief.[33]

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[29] Kevin Johnson, *Storage of DNA Evidence Crucial to Exonerations*, USA TODAY (Mar. 28, 2011), http://usatoday30.usatoday.com/news/nation/2011-03-28-crimelab28_ST_N.htm (last visited Sept. 8, 2013).

[30] *See, e.g.*, Ex parte Blair, Nos. AP-75954, AP-75955, 2008 WL 2514174 (Tex. Crim. App. June 25, 2008) (defendant sentenced to death in Collin County subsequently exonerated on the basis of advanced DNA testing).

[31] *See, e.g.*, Ben Crair, *Pat Lykos: Texas' Capital Punishment Avenger*, DAILY BEAST (Apr. 4, 2011), available at http://www.thedailybeast.com/articles/2011/04/04/pat-lykos-texas-capital-punishment-avenger.html (last visited Aug. 29, 2013) (noting that Harris County exonerations total did not match that of Dallas County because "Dallas' independent crime lab preserved old evidence" while the Houston lab "often neglected or threw it away").

[32] Pamela Colloff, *Why John Bradley Lost*, TEX. MONTHLY, May 31, 2013 (internal quotations omitted), *available at* http://www.texasmonthly.com/story/why-john-bradley-lost.

[33] A case from Virginia well illustrates this problem. Robin Lovitt was tried for capital murder and sentenced to death. After his conviction, the trial court clerk drafted an order authorizing the destruction of the exhibits from Lovitt's trial, including biological evidence. Lovitt v. Warden, 585 S.E.2d 801, 805, 808–09 (Va. 2003). The court entered the order and the evidence was destroyed. *Id.* Lovitt filed a habeas petition arguing that the Commonwealth had violated his due process rights because he was deprived of an opportunity to seek new scientific testing of DNA evidence collected in his case, which was necessary for him to seek a writ of actual innocence. *Id.* at 814. The Virginia Supreme Court denied relief, affirming the circuit court's finding that the Commonwealth did not act in bad faith when it destroyed the DNA evidence and holding that destruction of evidence does not provide grounds for habeas relief. *Id.* at 816. The day before Lovitt was scheduled to be executed, then-Governor Mark Warner commuted Lovitt's sentence to life imprisonment citing the Commonwealth's improper destruction of evidence. Michael D. Shear & Maria Glod, *Warner Commutes Death Sentence*, WASH. POST, Nov. 30, 2005, at A1. Notably,

B. Recommendation #2

All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law. Jurisdictions should provide access to post-conviction DNA testing to comport, at a minimum, with the standards and procedures set forth in the *American Bar Association Criminal Justice Standards on DNA Evidence*, *Standard 6.1*, *Post-conviction Testing* (reproduced below, in relevant part, with slight modifications).

1. Availability of Post-conviction DNA Testing

a. A person who has been convicted of a serious crime, including a person convicted based on a guilty plea, should be permitted to have DNA evidence in the possession of the prosecution or one of its agents tested or retested after conviction if:

i. the testing requested was not available at the time of trial, there is credible evidence that prior test results or interpretation were unreliable, or the interests of justice require testing or retesting; and

ii. the results of testing or retesting could create a reasonable probability that the person is innocent of the offense, did not have the culpability necessary to subject the person to the death penalty, or did not engage in aggravating conduct that caused a mandatory sentence or sentence enhancement.

2. Procedure for Post-conviction DNA Testing

a. When a person files an application for testing or retesting, the prosecution should be notified and, if the person is indigent and does not have counsel, counsel should be appointed.

b. The application should be denied unless the person, after consultation with counsel, files a sworn statement declaring that he or she is innocent of the crime, did not have the culpability necessary to be subjected to the death penalty, or did not engage in the aggravating conduct that caused a mandatory sentence or sentence enhancement.

c. If the person files the statement, a hearing should be held to determine whether the person has met the requirements of Section (1)(a) and, if there is a determination that the requirement of this standard has been met, the request for testing or retesting should be granted.

d. After the results of any testing are reported to the parties, an applicant should be permitted to seek a second hearing to determine what relief, if any, is appropriate.

e. An applicant should have the right to appeal or seek leave to appeal any adverse decision made pursuant to this standard.

Texas's recent amendments to the pretrial testing of evidence in capital cases permits a capital defendant to seek a remedy—specifically, a writ of mandamus from the Court of Criminal Appeals—if testing was not performed as required under the amended law. TEX. CODE CRIM. PROC. ANN. art. 38.43(*l*) (2013) (eff. Sept. 1, 2013).

Post-trial Testing

In Texas, several requirements must be satisfied to have DNA evidence tested after conviction, including:

(1) the evidence "still exists and is in a condition making DNA testing possible,"
(2) the evidence "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect,"
(3) "identity was or is an issue in the case,"[34]
(4) the inmate establishes by a preponderance of the evidence that s/he "would not have been convicted if exculpatory results had been obtained through DNA testing," and
(5) the inmate establishes, by that same standard, that "the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice."[35]

Furthermore, the evidence to be tested must have been secured "in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense."[36] The evidence also must not have been previously subjected to DNA testing or, if the evidence was previously tested, can now be "subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test."[37]

Importantly—and in conformance with the *ABA Criminal Justice Standards on DNA Evidence*—a court must appoint counsel for a convicted person seeking testing if the person "informs the court that the person wishes to submit a motion [for post-conviction DNA testing], the court finds reasonable grounds for a motion to be filed, and the court determines that the person is indigent."[38]

The current statutory framework governing post-conviction DNA testing, however, presents a number of limitations on a death row inmate's access to testing. Unlike the *ABA Criminal Justice Standards on DNA Evidence* or the statutory regimes of several states, Texas does not permit an inmate to request DNA testing and analysis to show that there is a reasonable probability that s/he would not have been sentenced to death if testing and analysis produced favorable results.[39] Furthermore, the statute's requirement that "identity was or is an issue in the case" eliminates the possibility of testing in cases where relative culpability is at issue—such as

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[34] A separate provision prevents a convicting court from finding that identity was *not* an issue in the case "solely on the basis of [a] plea, confession, or admission." TEX. CODE CRIM. PROC. ANN. art. 64.03(b) (2013).

[35] TEX. CODE CRIM. PROC. ANN. art. 64.03(a) (2013); *id.* at 64.03(c) (stating that a convicting court "shall order that the requested forensic DNA testing be conducted" in the event that all statutory requirements are satisfied).

[36] *Id.* at art. 64.01(b).

[37] *Id.* at art. 64.01(b)(1)–(2).

[38] *Id.* at art. 64.01(c).

[39] MODEL STATUTE CONCERNING ACCESS TO POST-CONVICTION DNA TESTING § 5(A) (Innocence Project 2010), available at http://www.innocenceproject.org/docs/2010/Access_to_Post-conviction_DNA_Testing_%20Model_Bill_2010.pdf; MISS CODE § 99-39-9(1)(d) (2011) (allowing testing to move for a "lesser sentence"); KAN STAT. § 21-2512(c) (2011) (allowing testing if the inmate can show s/he was "wrongly convicted or sentenced"); NEB. STAT. § 29-4120(5) (same); WYO. STAT. § 7-12-303(c)(i) (2008) (allowing testing if the result is reasonably likely to diminish a "sentencing enhancement" or an "aggravating factor in a capital case").

in the case of two co-defendants tried and convicted of the same crime.[40] In addition, the requirement that the evidence must have been secured in relation to the challenged offense may limit an inmate's ability to have newly-discovered evidence tested. For example, in cases where a convicted inmate alleges that a third party committed the crime, that inmate would not be able to secure comparator testing in cases in which s/he was not charged, but the alleged perpetrator was. Furthermore, the existing statute excludes the possibility of retesting, even if there is credible evidence that the previous testing results were simply incorrect. Finally, Texas law also does not provide a catch-all provision which would permit testing in the interest of justice.

Notably, an inmate's invocation of the DNA testing statute may also be challenged by the local district attorney. In Steven Phillips' case, for example, the district attorney for Dallas County opposed DNA testing that could have exonerated Mr. Phillips for the crimes of rape and burglary.[41] Indeed, such testing was approved by that district attorney's successor, and the results exonerated Mr. Phillips while inculpating Sidney Alvin Goodyear, a man "convicted of at least 16 other sexual assaults and related offenses in several states while Phillips was incarcerated for Goodyear's assaults in Dallas."[42]

Similarly, the former district attorney for Williamson County opposed Michael Morton's efforts to have tested potentially exculpatory evidence.[43] In 1987, Mr. Morton had been convicted of the murder of his wife, Christine, but a bloody bandana found near the couple's home and other DNA evidence held the promise of identifying another suspect.[44] Houston attorney John Raley would later recount: "I couldn't understand why [the Williamson County District Attorney] was opposing testing that we were paying for, that would cost the county nothing, especially if he was so certain that Michael was guilty."[45] Nine years after they made their initial request, Mr. Morton's defense counsel secured testing on the bandana, which testing implicated Mark Alan Norwood in the murder of Christine Morton. Norwood would later be convicted of the crime and sentenced to life in prison without the possibility of parole.[46]

A recent change in law will prevent some of these difficulties going forward. As of September 1, 2013, a defendant tried for a capital offense in which the State is seeking the death penalty is guaranteed DNA testing "on any biological evidence that was collected as part of an investigation of the offense and is in the possession of the state."[47] That testing must be performed at a laboratory accredited by the Texas Department of Public Safety, which also bears

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[40] In at least two cases, prosecutors tried two defendants for the same crime where only one of them had actually committed the offense: James Beathard and Gene Hathorn; and Joseph Nichols and Willie Williams. James Kimberly, *A Deadly Distinction: Part III / Parole Board often Deaf to Claims of Innocence / Panel, Appeals Court Disagree over Which Can Review Evidence*, HOUS. CHRON., Feb. 6, 2001, at A5; Nichols v. Collins, 802 F. Supp. 66, 73 (S.D. Tex. 1992).

[41] Bruce Tomaso, *Cleared of Rape by DNA Test, Parolee to Get His Day in Court*, DALLAS MORNING NEWS, Aug. 4, 2008.

[42] *Id.* "Dallas County prosecutors now believe Goodyear committed all 11 crimes that sent Phillips to prison." Diane Jennings, *Appeals Court Overturns Conviction of DNA Exoneree*, AP ALERT, Oct. 2, 2008.

[43] Pamela Colloff, *The Innocent Man: Part 2*, 40 TEX. MONTHLY 168 (2012).

[44] *Id.*

[45] *Id.*

[46] Pamela Colloff, *The Guilty Man*, 41 TEX. MONTHLY 156 (2013).

[47] TEX. CODE CRIM. PROC. ANN. art. 38.43(i) (2013) (effective Sept. 1, 2013).

the cost for performing the testing.[48] The defendant also may have another accredited laboratory perform additional testing of the evidence, but the defendant is responsible for these costs.[49] S/he also is responsible for the costs associated with testing evidence which falls outside the ambit of these provisions, and the testing of such evidence depends upon an *ex parte* showing of good cause.[50]

In view of the foregoing, the State of Texas partially complies with Recommendation #2.

Recommendation

The Assessment Team recommends that Texas amend its DNA testing statute to conform to the model statute described in Recommendation #2. Specifically, the State should ensure that DNA testing be made available to an inmate who is seeking to show a reasonable probability exists that s/he is innocent of the offense *or* did not engage in aggravating conduct that was presented to the fact-finder during the sentencing phase of his/her capital trial.

In addition, testing ought to be permitted on new evidence—subject to the rules of evidence and safeguards governing chain of custody—even if it was not secured in relation to the inmate's offense. The requirement that identity have been an issue in the case should also be eliminated, particularly as concerns over relative culpability have significant bearing on both eligibility to be tried for capital murder as well as the decision to sentence a defendant to death. Furthermore, given the difficulty in foreseeing future advances in forensic science, Texas should include a provision that provides the court discretion to order post-conviction testing if it is in the interest of justice. Finally, given the possibility of error regardless of the advances of science, credible allegations of error in previous testing should allow for the retesting of biological evidence.

The Assessment Team also notes that the recent enactment of pretrial testing obligations in capital cases does not resolve the shortcomings cited above. This new law should have no bearing on an inmate's access to testing in the post-trial context.

Finally, district attorney's offices throughout Texas should support testing and retesting of evidence analogous to the work of existing conviction integrity units in Texas and in other U.S. jurisdictions. In death penalty cases, in particular, the State has a strong interest in ensuring the guilt of the convicted, as well as providing immediate relief in cases where the innocent or those undeserving of a death sentence are on death row.

C. Recommendation #3

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

The Texas Code of Criminal Procedure requires the Texas Department of Public Safety (DPS) to "adopt standards and rules, consistent with best practices, . . . that specify the manner of

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48 *Id.*
49 *Id.* at art. 38.43(m).
50 *Id.*

collection, storage, preservation, and retrieval of biological evidence."[51] These standards and rules apply to the entities "charged with the collection, storage, preservation, analysis, or retrieval of biological evidence."[52]

In accordance with Texas law, DPS publishes online its *Best Practices for Collection, Packaging, Storage, Preservation, and Retrieval of Biological Evidence* (*DPS Best Practices*).[53] Some of the provisions in *DPS Best Practices* are advisory,[54] whereas others are drafted in stronger terms—for example, "[a]gency case numbers and identifiers must never be removed [from stored evidence] by another agency unless documented."[55] Ultimately, it is unclear the extent to which entities responsible for collecting, storing, preserving, analyzing, or retrieving biological evidence have adopted policies consistent with *DPS Best Practices*.[56]

As for enforcement, neither the Texas Code of Criminal Procedure nor *DPS Best Practices* specifies a penalty for failing to comply with written procedures and policies governing the preservation of biological evidence.[57]

The State of Texas has required DPS to adopt written procedures and policies governing the preservation of biological evidence, but the language of *DPS Best Practices* is largely advisory and its adoption in the many jurisdictions throughout Texas remains uncertain. Accordingly, Texas only partially complies with Recommendation #3.

Recommendation

As the Texas Department of Public Safety has promulgated written procedures and policies governing the preservation of biological evidence, the Assessment Team recommends that law enforcement agencies adopt *DPS Best Practices*.

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[51] TEX. CODE CRIM. PROC. ANN. art. 38.43(g) (2013).

[52] *Id.*; *see also id.* at art. 38.43(b).

[53] Tex. Dep't Pub. Safety, *Best Practices for Collection, Packaging, Storage, Preservation, and Retrieval of Biological Evidence* (eff. Oct. 30, 2012), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/labBP01BestPractice.pdf.

[54] *See, e.g.*, *id.* at 3 ("These are best practices to keep in mind when packaging biological evidence at a crime scene . . . .").

[55] *Id.* at 5.

[56] The Assessment Team submitted surveys regarding policy and practice on evidence collection and preservation, along with a number of other issues, to twenty-two country sheriff's offices, twenty-three police departments, and the Texas Ranger Division of the Department of Public Safety. It received responses only from the Fort Worth Police Department and the Nueces County Sheriff's Office. The Fort Worth Police Department, for example, noted that while the department follows the criminal code's preservation requirements, "no state statutes or general orders [] deal with evidence collection." Survey from Marty Humphrey, Police Planner, Ft. Worth Police Dep't., at 9 (Oct. 12, 2012) (on file with author).

[57] *See* Recommendation #1, *supra* note 25 and accompanying text.

D. Recommendation #4

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

The Texas Code of Criminal Procedure permits governmental entities to "solicit and accept gifts, grants, donations, and contributions to support the collection, storage, preservation, retrieval, and destruction of biological evidence."[58] This provision calls into question whether existing funding is adequate to ensure proper preservation of evidence.

Furthermore, to the extent that storing biological evidence places a burden on local resources, it does not appear that the state offers financial assistance to help defray these expenses. Although the post-conviction testing statute does provide storage space at DPS's Houston facility for low-population counties, since 1976 84% of all death sentences have originated in the populous counties not covered by this provision.[59] The counties that make considerable use of the death penalty would not as a matter of course receive financial assistance from the State to store biological evidence in the long term.

While it is difficult to establish inadequate funding as the cause of lost evidence—for example, all evidence in the aggravated sexual assault case against Roy Lee Kinney and a blood- and sweat-stained windbreaker in the capital murder case against Hank Skinner vanished without explanation[60]—this anecdotal evidence also raises questions regarding sufficient funding.
With respect to provisioning proper funding for testing of biological evidence, the amendments to Texas law calling for the pretrial testing of biological evidence specify that such testing must be performed at a laboratory accredited by the Texas Department of Public Safety, which also bears the cost for performing the testing.[61]

Ultimately, the State of Texas only partially complies with Recommendation #4.

<u>Recommendation</u>

Texas should ensure that jurisdictions have the funding necessary to retain and preserve biological evidence. Texas law tacitly recognizes that long-term storage of biological evidence may impose significant costs, for, as mentioned, the Texas Code of Criminal Procedure permits governmental entities to "solicit and accept gifts, grants, donations, and contributions to support the collection, storage, preservation, retrieval, and destruction of biological evidence."[62] Ideally, jurisdictions should not rely on charity to guard against the miscarriage of justice that can result from the premature destruction of biological evidence.

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[58] TEX. CODE CRIM. PROC. ANN. art. 38.43(h) (2013).

[59] As of April 2013, the thirty-nine excluded counties account for 887 of Texas's 1,061 death sentences. *Total Number of Offenders Sentenced to Death from Each County*, TEX. DEP'T OF CRIM. JUST., http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited Apr. 5, 2013).

[60] Bob Ray Sanders, Op-Ed, *The Tarrant County Case of Missing DNA Evidence*, FORT-WORTH STAR-TELEGRAM, July 24, 2012; Jordan Smith, *Evidence Missing in Skinner Case*, AUSTIN CHRON., June 13, 2012.

[61] *Id.*

[62] TEX. CODE CRIM. PROC. ANN. art. 38.43(h) (2013).

While there are many avenues by which state resources can be marshaled to support local jurisdictions in their efforts to store biological evidence in the long term, the maintenance of dedicated regional storage facilities would be especially beneficial. DPS's Houston facility already is made available to low-population counties for this purpose, but that accommodation is limited to criminal proceedings "commenc[ing] on or after January 1, 2010."[63] State law should permit larger counties to make use of accredited regional facilities dedicated to the preservation of biological evidence in felony cases.

[63] H.B. 3594, 2009 Leg., Reg. Sess., at § 4 (Tex. 2009).

CHAPTER FOUR

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that forensic service providers, such as crime laboratories and medical examiner offices provide expert and accurate results. In recognition of the increased importance and risks posed by forensic science, a comprehensive, congressionally-authorized review of the national state of forensic science was commissioned and completed by a blue ribbon panel in 2009.[1]

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by forensic science providers has been called into question.[2] In some instances, the reliability of the methods used in the forensic science field has been challenged as invalid or untrustworthy. In others, systemic deficiencies—such as lack of funding improper procedures, and ineffective accreditation—have perpetuated the continued use of flawed and unreliable scientific testing. And finally, while the majority of forensic service providers strive to do their work accurately and impartially, some laboratory technicians have been accused 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, testifying falsely for the prosecution, failing to preserve DNA samples, or destroying DNA or other biological evidence.[3] This has led to internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, and the reexamination of cases.[4]

In addition, the system of medicolegal death investigations used to determine the cause and manner of sudden or unexplained deaths throughout the United States is fragmented, sometimes relying on elected officials without any medical training.[5] Like other forensic service providers,

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[1] COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 1 (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf [hereinafter 2009 NAS REPORT].

[2] 2009 NAS REPORT, *supra* note 1, at 37–52.

[3] *Id.* at 42–48.

[4] *See, e.g.*, Martha Waggoner, *Report Blasts N.C. Crime Lab: Review Found that Agents Misrepresented Evidence, Kept Critical Notes from Attorneys*, CHARLESTON GAZETTE & DAILY MAIL, Aug. 19, 2010, at 5D; *Error-prone Detroit Crime Lab Shut Down*, USA TODAY, Sep. 25, 2008 (reporting that a state audit found a 10% error rate in 200 cases); Julie Bykowicz & Justin Fenton, *City Crime Lab Director Fired*, BALTIMORE SUN, Aug. 21, 2008 (reporting that several samples were contaminated by analysts own DNA); 2009 NAS REPORT, *supra* note 1, at 193 (describing the problems in the Houston Police Department Crime Laboratory, including "poor documentation, serious analytical and interpretive errors, the absence of quality assurance programs, inadequately trained personnel, erroneous reporting, the use of inaccurate and misleading statistics, and even . . . the falsification of scientific results"). *See also Wrongful Convictions Involving Unvalidated or Improper Forensic Science that Were Later Overturned Through DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/docs/DNA_Exonerations_Forensic_Science.pdf (last visited Sept. 3, 2013) ("Of the first 225 wrongful convictions overturned by DNA testing, more than 50% (116 cases) involved unvalidated or improper forensic science.").

[5] 2009 NAS REPORT, *supra* note 1, at 49–51.

many medical examiner and coroner offices suffer from inadequate funding, making it difficult to recruit and retain qualified death investigation personnel. Despite these concerns, pressure mounts on the forensic science community. Significant backlogs continue to plague publicly-funded crime laboratories while demands for their services increase.[6]

Accurate and reliable forensic science depends upon jurisdictions' allocating adequate resources to forensic service providers. To take full advantage of the power of forensic science to aid in the search for truth and to minimize its enormous potential to contribute to wrongful convictions, forensic service providers must erect meaningful safeguards, including, at minimum, accreditation of laboratories, certification of examiners and laboratory technicians, standardization and publication of procedures, as well as ensure their adequate funding.

[6] *Id.* at 37, 61.

I. FACTUAL DISCUSSION: TEXAS OVERVIEW

Forensic science services[7] are provided to Texas law enforcement through over one-hundred crime laboratories—both public and private, both in-state and out-of-state, both accredited and unaccredited—as well as by several county-based medical examiner offices, only five of which are required under Texas law due to county population.[8] Autopsies not performed by a county medical examiner are carried out by physicians acting at the direction of justices of the peace.[9] Notably, forensic science analysis occurs in a variety of settings in Texas, which may include formal laboratory settings as well as more informal settings—for example, at law enforcement agency offices.[10] The discussion that follows describes the varying systems for the provision of forensic science analysis in Texas criminal cases.

A. Forensic Science Laboratories

At the state level, the Texas Department of Public Safety (DPS) operates fourteen crime laboratories.[11] Specifically, thirteen regional laboratories operate in Austin, Abilene, Amarillo, Corpus Christi, El Paso, Garland, Houston, Laredo, Lubbock, Midland, Tyler, Waco, and Weslaco; the fourteenth laboratory is DPS's Breath Alcohol Laboratory, also based in Austin.[12] DPS also has accredited eleven county-based and nine city-based crime laboratories, the latter of which serve the cities of Arlington, Austin, Corpus Christi, Dallas, El Paso, Houston, Pasadena, and Plano.[13]

Texas law makes a distinction between two groups of forensic science service providers. The first group of services cannot provide the basis for expert testimony unless they are performed by a crime laboratory "accredited by the [DPS] director."[14] The second group of services is exempted from this requirement. "The director by rule may exempt from the accreditation

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[7] "Forensic science" encompasses a broad range of disciplines, including general toxicology, biology/serology (such as DNA analysis), firearms, blood pattern analysis, and crime scene investigation. 2009 NAS REPORT, *supra* note 1, at 6–7. Forensic science also includes "medicolegal death investigation," typically conducted by a coroner, medical examiner, forensic pathologist, and/or physician's assistant, to determine the cause and manner of sudden, unexpected, or violent deaths. *Id.* at 5 n.5. Consistent with this meaning, Texas law explicitly defines *forensic analysis* as "medical, chemical, toxicologic, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action." TEX. CODE CRIM. PROC. ANN. art. 38.35(a)(4) (2013).

[8] *See* TEX. CODE CRIM. PROC. ANN. art. 38.35(d)(1) (2013); *List of DPS Accredited Labs from Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_Texas_LabsAccredited.pdf; *List of DPS Accredited Labs from outside of Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_NonTexas_LabsAccredited.pdf; TEX. CODE CRIM. PROC. ANN. art. 49.25, § 1 (2013) (requiring that a county medical examiner office be established under certain circumstances).

[9] TEX. CODE CRIM. PROC. ANN. art. 49.10(c)(1), (f) (2013).

[10] TEX. CODE CRIM. PROC. ANN. art. 38.35(a)(4) (2013).

[11] *Overview*, TEX. DEP'T PUB. SAFETY, http://www.txdps.state.tx.us/CrimeLaboratory/index.htm (last visited Mar. 19, 2013); *Contact Information*, TEX. DEP'T PUB. SAFETY, http://www.txdps.state.tx.us/CrimeLaboratory/Contact.htm (last visited Mar. 19, 2013).

[12] *Id.*

[13] *List of DPS Accredited Labs from Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_Texas_ LabsAccredited.pdf.

[14] TEX. CODE CRIM. PROC. ANN. art. 38.35(d)(1) (2013).

process . . . a crime laboratory conducting a forensic analysis or a type of analysis, examination, or test if the director determines that [one of four conditions apply]."[15] DPS does not compile lists of in- and out-of-state forensic science service providers that, by virtue of the analyses they perform, are not required to be accredited under Texas law.[16]

1. Services Subject to Mandatory Accreditation

Accreditation means that a laboratory "adheres to an established set of standards of quality and relies on acceptable practices within these requirements," that it "has in place a management system that defines the various processes by which it operates on a daily basis, monitors that activity, and responds to deviations from the acceptable practices using a routine and thoughtful method," and finally, that there is outside oversight of the laboratory.[17]

The forensic science services or disciplines subject to Texas's accreditation requirements are (1) controlled substances; (2) toxicology; (3) biology; (4) firearms/toolmark; (5) questioned documents; and (6) trace evidence.[18] Importantly, accreditation may be pursued only with respect to a *sub*discipline.[19] For example, a laboratory may seek accreditation within the biology discipline, but only with respect to the subdisciplines of biology, serology, and DNA.[20]
Five accrediting bodies are recognized under Texas law, which also specifies limitations on those bodies' capacity to issue accreditation:

(1) American Society of Crime Laboratory Directors' Laboratory Accreditation Board (ASCLD/LAB), which may issue accreditation in all disciplines;
(2) Forensic Quality Services (FQS), which may issue accreditation in all disciplines;
(3) American Board of Forensic Toxicology, which may issue accreditation only in toxicology (ABFT);
(4) College of American Pathologists (CAP), which may issue accreditation only in toxicology; and
(5) Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA), which may issue accreditation only in the toxicology subdiscipline of urine drug testing.[21]

As of May 22, 2013, DPS lists as accredited fifty-two in-state and fifty-four out-of-state laboratories.[22] However, some of these listed laboratories have had their DPS accreditation

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[15] TEX. GOV'T CODE ANN. § 411.0205(c) (2013).
[16] Interview by Ryan Kent with Forrest Davis, Tex. Dep't of Pub. Safety Crime Lab. Serv. (Mar. 19, 2013) (on file with author) [hereinafter Forrest Davis Interview].
[17] 2009 NAS REPORT, *supra* note 2, at 195.
[18] 37 TEX. ADMIN. CODE § 28.135(b) (2013).
[19] 37 TEX. ADMIN. CODE § 28.135(c) (2013) (emphasis added).
[20] *See* 37 TEX. ADMIN. CODE § 28.145(c)(1) (2013).
[21] 37 TEX. ADMIN. CODE § 28.144(a) (2013).
[22] *List of DPS Accredited Labs from Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_Texas_LabsAccredited.pdf; *List of DPS Accredited Labs from outside of Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_NonTexas_LabsAccredited.pdf.

status "[w]ithdrawn" or have dates of recognized accreditation that are not current.[23] If these laboratories are excluded, then forty-four in-state and forty-one out-of-state laboratories are, as of May 22, 2013, recognized as accredited by DPS.[24]

Most of these laboratories are operated by federal, state, or local government, and only a few are accredited in all six disciplines specified in the Texas Administrative Code.[25] Some laboratories also are currently accredited by multiple accreditation bodies.[26] The following table summarizes the extent to which the in-state laboratories are accredited by the five bodies eligible to issue accreditation under Texas law:

DPS Accreditation of Texas Laboratories[27]

	ASCLD/LAB						
Operating Entity	*Legacy* Program	*International* Program	**FQS-I**[a]	**ABFT**	**CAP**	**SAMHSA**	**Total**
Government	13	19	2	2	–	–	36
Federal	–	1	–	–	–	–	1
State	2	13	1	–	–	–	16
County	5	4	–	2	–	–	11
City	6	1	1	–	–	–	8
Regional	–	–	–	–	–	–	0
Private	3	3[b]	1	–	1	1	9[b]
Total	**16**	**22**	**3**	**2**	**1**	**1**	**45**

[a] Although two separate FQS-brand programs are listed—FQS and FQS-I—the ANSI-ASQ National Accreditation Board, which provides FQS-brand accreditation, has not offered FQS accreditation in some time. According to DPS, the few laboratories listed as accredited under FQS likely retain their accreditation status under the FQS-I program. In view of this, the table merges the two FQS-brand programs into a single "FQS-I" column. Forrest Davis Interview, *supra* note 16.

[b] Cellmark Forensics, a private laboratory based in Farmers Branch, is accredited by both ASCLD/LAB and FQS.

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[23] *See, e.g.*, *List of DPS Accredited Labs from Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_Texas_LabsAccredited.pdf (listing as "[w]ithdrawn" the DPS accreditation status for the Sam Houston State University Regional Crime Laboratory and the El Paso P.D. Crime Laboratory; for the private laboratory One Source Toxicology, listing as dates of recognized accreditation October 1, 1996, through October 1, 2012); *List of DPS Accredited Labs from outside of Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_NonTexas_LabsAccredited.pdf (listing as "[w]ithdrawn" the DPS accreditation status for the Arkansas State Crime Laboratory).

[24] Two in-state laboratories with either no listing and listed as revised and three one out-of-state laboratories with no listing were included in those recognized as accredited; each of their accreditation expires in the near future. *List of DPS Accredited Labs from Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_Texas_ LabsAccredited.pdf; *List of DPS Accredited Labs from outside of Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_NonTexas_LabsAccredited.pdf

[25] *List of DPS Accredited Labs from Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_Texas_LabsAccredited.pdf. *See, e.g.*, *id.* (listing the Texas Department of Public Safety Austin Laboratory as accredited in all six disciplines).

[26] *See, e.g.*, *List of DPS Accredited Labs from Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_Texas_LabsAccredited.pdf (for the private laboratory Cellmark Forensics, listing as "[c]urrent" the DPS accreditation status for both ASCLD/Lab-Int and FQS-I).

[27] *Id.*

Among in-state crime laboratories, the two programs of ASCLD/LAB—the *Legacy* Accreditation Program (*Legacy* program) and the *International* Accreditation Program (*International* program)—are the most widely sought.[28] Both programs require crime laboratories to demonstrate and maintain compliance with a number of established standards. For the *Legacy* program, compliance is evaluated against the ASCLD/LAB-*Legacy* Accreditation Board Manual;[29] for the *International* program, compliance is evaluated against the "ISO/IEC 17025:2005 requirements and applicable ASCLD/LAB-*International* supplemental requirements."[30] The focus and specificity of the more rigorous ISO/IEC 17025 standards are well-regarded among forensic service providers.[31] The ISO/IEC 17025 requirements themselves were "developed through technical committees to deal with particular fields of technical activity,"[32] and they "specif[y] the general requirements for the competence to carry out tests and/or calibrations."[33] The supplemental requirements of the *International* program pertain to "the examination or analysis of evidence as it relates to legal proceedings."[34]

Forensic Quality Service (FQS) also accredits many of these laboratories through its FQS-I program, which, like ASCLD/LAB *International* program, is based on compliance with ISO/IEC 17025 requirements as well as "the applicable Forensic Requirements for Accreditation," which "are intended to describe what constitutes acceptable practice in the particular field of accreditation."[35] Among the subjects for which FQS offers ISO/IEC 17025 accreditation are

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[28] Since April 2004, ASCLD/LAB has provided accreditation under both the *Legacy* program and its *International* Accreditation Program, the latter of which is based on standards developed by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), called the ISO/IEC 17025:2005. *Programs of Accreditation*, AM. SOC'Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., http://www.ascld-lab.org/programs/prgrams_of_accreditation_index.html (last visited Mar. 3, 2013); INT'L ORG. FOR STANDARDIZATION & INT'L ELECTROTECHNICAL COMM., ISO/IEC 17025: GENERAL REQUIREMENTS FOR THE COMPETENCE OF TESTING AND CALIBRATION LABORATORIES vi (2d ed. 2005) (on file with author) [hereinafter ISO/IEC 17025: GENERAL REQUIREMENTS]. Effective April 1, 2009, ASCLD/LAB no longer accepts new applications for accreditation under the *Legacy* program. *Programs of Accreditation*, AM. SOC'Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., http://www.ascld-lab.org/programs/prgrams_of_accreditation_index.html (last visited Mar. 3, 2013); ABA, RECOMMENDATION 100E, 2010 Ann. Mtg. (adopted Aug. 9–10, 2010), *available at* www.abanet.org/leadership/2010/annual/docs/100e.doc (urging the federal government to provide funding and resources to facilitate the accreditation of crime laboratories under standards such as ISO/IEC 17025). ASCLD/LAB continues to provide "full support and program compliance monitoring . . . to those laboratories accredited under the [*Legacy*] program," and it "accept[s] applications to add new accredited disciplines under the *Legacy* Program for those laboratories that are accredited under the program." *Programs of Accreditation*, AM. SOC'Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., http://www.ascld-lab.org/programs/prgrams_of_accreditation_index.html (last visited Mar. 3, 2013) (italics added).

[29] AM. SOC'Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., LABORATORY ACCREDITATION BOARD 2008 MANUAL 3, 69–84, app. 1–3 (2008) (on file with author) [hereinafter ASCLD/LAB-*LEGACY* 2008 MANUAL].

[30] AM. SOC'Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., ASCLD/LAB-*INTERNATIONAL* PROGRAM OVERVIEW 3 (2010) (eff. May 13, 2012), *available at* http://www.ascld-lab.org/documents/AL-PD-3041.pdf.

[31] 2009 NAS REPORT, *supra* note 1, at 21. *See also* Frank Kitzpatrick & Kenneth Martin, *The Need for Mandatory Accreditation and Certification*, THE POLICE CHIEF, Sept. 2009 ("[T]he NAS report and the forensic science community specifically recognize an international standard—ISO 17025—as the gold standard in forensic service provider accreditation.").

[32] 2009 NAS REPORT, *supra* note 1, at 198.

[33] 2009 NAS REPORT, *supra* note 1, at 21; ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 28, at vi.

[34] ASCLD/LAB-*INTERNATIONAL*, 2006 SUPPLEMENTAL REQUIREMENTS FOR THE ACCREDITATION OF FORENSIC SCIENCE TESTING LABORATORIES 2 (Jan. 24, 2006) (on file with author) [hereinafter *INTERNATIONAL* SUPPLEMENTAL REQUIREMENTS].

[35] *FAQ*, FORENSIC QUALITY SERV., http://fqsforensics.org/accreditation/faq.aspx (last visited Sept. 6, 2013).

crime laboratories, crime scene investigation, and DNA testing laboratories that adhere to the Federal Bureau of Investigation's Quality Assurance Standards.[36]

Out-of-state laboratories also may be accredited by DPS; however, like in-state laboratories, these laboratories differ with respect to accreditation.[37]

2. Services Not Subject to Mandatory Accreditation

The Texas Administrative Code exempts certain subjects within the definition of *forensic analysis* from the accreditation requirements, subjects that include "sexual assault examination of the person," "forensic anthropology, entomology, or botany," and "voice stress, voiceprint, or similar voice analysis."[38] These exemptions are at the discretion of the director of DPS.[39] The director also may list "at the department's website" other exempt disciplines and subdisciplines.[40] Pursuant to this provision, testimony on a number of issues that may be relevant in death penalty cases may be admitted into evidence even if "the crime laboratory conducting the analysis was not accredited by the director."[41]

The Code of Criminal Procedure also explicitly excludes from its accreditation requirements that "portion of an autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician."[42]

3. Monitoring Crime Laboratories and the Texas Forensic Science Commission

Apart from internal quality controls,[43] crime laboratories principally are monitored by the Texas Forensic Science Commission (Commission), established in 2005.[44] Under the Texas Code of

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[36] *FQS ISO/IEC 17025 Accreditation*, FORENSIC QUALITY SERV., http://fqsforensics.org/accreditation/isoiec-17025.aspx (last visited Sept. 6, 2013); *see also Quality Assurance Standards for Forensic DNA Testing Laboratories*, FBI, http://www.fbi.gov/about-us/lab/biometric-analysis/codis/qas_testlabs (last visited Sept. 6, 2013).

[37] *List of DPS Accredited Labs from outside of Texas*, TEX. DEP'T PUB. SAFETY (May 22, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_NonTexas_LabsAccredited.pdf.

[38] *See* 37 TEX. ADMIN. CODE § 28.147 (2013).

[39] *See* TEX. GOV'T CODE ANN. § 411.0205(c) (2013).

[40] 37 TEX. ADMIN. CODE § 28.147(b)(11) (2013).

[41] TEX. CODE CRIM. PROC. ANN. art. 38.35(d) (2013); *DPS Crime Lab Accreditation Program*, TEX. DEP'T PUB. SAFETY, http://www.txdps.state.tx.us/CrimeLaboratory/LabAccreditation.htm (last visited Sept. 6, 2013).

[42] TEX. CODE CRIM. PROC. ANN. art. 38.35(f) (2013); 37 TEX. ADMIN CODE § 28.146(1)(E) (2013). Such admitted evidence may include testimony based on viral DNA testing, forensic engineering as it pertains to failure analysis of plastic bags and the examination of electrical appliances, the testing of blood samples for the presence of bleach, bacterial DNA testing, and testing to determine the presence of excrement. *DPS Crime Lab Accreditation Program*, TEX. DEP'T PUB. SAFETY, http://www.txdps.state.tx.us/CrimeLaboratory/LabAccreditation.htm (last visited Sept. 6, 2013); TEX. CODE CRIM. PROC. ANN. art. 38.35(d)(1) (2013).

[43] The acceptance and implementation of certain quality control measures are necessary for laboratories to receive accreditation. For example, ASCLD/LAB's *International* program includes scheduled on-site surveillance visits, the laboratory's completion and submission of an *Annual Accreditation Audit Report*, and the laboratory's participation in prescribed proficiency testing programs. AM. SOC'Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., ASCLD/LAB-*INTERNATIONAL* PROGRAM OVERVIEW 19 (Sept. 11, 2010) (effective Oct. 1, 2010), *available at* http://www.ascld-lab.org/documents/AL-PD-3041.pdf [hereinafter ASCLD/LAB-*INTERNATIONAL* OVERVIEW].

[44] *See generally* TEX. CODE CRIM. PROC. ANN. art. 38.01 (2013).

Criminal Procedure, the Commission has three statutory duties. First, it must "develop and implement a reporting system through which a crime laboratory may report professional negligence or professional misconduct."[45] Second, the Commission must "require a crime laboratory that conducts forensic analyses to report professional negligence or professional misconduct to the [C]ommission."[46] Finally, the Commission is empowered to "investigate, in a timely manner, any allegation of professional negligence or professional misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by a crime laboratory."[47]

Allegations of misconduct or negligence at laboratories unaccredited by DPS previously fell outside the purview of the Commission. However, legislation was passed in the 2013 General Assembly and signed into law in June 2013 to clarify the jurisdiction of the Commission to include any laboratory conducting forensic analysis—not just those that are accredited.[48] The 2013 law also empowers the Commission to "initiate for educational purposes an investigation of forensic analysis without receiving a complaint" by majority vote of a quorum of the members.[49]

The Commission's nine members are appointed by the Governor.[50] The Governor selects the Commission's presiding officer.[51] Texas law specifies that these appointments must be of particular individuals. For example, two of the Governor's appointees "must have expertise in the field of forensic science," one "must be a prosecuting attorney that the governor selects from a list of 10 names submitted by the Texas District and County Attorneys Association," and one "must be a defense attorney that the governor selects from a list of 10 names submitted by the Texas Criminal Defense Lawyers Association."[52]

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[45] TEX. CODE CRIM. PROC. ANN. art. 38.01, § 4(a)(1) (2012); S.B. 1238, 83d Legis., Reg. Sess. (Tex. 2013) (as signed into law on June 14, 2013). *Professional misconduct* and *professional negligence* are defined as "deliberately fail[ing] to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised," with professional misconduct being based on a "deliberate act or omission substantially affect[ing] the integrity of the results of a forensic analysis" and professional negligence being based on a "negligent act or omission substantially affect[ing] the integrity of the results of a forensic analysis." TEX. FORENSIC SCI. COMM., POLICIES AND PROCEDURES 3 (Apr. 13, 2012) (guideline 1.2). "An act or omission was deliberate if the actor was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis," whereas "[a]n act or omission was negligent if the actor should have been but was not aware of an accepted standard of practice required for a forensic analysis." *Id.* Both of these definitions consider the circumstances "from the actor's standpoint." *Id.*

[46] S.B. 1238, 83d Legis., Reg. Sess. (Tex. 2013) (as signed into law on June 14, 2013).

[47] *Id.* Under this authority, the Texas Forensic Science Commission recently "directed all labs under its jurisdiction to take the first step to scrutinize" past cases which relied upon microscopic analysis of hair to place a defendant at a crime scene. Spencer S. Hsu, *At Least 27 Death Penalty Convictions May be Faulty*, WASH. POST, July 18, 2013, at A1.

[48] *See* S.B. 1238, 83d Legis., Reg. Sess. (Tex. 2013) (as signed into law on June 14, 2013).

[49] TEX. CODE CRIM. PROC. ANN. art. 38.01, § 4(a)(3)(a-1) (2013); S.B. 1238, 83d Legis., Reg. Sess. (Tex. 2013) (as signed into law on June 14, 2013).

[50] TEX. CODE CRIM. PROC. ANN. art. 38.01, § 3(a) (2013).

[51] *Id.* at art. 38.01, § 3(c).

[52] *Id.* at art. 38.01, § 3(a)(1). In addition, the three appointees of the Lieutenant Governor must be faculty members of three Texas universities: One of the University of Texas and one of Texas A&M University, both of whom "specialize[] in clinical laboratory medicine," and one of Texas Southern University "who has expertise in pharmaceutical laboratory research." *Id.* at § 3(a)(2). The two appointees of the Attorney General must be "a director or division head of the University of North Texas Health Science Center at Fort Worth Missing Persons

B. Medical Examiner Offices and Justices of the Peace

Under Texas law, "the Commissioners Court of any county having a population of more than one million . . . shall establish and maintain the office of medical examiner."[53] Based on the figures compiled for the 2010 federal census, five Texas counties meet this population threshold: Bexar, Dallas, Harris, Tarrant, and Travis.[54] These counties each have their own medical examiner office, as do at least seven other counties: Collin, Ector, El Paso, Galveston, Lubbock, Nueces, and Webb.[55] In addition, the counties of Denton, Johnson, and Parker are served by the Tarrant County Medical Examiner's Office.[56] In all other counties, justices of the peace may act as coroners and are responsible for carrying out the duties assigned to medical examiners in more populous counties—that is, determining the cause and manner of death in all cases specified under Article 49.04 of the Texas Code of Criminal Procedure.[57] If a justice of the peace determines that a death requires an inquest,[58] s/he must "direct a physician to perform an autopsy."[59]

The circumstances that require an inquest by a medical examiner or a coroner largely are the same:

(1) A person dies an unnatural death other than by means of a legal execution;[60]

DNA Database" and "a faculty or staff member of the Sam Houston State University College of Criminal Justice [who has] expertise in the field of forensic science or statistical analyses." *Id.* at § 3(a)(3).

[53] TEX. CODE CRIM. PROC. ANN. art. 49.25, § 1 (2013). This provision creates an exception for those counties that "hav[e] a reputable medical school as defined in Articles 4501 and 4503, Revised Civil Statutes of Texas," but those articles were repealed in 1981. *See* Acts of 1981, 1981 Leg., 1st Called Sess. (eff. Aug. 5, 1981). In recent years, bills have been introduced that would have removed the obsolete "reputable medical school" exception, but these measures were not enacted into law. *See* H.B. 3485, 2009 Leg., Reg. Sess. (Tex. 2011) (incorporating S.B. 312, 2009 Leg., Reg. Sess. (Tex. 2009)), *vetoed* June 19, 2009; S.B. 133, 2011 Leg., Reg. Sess. (Tex. 2011).

[54] *See Texas*, U.S. CENSUS BUREAU (rev. June 27, 2013), http://quickfacts.census.gov/qfd/states/48000.html (under "Lists of Entities," select link under "Counties").

[55] *See Medical Examiner*, COLLIN CNTY., TEX., http://www.co.collin.tx.us/medical_examiner (last visited Sept. 5, 2013); *Ector County Medical Examiner*, ECTOR CNTY., TEX., http://www.co.ector.tx.us/default.aspx?Ector_County/Medical%20Examiner (last visited Sept. 5, 2013); *Office of the Medical Examiner & Forensic Laboratory*, EL PASO CNTY., TEX., http://www.epcounty.com/medicalexaminer/aboutus.htm (last visited Sept. 5, 2013); *Galveston County Medical Examiner's Office*, GALVESTON CNTY., TEX., http://www.co.galveston.tx.us/Medical-Examiner (last visited Sept. 5, 2013); *Medical Examiner*, LUBBOCK CNTY., TEX., http://www.co.lubbock.tx.us/department/?fDD=36-0 (last visited Sept. 5, 2013); *Webb County Medical Examiner*, WEBB CNTY., TEX., http://webbcounty.com/MedicalExaminer (last visited Sept. 5, 2013).

[56] *Tarrant County Medical Examiner*, TARRANT CNTY., TEX., http://www.tarrantcounty.com/emedicalexaminer/site/default.asp (last visited Mar. 13, 2013); *see also* TEX. CODE CRIM. PROC. ANN. art. 49.25, § 1-a (2013) (providing for the creation of a multi-county "medical examiners district").

[57] *See* TEX. CONST. art. V, § 18 (2013) (providing for the election of justices of the peace); TEX. CODE CRIM. PROC. ANN. arts. 49.04, 49.25, § 12 (2013).

[58] *See* TEX. CODE CRIM. PROC. ANN. art. 49.04(a) (2013); *see also id.* at art. 49.10(a) ("a justice of the peace may obtain the opinion of a county health officer or a physician concerning the necessity of obtaining an autopsy in order to determine or confirm the nature and cause of a death").

[59] TEX. CODE CRIM. PROC. ANN. art. 49.10(c)(1), (f) (2013).

[60] TEX. CODE CRIM. PROC. ANN. arts. 49.04(a)(2), 49.25, § 6(a)(2) (2013). In addition, medical examiners are required to conduct an inquest if a person "dies in the absence of one or more good witnesses." *Id.* at art. 49.25, § 6(a)(2).

(2) A person dies under circumstances that indicate his/her death may have been caused by unlawful means;[61]
(3) A person dies without having been attended by a physician;[62]
(4) A person dies while attended by a physician who is unable to certify the cause of death and who requests an inquest;[63]
(5) A person dies in prison or in jail;[64]
(6) A person dies by suicide or apparent suicide;[65]
(7) A child under the age of six dies and the provisions of the Texas Family Code pertaining to Child Welfare Services apply;[66] and
(8) A body or body part is found and the cause or circumstances of death are unknown.[67]

Texas law also specifies the minimum content of any autopsy of an unidentified person conducted by a medical examiner or a physician acting at the direction of justices of the peace.[68] If the identity of a cadaver is known, a medical examiner or justice of the peace has discretion to conduct or to order a limited autopsy.[69]

As to medical examiners' qualifications, Texas law requires that "[n]o person shall be appointed medical examiner unless he is a physician licensed by the State Board of Medical Examiners."[70] Although the Texas Code of Criminal Procedures commands that, "[t]o the greatest extent possible, the medical examiner shall be appointed from persons having training and experience in pathology, toxicology, histology and other medico-legal sciences," any such qualifications would depend on the internal policies of a medical examiner's office.[71] One need not be a fully-licensed physician to conduct an autopsy.[72]

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[61] *Id.* at arts. 49.04(a)(4), 49.25, § 6(a)(4).

[62] *Id.* at arts. 49.04(a)(6), 49.25, § 6(a)(6). A medical examiner is required to conduct an inquest under this circumstance if "the local health officer or registrar required to report the cause of death . . . does not know the cause of death." *Id.* at art. 49.25, § 6(a)(6). In fact, if the local health officer or registrar does not know the cause of death, s/he is required under Texas law to "notify the medical examiner" and to "request an inquest." *Id.*

[63] *Id.* at arts. 49.04(a)(7), 49.25, § 6(a)(8). With respect to medical examiners, "the attending physician or physicians, or the superintendent or general manager of the hospital or institution in which the deceased shall have died," is required to report the death to the medical examiner and to request an inquest. *Id.* at art. 49.25, § 6(a)(8).

[64] *Id.* at arts. 49.04(a)(1), 49.25, § 6(a)(1). While justices of the peace do not need to conduct an inquest if a person dies in prison due to natural causes while attended by a physician or registered nurse or due to a lawful execution, *see* TEX. GOV'T CODE ANN. § 501.055(b) (2013), no such limitations apply to medical examiners. *Compare* TEX. CODE CRIM. PROC. ANN. art. 49.04(a)(1) (2013), *with id.* at 49.25, § 6(a)(1). On the other hand, medical examiners are required to conduct an inquest if a person dies "within twenty-four hours after admission to a hospital or institution." *Id.* at art. 49.25, § 6(a)(1).

[65] *Id.* at arts. 49.04(a)(5), 49.25, § 6(a)(5).

[66] TEX. CODE CRIM. PROC. ANN. arts. 49.04(a)(8), 49.25, § 6(a)(7) (2013).

[67] *Id.* at arts. 49.04(a)(3), 49.25, § 6(a)(3). Both provisions add to this circumstance ". . . and (A) the person is identified; or (B) the person is unidentified." *Id.*

[68] *See id.* at art. 49.25, § 9(b); *id.* at art. 49.10(*l*).

[69] *See id.* at art. 49.25, § 9(a); *id.* at art. 40.10(i).

[70] *Id.* at art. 49.25, § 2.

[71] *Id.*

[72] Ramey v. State, No. AP-75678, 2009 WL 335276, at *7 (Tex. Crim. App. Feb. 11, 2009) (citing TEX. OCC. CODE ANN. § 155.105 (2009)).

1. Medical Examiner Office Accreditation and Personnel Certification Programs

With respect to medical examiner offices, two accrediting authorities are particularly relevant: The National Association of Medical Examiners (NAME) and the American Board of Medicolegal Death Investigators (ABMDI).[73] NAME accredits medical examiner offices and ABMDI accredits medical examiners pursuant to its own standards.[74] Under Texas law, all such accreditation and certification is voluntary. Nevertheless, seven medical examiner offices currently are accredited by NAME: Bexar, Collin, Dallas, Harris, Nueces, Tarrant, and Travis.[75] Individual medicolegal personnel may receive some form of certification by ABMDI—whether Registry Certification[76] or Board Certification[77]—but such certification is not required under Texas law. Currently, fifty-five Texas medicolegal death investigators have received ABMDI Registry Certification, and nine investigators have obtained ABMDI Board Certification.[78]

With respect to NAME accreditation specifically, accredited offices must have "a functional governing code, adequate staff, equipment, training, and a suitable physical facility and produce[] a forensically documented accurate, credible death investigation product."[79] The NAME accreditation process for medical examiner offices is similar to the ASCLD/LAB accreditation process for forensic laboratories. The applicant must perform a self-inspection using the NAME Accreditation Checklist,[80] file an application, and undergo an external inspection to evaluate whether the facility meets the NAME Standards for Accreditation.[81]

To obtain ABMDI Registry Certification, an investigator must complete a number of skills-based tasks, pass the registry examination, and have a minimum of 640 hours of death investigation experience.[82] To obtain Board Certification, an investigator must be certified at the ABMDI Registry Level, hold at least an associate's degree from a post-secondary institution "recognized

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[73] 2009 NAS REPORT, *supra* note 2, at 258 ("Currently, the standard for quality in death investigation for medical examiner offices is accreditation by NAME"). ABMDI is a voluntary, independent professional certification board established to ensure that medico-legal death investigators "have the proven knowledge and skills necessary to perform medicolegal death investigations as set forth in the National Institutes of Justice 1999 publication *Death Investigation: A Guide for the Scene Investigator . . . .*" *American Board of Medicolegal Death Investigators*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, http://www.abmdi.org (last visited Sept. 5, 2013).

[74] *See NAME Accredited Programs*, NAT'L ASS'N OF MED. EXAM'RS (July 12, 2012); *American Board of Medicolegal Death Investigators*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, http://www.abmdi.org (last visited Sept. 5, 2013).

[75] *NAME Accredited Programs*, NAT'L ASS'N OF MED. EXAM'RS (July 12, 2012), *https://netforum.avectra.com/eweb/DynamicPage.aspx?Site=NAME&WebCode=PubIA* (follow "Accredited Progams-by state" hyperlink).

[76] *See Registry Certification (basic)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, http://abmdi.org/index.php?page=registry-certification-basic (last visited Sept. 5, 2013).

[77] *See Board Certification (advanced)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, http://abmdi.org/index.php?page=board-certification-advanced (last visited Sept. 5, 2013).

[78] *Board Certified Fellows and Registered Diplomates*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS (Dec. 13, 2012), http://abmdi.org/index.php?page=board-diplomates (last visited Sept. 5, 2013).

[79] 2009 NAS REPORT, *supra* note 1, at 258.

[80] NAT'L ASS'N OF MED. EXAM'RS, NAME INSPECTION AND ACCREDITATION CHECKLIST 2–6 (2d ed. 2009), *available at* http://thename.org/index.php?option=com_docman&task=cat_view&gid=45&Itemid=26.

[81] NAT'L ASS'N OF MED. EXAM'RS, INSPECTION & ACCREDITATION POLICIES AND PROCEDURES MANUAL 61–65, July 2009, *available at* http://thename.org/index.php?option=com_docman&task=cat_ view&gid=45&Itemid=26.

[82] *Registry Certification (basic)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, http://abmdi.org/ index.php?page=registry-certification-basic (last visited Mar. 27, 2013).

by a national educational accrediting agency," pass the board certification examination, and have a minimum of 4,000 hours of death investigation experience in the past six years.[83]

2. Monitoring Medical Examiner Offices

A medical examiner office ultimately is monitored by the Commissioners Court that established it.[84] The Forensic Science Commission has no jurisdiction to investigate negligence or misconduct on the part of medical examiners, nor may the Commission investigate negligence or misconduct connected to an autopsy performed by a physician at the direction of a justice of the peace.[85] To the extent that medical examiners may be held civilly liable for official misconduct, they "enjoy the same protection from liability as their investigators," that is, "the same official immunity as other public officials."[86]

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[83] *Board Certification (advanced)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, http://www.abmdi.org/?page=board-certification-advanced (last visited Mar. 27, 2013).

[84] TEX. CODE CRIM. PROC. ANN. art. 49.25, § 1 (2012) ("[T]he Commissioners Court . . . shall establish and maintain the office of medical examiner").

[85] Yamil Berard, *Tighter Requirements on Medical Examiners Are Blocked in Texas*, FT. WORTH STAR-TELEGRAM, Oct. 3, 2009 (citing the opinion of Edwin Colfax of The Justice Project).

[86] Putthoff v. Ancrum, 934 S.W.2d 164 (Tex. App. 1996); *see also* TEX. CODE CRIM. PROC. ANN. art. 49.12 (2013) ("A person who performs an autopsy or makes a test on a body on the order of a justice of the peace in the good faith belief that the order is valid is not liable for damages if the order is invalid."); Tarrant County v. Dobbins, 919 S.W.2d 877 (Tex. App. 1996) (death investigators protected by official immunity).

II. ANALYSIS

A. Recommendation #1

> **Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.**

Accreditation means that a "laboratory adheres to an established set of standards of quality and relies on acceptable practices within these requirements."[87] As explained in the 2009 National Academy of Sciences report on forensic science (*NAS Report*), "[l]aboratory accreditation and individual certification of forensic science professionals should be mandatory" and all forensic laboratories should "establish routine quality assurance and quality control procedures to ensure the accuracy of forensic analyses and the work of forensic practitioners."[88]

In assessing Texas's compliance with this Recommendation, however, the Assessment Team is aware that accreditation, even by leading organizations, sometimes has either failed to detect or even facilitated ongoing lapses and deficiencies in laboratories. As recognized by the NAS Report, "[a]ccreditation is just one aspect of an organization's quality assurance program . . . . [i]n the case of laboratories, accreditation does not mean that accredited laboratories do not make mistakes, nor does it mean that a laboratory utilizes best practices in every case." [89] Notably, Texas has developed a "unique . . . investigation framework"—the Forensic Science Commission—with the authority to ensure compliance with accreditation requirements and to investigate ongoing deficiencies and allegations of misconduct and error.[90]

<u>Crime Laboratories</u>

As noted in the Factual Discussion, a majority of accredited Texas-based crime laboratories receive their accreditation from ASCLD/LAB through its *Legacy* program or *International* program.[91] As a prerequisite for accreditation, both the *Legacy* and *International* programs require laboratories to take measures to ensure the validity, reliability, and timely analysis of forensic evidence. For example, the *Legacy* program requires the laboratory to possess clearly written procedures for handling and preserving the integrity of evidence; for preparing, storing, securing, and disposing of case records and reports; and for maintaining and calibrating equipment.[92] Similarly, the *International* program requires the laboratory to establish and maintain procedures for identifying, collecting, indexing, accessing, filing, storing, maintaining,

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[87] 2009 NAS REPORT, *supra* note 1, at 195.
[88] *Id*. at 215.
[89] 2009 NAS REPORT, *supra* note 1, at 195.
[90] Ryan M. Goldstein, *Improving Forensic Science Through State Oversight*, 90 TEX. L. REV. 225, 244 (2011).
[91] *See supra* notes 27–28, and accompanying text.
[92] ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 29, at 24–25. Written procedures "minimize, to the greatest extent reasonably possible, potential bias and sources of human error in forensic practice." NAS REPORT 2009, *supra* note 1, at 24.

and disposing of quality and technical reports.[93] Both programs also require the laboratory to maintain a written quality assurance manual.[94]

These programs also require laboratory personnel to possess certain qualifications. For example, the *Legacy* program—under which sixteen in-state laboratories receive accreditation—requires forensic analysts to have a specialized baccalaureate degree relevant to his/her crime laboratory specialty; experience or training commensurate with the examinations and testimony required; and an understanding of the necessary instruments, methods, and procedures.[95] The examiners also must successfully complete a competency test prior to assuming casework responsibility and successfully complete annual proficiency tests.[96]

While these are positive features, the *Legacy* program does suffer from inadequacies which underscore the need for in-state laboratories to pursue accreditation under the standards of the *International* program or an accreditation program comparable to it. Under the *International* program, there are no optional requirements for quality management systems and technical operations of laboratories, unlike the *Legacy* program.[97] Each requirement must be met for accreditation.[98] The *International* program also has an additional requirement for an annual site visit, at which time "any issues that may have come to the attention of ASCLD/LAB and/or requirements selected by ASCLD/LAB are reviewed."[99] Furthermore, the *International* program bars ASCLD Consulting, a for-profit corporation criticized for working with applicant laboratories to meet *Legacy* program requirements, from consulting with laboratories on their applications for *International* program accreditation.[100]

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[93] ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 28, at 1; *INTERNATIONAL* SUPPLEMENTAL REQUIREMENTS, *supra* note 34, at 2.

[94] ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 29, at 24–25; ISO/IEC 17025: GENERAL REQUIREMENTS, *supra* note 28, at 3; *INTERNATIONAL* SUPPLEMENTAL REQUIREMENTS, *supra* note 34, at 7.

[95] ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 29, at 11, 41–54. *See also* ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 43, at 25 (noting that ASCLD/LAB has "adopted a comprehensive Proficiency Review Program (PRP) and established a Proficiency Review Committee (PRC) for each of the accredited disciplines"); NAS REPORT 2009, *supra* note 2, at 59 ("Because of the distinctly different professional tracks within larger laboratories, for example, technicians perform tests with defined protocols, and credentialed scientists conduct specialized testing and interpretation.").

[96] ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 29, at 37–50.

[97] ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 43, at 13–14; ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 29, at 84, app. 3.

[98] ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 43, at 13–14; ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 29, at 84, app. 3.

[99] NAS REPORT 2009, *supra* note 1, at 199; ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 43, at 23–28.

[100] Joseph Neff & Mandy Locke, *Forensic Groups Ties Raise Concerns*, NEWS & OBSERVER, Oct. 13, 2010, http://www.newsobserver.com/2010/09/26/703376/forensic-groups-ties-raise-concerns.html (last visited Sept. 10, 2013). The deficiency of the *Legacy* program is perhaps best illustrated by the failures of North Carolina's *Legacy*-accredited State Bureau of Investigations (SBI). After the highly publicized exoneration of Gregory Taylor in 2010, an independent evaluation of the SBI's practices from January 1987 through January 2003—during which time the SBI was accredited through the *Legacy* program—raised "serious issues about laboratory reporting practices . . . and the potential that information that was material and even favorable to the defense of criminal charges was withheld or misrepresented." N.C. ATT'Y GEN. OFFICE, AN INDEPENDENT REVIEW OF THE SBI FORENSIC LABORATORY 4 (2010). Despite SBI's long-standing *Legacy* accreditation, the independent review of the SBI's practices during that time identified laboratory reports in 230 cases that were similar to the reports produced in Taylor's case. For example,

Finally, both accreditation programs of ASCLD/LAB place the decision to confer accreditation with the ASCLD/LAB Board of Directors, a group of fellow laboratory directors from other ASCLD/LAB-accredited laboratories. This arrangement effectively makes any inspection of a laboratory a peer review, which may affect the impartiality of the accreditation process.[101]

Reliability and Validity of Evidence Tested at Texas Crime Laboratories

Notwithstanding the accreditation requirements under Texas law, anecdotal evidence reveals that Texas's in-state laboratories do suffer from deficiencies that affect the integrity of forensic tests and testimony. The failings of the Houston crime laboratory, as well as of the Department of Public Safety (DPS) laboratory based in Houston, are significant in the capital-punishment context. Thirty-five percent of current death-sentenced inmates were sentenced in Harris County, and twenty-five percent of all executions that have taken place in Texas since 1976 were tried in Harris County.[102]

The crime laboratory operated by the City of Houston has been plagued by scandal. A series of audits throughout the past ten years raise questions about the integrity of tests performed at the laboratory, and in its DNA Section, in particular.[103] One such audit by the U.S. Department of Justice uncovered errors in the laboratory's DNA profiles database,[104] while another independent investigation "found that some of the weaknesses in the Laboratory included the absence of a quality assurance program, inadequately trained analysts, poor analytical technique, incorrect

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> cases in which the presumptive tests yielded "positive indications for the presence of blood," but were subsequent confirmatory tests reflecting "negative" or "inconclusive" results were omitted from the final report. The final report in such cases, then, would only indicate the positive results of the less sensitive presumptive test for blood.

Id. at 3.

[101] ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 29, at 8; ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 43, at 15–16. *See also* Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 24 CHAMPION 18 (2000). Furthermore, while Lead Assessors or Inspectors conducting the requisite site-assessments are usually ASCLD employees, occasionally the Lead Assessor may be a volunteer from the ASCLD/LAB Delegates Assembly, which also is comprised of the ASCLD/LAB-accredited laboratories' directors. *Id.* ("This peer-to-peer composition of ASCLD Inspectors creates the potential for conflicts in the close-knit forensic community. If an Inspector is perceived as being too rough on a laboratory, it could limit his or her career opportunities at sister laboratories. Or consider the fact that representatives from the laboratory that I audit today may show up on my doorstep next month to audit my laboratory."); ASCLD/LAB-*LEGACY* 2008 MANUAL, *supra* note 29, at 8–9; ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 43, at 12–14.

[102] *See Offenders on Death Row*, TEX. DEP'T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_county_conviction_offenders.html (last visited Sept. 10, 2013) (listing 98 offenders from Harris County); *Executed Offenders*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_county_conviction_executed.html (last visited Sept. 10, 2013) (listing as executed 118 offenders from Harris County).

[103] *Background on the Investigation*, OFFICE OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEP'T CRIME LABORATORY AND PROPERTY ROOM, http://www.hpdlabinvestigation.org/about.htm (last visited Sept. 10, 2013) Chris Moran, *City Council Agrees to Hand Crime Lab to Independent Board*, HOUSTON CHRON., June 7, 2012. *See also* MICHAEL BROMWICH, FINAL REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM 185–86 (June 13, 2007) [hereinafter BROMWICH REPORT].

[104] U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, COMPLIANCE WITH STANDARDS GOVERNING COMBINED DNA INDEX SYSTEM ACTIVITIES AT THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY 13–14 (Sept. 2010).

interpretation of data, characterizing of results as inconclusive when that was not the result, and the lack of meaningful and competent technical reviews."[105] The 2007 report of the Independent Investigator for the Houston Police Department (HPD) Crime Laboratory and Property Room (Bromwich Report) found that

> Major problems existed in the DNA/Serology Section of the Crime Lab almost from its inception in the early 1990s. These problems were insufficiently recognized by Crime Lab management and the HPD command staff for many years. By the time of the 2002 outside audit, the DNA Section was in shambles—plagued by a leaky roof, operating for years without a line supervisor, overseen by a technical leader who had no personal experience performing DNA analysis and who lacked the qualifications required under the applicable Federal Bureau of Investigation ("FBI") standards, staffed by underpaid and undertrained analysts, and generating mistake-ridden and poorly documented casework.[106]

As documented by the Bromwich Report, these problems affected at least four capital cases.[107] In one of these cases, the State introduced evidence from other crimes attributed to the defendant at the sentencing phase.[108] That evidence, however, was distorted, as "the Crime Lab failed to report (and, in fact, mischaracterized) the clearly probative, and potentially exculpatory, [test] results it had obtained in favor of less reliable, but inculpatory, [] results."[109]

The Bromwich Report also sets out the disparity between the statistical significance of DNA "matches" reported by the Houston Crime Laboratory and those found by experts who retested the same evidence on behalf of the independent investigation, finding that "[i]n many cases, the disparities are staggering."[110] The chart found in the Bromwich Report detailing the disparate findings of HPD analysts and those of the Bromwich investigation regarding statistical significance of DNA matches is reproduced below in Table 2.

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[105] *Id*. at 6 (Sept. 2010) (citing MICHAEL BROMWICH, FINAL REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM (June 13, 2007)).

[106] BROMWICH REPORT, *supra* note 103, at 10.

[107] BROMWICH REPORT, *supra* note 103, at 116. The four capital cases are those of Franklin Dwayne Alix, Juan Carlos Alvarez, Gilmar Alex Guevara, and Derrick Jackson. *Id.*

[108] *Id*. at 123.

[109] *Id*. at 124.

[110] *Id*. at 141.

Table 2: Comparison of Statistics Reported by the Crime Lab with Properly Calculated Frequency Estimates[111]

Suspect's Name	HPD Reported Stats (1 in ___)	Recalculated Stats (1 in ___)
Alix, Franklin	81,000	11
Boudreaux, Raymon	11,200	37
Carter, Harold	9%	75%
Emory, Gregory	13,000	23
Guevara, Luis/Fernandez, Sixto	663 million/61 trillion	5,900/9,100
Harris, Erskin	158,000	8 and 6
House, Dillard	2,773	83
Johnson, Arthur	11 million	113
Lawson, David	1.8 million	55
Lopez, Segundo	1.7 million	400
Meza, Alfredo	2.6 million	9
Pineda, Johnny	110,000	110
Napper, Laurence	statistical match	232,000
Parra, Carlos	14,600	119
Rayson, Carl Lee	1.8 million	145
Segura, Carlos/Zavala, Mark	11,300/758,000	48
Southern, Ronnie	6.3 million	30
Sutton, Josiah	694,000	14
Valdez, Richard	15,000	50
Vanzandt, Lonnie	15	2
Vaughn, Artice	988	42% (~1 in 2)
Ware, Marshall	2.9 million	22% (~1 in 5)
Washington, Dedrick	1,800	428

These problems are aggravated by allegations that some forensic analysts have deliberately falsified or distorted testing results. For example, it appears that analysts from the HPD misrepresented the significance of certain DNA data that were collected.[112] One analyst made serious mistakes that helped to convict Josiah Sutton for a rape for which he was later

[111] *Id.* at 142. The U.S. Department of Justice has similarly found these same types of problems and inconsistencies in at least one Texas death penalty case. Following a misconduct scandal at the FBI laboratory in 1997, the Department of Justice undertook a review of the forensic analysis used in 250 convictions nationwide. In one Texas case, Benjamin Boyle was tried and convicted for the murder of Gail Lenore Smith. He was executed in 1997. The Department of Justice's review of the forensic evidence presented in his case, however, concluded that the examiner did not "perform the appropriate tests in a scientifically acceptable manner, based on the methods, protocols, and analytic techniques available at the time of the original examination(s)." *Attachment to Independent Case Review Report for CDRU #195, Case File #95-269475*, WASH. POST, May 18, 1997, at 2, http://www.washingtonpost.com/wp-srv/special/local/fbi-crime-lab-case-reviews/documents/?d=284108-r0136 (last visited Sept. 5, 2013). The review further found that the examiner's trial testimony was not "consistent with the laboratory report(s)" and not "within [the] bounds of [the] examiner's expertise." *Id.*

[112] In one homicide case, the Crime Lab reported that the results of RFLP testing—a more definitive type of DNA testing—were inconclusive. However, a review of the RFLP tests determined that they contained "very clear typing results" that did not implicate the suspect. *See* MICHAEL R. BROMWICH, FOURTH REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM 35–39 (Jan. 4, 2006) (discussing Texas v. Alix, Cause No. 772073 (Harris Cnty., Tex.)).

exonerated.[113] Most critically, the analyst's notes "state[d] that Sutton's DNA was not a match for the rapist's. However, the information transcribed into the lab's office report said otherwise."[114] Josiah Sutton, who was sixteen at the time of his conviction, went on to serve 4.5 years in prison before the mistakes were identified and he was released.[115] Following this and similar scandals, an independent investigation found that "[i]n more than 20 cases reviewed . . . analysts at the Houston Police Department crime lab failed to report the results of blood-typing and DNA tests that did not implicate the suspects police had identified."[116]

Similarly, a forensic examiner from the DPS crime laboratory in Houston "falsely claimed to have tested a drug sample but actually used results from another case."[117] The analyst handled nearly 5,000 drug cases in the seven years that he worked for the DPS crime laboratory,[118] and it is expected that thousands of convictions will be retried or overturned as a result of the analyst's errors.[119] While the analyst maintains that the errors were administrative mistakes, the Office of Inspector General concluded that, "while performing his duty as a forensic scientist, [the analyst] improperly acted with total disregard for policy and procedure."[120]

The HPD Crime Laboratory's failings have also not been without financial consequence.[121] For example, the City of Houston recently reached a multi-million dollar settlement with George Rodriguez who had been wrongfully convicted of rape and kidnapping after the city's crime laboratory misinterpreted serology test results to exclude a key suspect in the case.[122] Furthermore, the Bromwich investigation itself cost the City of Houston more than $3.8 million.[123] While the Assessment Team applauds every effort to compensate injustice, justice in the first instance also would have made good fiscal sense.

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[113] Lise Olsen & Roma Khanna, *DNA Lab Analysts Unqualified: Review Finds Education, Training Lacking*, HOUS. CHRON., Sept. 7, 2003, at A31.

[114] Mary Ann Fergus, *Josiah Sutton One Year Later*, HOUS. CHRON., Mar. 9, 2004, at A1.

[115] *Id.*

[116] Roma Khanna & Steve McVicker, *Report: HPD Crime Lab Tailored Tests to Theories*, HOUS. CHRON., May 12, 2006 (discussing MICHAEL R. BROMWICH, FIFTH REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM (May 11, 2006)).

[117] Brian Rogers, *Drug Convictions May Be Tossed: Court of Criminal Appeals Says Any Evidence Handled by Disgraced Chemist Is Now Suspect*, HOUS. CHRON., June 6, 2013, at B1.

[118] *See id.*

[119] *See TXCCA Will Overturn Salvador-tainted Cases No Matter What Other Evidence Exists*, GRITS FOR BREAKFAST, June 7, 2013, http://gritsforbreakfast.blogspot.com/2013/06/txcca-will-overturn-salvador-tainted.html (last visited Sept. 5, 2013). According to the head of the Harris County Public Defender's Office, "any of the cases that Salvador was responsible for are suspect, and the courts will not respect those convictions, and they'll be overturned . . . . [i]n Harris County, it could be hundreds." *Id.*

[120] REPORT OF THE TEX. FORENSIC SCI. COMM., TEX. DEP'T OF PUB. SAFETY HOUS. REG'L CRIME LAB. SELF-DISCLOSURE 8, Apr. 5, 2013.

[121] *See, e.g.*, Roma Khanna & Steve McVicker, *'Troubling' Cases Surface in Report on HPD Crime Lab*, HOUS. CHRON., June 17, 2007, at A1 (citing three cases—those of Leroy Lewis, Ronald Cantrell, and Lawrence Napper—in which "new tests have discredited the [Houston Crime Laboratory's] work, eliminating the men as contributors to the biological samples from the crimes or greatly reducing the statistical link between them and the evidence" and noting that, "[f]acing a capital murder charge and possible death sentence, Lewis [had] pleaded guilty to murder").

[122] *Mayor Parker Announces Settlement with Man Wrongly Convicted by Faulty Analysis of Scientific Evidence*, STATES NEWS SERV., Nov. 2, 2012.

[123] Roma Khanna & Steve McVicker, *Lack of Cash Stalls Crime Lab Inquiry: Not All Agree It's Worth $1.5 Million in Additional Funds*, HOUS. CHRON., Sept. 19, 2006, at A1 ("To date, the probe has cost the city $3.8 million.").

In addition, a DPS regional crime laboratory in Houston offers another example. A controlled substances analyst who had worked at the laboratory since 2006 and who ostensibly tested evidence in at least 4,500 cases[124] was terminated "when it was discovered [that] he reported the contents of a batch of pills without testing them, substituting data from another sample."[125] To date, the judgments in over a dozen cases have been set aside by Texas's appellate courts.[126] While the laboratory itself reported this incident to DPS, the fact that one analyst's lapse could cast doubt upon the evidence in thousands of cases gravely undermines confidence in Texas's criminal justice system.

Problems concerning the reliability of testing conducted by crime laboratories are not confined to casework arising out of Harris County. For example, problems also have been identified at the. The Texas Forensic Science Commission released a report in 2012 "express[ing] significant concern regarding the lack of scientific leadership in the [El Paso Police Department Crime Laboratory] from 2006–2011" and observing that "a hierarchical culture [at the laboratory] prioritized police department chain of command over scientific expertise in decision-making."[127] Similarly, the Fort Worth Crime Laboratory's DNA testing section has recently become operational after having been shut down in 2002 "amid backlogs and accusations of shoddy work and contamination."[128]

Finally, and as noted elsewhere in this Chapter, several aspects of forensic investigation occur outside of the accredited-laboratory environment.[129] To the extent that latent prints are examined, digital evidence is reviewed, and other tasks are performed that fall outside the statutory definition of *forensic analysis*, no external accrediting body examines the validity and reliability of the investigation conducted by such laboratories. The extent to which Texas capital cases involve evidence tested by unaccredited laboratories is unknown.

<u>The Forensic Science Commission and the Willingham Case</u>

As mentioned in the Factual Discussion, the Texas Forensic Science Commission (Commission) is empowered to "investigate, in a timely manner, any allegation of professional negligence or

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[124] Brian Rogers, *Hundreds of Cases To Be Reviewed Because of Errors by Crime Lab Worker*, HOUS. CHRON., May 2, 2012.

[125] *Bad Apple at DPS Crime Lab Could Spoil Barrel of Convictions*, GRITS FOR BREAKFAST (Jan. 28, 2013) http://gritsforbreakfast.blogspot.com/2013/01/bad-apple-at-dps-crime-lab-could-spoil.html (reporting on a January 25, 2013, meeting of the Texas Forensic Science Commission, during which the breach in protocol was discussed).

[126] *See, e.g.*, *Ex parte* Sereal, No. AP-76,972 (Tex. Crim. App. Mar. 6, 2013); *Ex parte* Sellers, No. AP-76,975 (Tex. Crim. App. Mar. 6, 2013); *Ex parte* Broussard, No. AP-76,976 (Tex. Crim. App. Mar. 6, 2013); *Ex parte* Rent, No. AP-76,981 (Tex. Crim. App. Mar. 6, 2013); *Ex parte* Artmore, No. AP-76,982 (Tex. Crim. App. Mar. 6, 2013); *Ex parte* Hinson, No. AP-76,983 (Tex. Crim. App. Mar. 6, 2013); *Ex parte* McCardell, No. AP-76,984 (Tex. Crim. App. Mar. 6, 2013); *Ex parte* Martin, No. AP-76,985 (Tex. Crim. App. Mar. 6, 2013); *Ex parte* Eagleton, No. AP-76,986 (Tex. Crim. App. Mar. 6, 2013).

[127] *See* TEX. FORENSIC SCI. COMM., EL PASO POLICE DEPARTMENT CRIME LABORATORY INVESTIGATION 6, 20 (July 27, 2012), *available at* http://www.fsc.state.tx.us/documents/FINAL-EPPDReport082312.pdf (recounting "the most significant corrective actions identified by the ASCLD-LAB lead assessor" following that lead assessor's on-site assessment); *id.* at 10–14 (listing the Texas Forensic Science Commission's findings with respect to laboratory integrity).

[128] Deanna Boyd, *Fort Worth Police's Crime Lab Preparing to Resume DNA Testing*, FORT WORTH STAR-TELEGRAM, Jul. 5, 2012.

[129] *See* TEX. CODE CRIM. PROC. ANN. art. 38.35(a)(4) (2012).

misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by an accredited laboratory, facility or entity."[130] Accordingly, in 2008, the Innocence Project asked the Commission to review the work of the arson analysts in the case of Cameron Todd Willingham. Willingham had been sentenced to death and executed for the murder of his three children which were the result of a fire that engulfed the Willinghams' home in Corsicana, Texas.[131]

The Innocence Project complaint to the Commission included a report by Craig Beyler, a nationally-recognized fire expert, which concluded that "[a] finding of arson could not be sustained."[132] Other experts similarly concluded that the death of his three children resulted from accident.[133] The apparent flaws in the forensic evidence relied upon in Mr. Willingham's trial have led many to conclude that Texas might "become the first state to acknowledge officially that, since the advent of the modern judicial system, it had carried out the execution of a legally and factually innocent person."[134]

The seriousness of the Willingham case, however, has been further compounded by the State's impeding a full investigation into the systemic failures that led to the execution of an arguably innocent man. Shortly before the Commission was scheduled to hear testimony from Beyler, Governor Rick Perry dismissed the Commission's chair and two other members, and the Willingham investigation stalled.[135] Furthermore, on the objection of the State Fire Marshal's Office and the Corsicana Fire Department, the new chair sought the opinion of the Texas Attorney General as to whether the Commission had authority to investigate.[136] The Attorney General answered that evidence tested or offered into evidence before September 1, 2005 fell outside the Commission's jurisdiction, which effectively ended the investigation into the alleged professional negligence and misconduct in the Willingham case.[137]

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[130] TEX. CODE CRIM. PROC. ANN. art. 38.01, § 4(a)(3) (2013).

[131] Mark Benjamin, *The Controversial Willingham Case: What Rick Perry Knew and When*, TIME, Sept. 27, 2011.

[132] *Id.*

[133] Fire expert Gerald Hurst concluded that the original fire investigation report in Mr. Willingham's case "reflects the shortcomings in the state of the art prior to the beginning of serious efforts to introduce standards and to test old theories that had previously been accepted on faith." REPORT OF DR. GERALD HURST, *EX PARTE* WILLINGHAM, TRIAL COURT NO. 24,4670(B), at 2 (Navarro Cnty. Dist. Ct. 2005), *available at* http://www.innocenceproject.org/docs/Willingham_Hurst_Report.pdf. Similarly, Chairman of the Arson Review Committee John Lentini testified at a court of inquiry regarding the Willingham case that "all the evidence is consistent with an accidental fire." Dave Mann, *At Willingham Hearing, Science Finally Takes Center Stage*, TEX. OBSERVER, Oct. 15, 2010, http://www.texasobserver.org/at-willingham-hearing-science-finally-takes-center-stage. *See also* Steve Mills & Maurice Possley, *Man Executed on Disproved Forensics*, CHI. TRIB., Dec. 9, 2004, *available at* http://www.chicagotribune.com/news/nationworld/chi-0412090169dec09,0,7443588,full.story ("[A]ccording to four fire experts consulted by the Tribune, the original investigation was flawed and it is even possible the fire was accidental.").

[134] David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, THE NEW YORKER, Sept. 7, 2009 (internal quotations omitted).

[135] *Id.* It perhaps indicates bad faith on the part of the new chair that he publicly referred to Willingham as a "guilty monster," even though one plausible result of the Willingham investigation would have been to cast grave doubt on Willingham's culpability. Peggy Fikac, *Williamson County DA Being Put on Hot Seat*, HOUS. CHRON., Feb. 28, 2011, at B2.

[136] Tex. Atty. Gen. Op., *Re: Investigative Authority of the Texas Forensic Science Commission*, GA-0866 (July 29, 2011); Tim Eaton, *AG Says Forensic Science Commission Can't Consider Willingham Case, Others Before Sept. 2005*, AM.-STATESMAN (Austin, Tex.), July 29, 2011.

[137] *Id.*

A newly enacted law clarifies that the Commission may investigate both accredited and unaccredited laboratories and "initiate for educational purposes an investigation of a forensic analysis without receiving a complaint."[138] The new law, however, expressly prohibits the Commission from making "a determination of whether professional negligence or professional misconduct occurred or issue a finding on that question…"[139] Neither the Commission nor any other entity in Texas has investigated claims of professional negligence and misconduct by the arson analysts whose testimony helped secure Willingham's conviction.[140] Ultimately, the Commission issued seventeen recommendations after reviewing the Willingham case,[141] and, as a consequence of its work, arson cases that turned on questionable investigative techniques currently are under review by the Innocence Project and Texas State Fire Marshal's Office.[142]

Medical Examiner Offices

There is no requirement under Texas law that medical examiner offices should be accredited.[143] Neither medical examiners nor physicians conducting an autopsy at the direction of a justice of the peace must be certified or otherwise credentialed as forensic pathologists, whether by ABMDI or by any other authority.[144] However, Texas law does specify the circumstances necessitating an autopsy[145] as well as the information required to complete an autopsy of an unidentified person.[146] Medical examiners are required to "keep full and complete records properly indexed, giving the name if known of every person whose death is investigated, the place where the body was found, the date, the cause and manner of death, and shall issue a death

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[138] *See* S.B. 1238, 83d Leg. Sess. (2013–14), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB01238F.htm.

[139] *Id.*

[140] *See* Sommer Ingram, *No Vote on Arson Case after AG's Warning*, DALL. MORNING NEWS, Sept. 10, 2011, at A03. The policy director at the Innocence Project speculated that commissioners became hesitant to investigate negligence and misconduct in the Willingham case after the Texas Attorney General advised that such an investigations would exceed the Commission's authority, remarking: "The lasting legacy of [former Forensic Science Commission Chair] John Bradley is the threat that affirmative action on these allegations may result in [the commissioner's] individual liability." *Id.* (internal quotations omitted) (second alteration in original).

[141] The Commission also reviewed, in tandem with the Willingham case, the case of Ernest Ray Willis, who also had been sentenced to death based on questionable arson analysis. *See* ARSON REVIEW CMTE., REPORT ON THE PEER REVIEW OF THE EXPERT TESTIMONY IN THE CASES OF *STATE OF TEXAS V. CAMERON TODD WILLINGHAM* AND *STATE OF TEXAS V. ERNEST RAY WILLIS* (2006), *available at* http://www.innocenceproject.org/docs/ArsonReviewReport.pdf; TEX. FORENSIC SCI. COMM., ANNUAL REPORT FY2011 (2012). Willis obtained his freedom only after a federal district court found that Willis's trial counsel had been ineffective, *see* Willis v. Cockrell, No. P-01-CA-20, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004), and the district attorney "determined that 'the facts in the case exonerate[d] Mr. Willis.'" Maureen Balleza, *After 17 Years on Death Row, Texas Inmate Walks Free*, N.Y. TIMES, Oct. 8, 2004.

[142] Innocence Blog, *Six Texas Arson Cases to Be Reviewed*, INNOCENCE BLOG, Mar. 21, 2013, *available at* http://www.innocenceproject.org/Content/Six_Texas_Arson_Cases_to_Be_Reviewed.php; Chuck Lindell, *Review of Old Arson Cases Picking Up Steam*, AM. STATESMAN (Austin, Tex.), Oct. 5, 2012.

[143] *See* TEX. CODE CRIM. PROC. ANN. art. 49.25 (2013).

[144] *See id.* at arts. 49.10(c) (referring to "physician[s]" but silent as to their qualifications), 49.25, § 2 ("To the greatest extent possible, the medical examiner shall be appointed from persons having training and experience in pathology, toxicology, histology and other medico-legal sciences.").

[145] *See id.* at arts. 49.04(a), 49.10(e), 49.25, § 6(a).

[146] *See id.* at arts. 49.10(*l*), 49.25, § 9(b) (mandatory content of certain autopsy reports); *see also id.* at arts. 49.10(m) (justices of the peace have discretion to order limited autopsies); 49.25, § 9(a) (medical examiners have discretion to order limited autopsies).

certificate."[147] Nevertheless, these procedures only would be standardized to the extent that these offices voluntarily pursue accreditation, which only is the case at the medical examiner offices of Bexar, Collin, Dallas, Harris, Nueces, Tarrant, and Travis Counties.[148]

Furthermore, only those counties having a population of over one million and no reputable medical school are mandated to have a medical examiner's office.[149] In those counties that do not "have a medical examiner's office or that is not part of a medical examiner's district," justices of the peace are authorized to perform inquests into the death of a person.[150] In 2012 alone, justices of the peace performed 15,371 inquests.[151] This is troublesome in light of the fact that justices of the peace, who are not required to have any medical training or certification, need only consult with a health officer or physician regarding cause of death "at [their] discretion."[152]

While these facts alone demonstrate that the State of Texas is short of complying fully with Recommendation #1, anecdotal evidence of failures at individual medical examiner offices illustrates that—whatever the accreditation status of these offices—the validity, reliability, or timely analysis of forensic evidence in Texas is lacking. In two cases reviewed by the Harris County Medical Examiner's Office, the initial medical examiner later repudiated their findings. In the capital case against Neal Hampton Robbins, the examiner changed her assessment that an infant had died from asphyxiation, stating for the record: "Given my review of all the material from the case file *and having had more experience in the field of forensic pathology*, I now feel that an opinion for a cause and manner of death of undetermined, undetermined is best for this case."[153] This same medical examiner also had her autopsy results reclassified in at least four other cases, leading to the release of at least two individuals who had been convicted of murder based on her testimony.[154]

Likewise, the examiner who conducted the 1999 autopsy in the case against Larry Ray Swearingen substantially revised her estimate of the decedent's date of death—a crucial detail—after reviewing, in 2007, the "internal organs findings in her [1999] autopsy report."[155] While it is agreed that professionals should acknowledge their errors as soon as they become known, the interpretation of forensic evidence must be accurate in the first instance. This is particularly so when the stakes are high, as they inevitably are in capital cases.

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[147] *Id.* at art. 49.25, § 11.

[148] *NAME Accredited Programs*, NAT'L ASS'N OF MED. EXAM'RS (July 12, 2012), *available at https://netforum.avectra.com/eweb/DynamicPage.aspx?Site=NAME&WebCode=PubIA* (follow "Accredited Progams-by state" hyperlink).

[149] TEX. CODE CRIM. PROC. ANN. art. 49.25 § 1 (2013).

[150] *Id.* at art. 49.02.

[151] *See Annual Statistical Report for the Texas Judiciary: Fiscal Year 2012*, TEX. CTS. ONLINE at 86, *available at* http://www.courts.state.tx.us/pubs/AR2012/AR12.pdf.

[152] *See* TEX. CODE CRIM. PROC. ANN. art. 49.10(a) (2013).

[153] *Ex parte* Robbins, 360 S.W.3d 446, 454 (Tex. Crim. App. 2011) (internal quotations omitted) (emphasis added). The Texas Court of Criminal Appeals nevertheless denied appellant relief, explaining that the recantation did not amount to the original testimony being false and that the new evidence had not "unquestionably established [the defendant's] innocence." *Id.* at 463.

[154] Lise Olsen, *New Results of Autopsy Spur Plea: Woman Sent to Prison in Baby's Death Based on Doctor's Report Is Seeking Release*, HOUS. CHRON., Sept. 14, 2009.

[155] *Ex parte* Swearingen, Nos. WR-53613-08, WR-53613-09, 2009 WL 249759, at *6 (Tex. Crim. App. Jan. 27, 2009) (Cochran, J., concurring).

Indeed, as the 2009 *NAS Report* found, "little research is being conducted in the areas of death investigation and forensic pathology in the United States. . . . . Few university pathology departments promote basic pathology research in forensic problems such as time of death, injury response and timing, or tissue response to poisoning."[156] Moreover, "[f]ew forensic science methods have developed adequate measures of the accuracy of inferences made by forensic scientists."[157]

These deficiencies, coupled with a failure to "understand the weaknesses" of medico-legal death investigations,[158] will tend to skew outcomes, particularly if, as critics contend, "some medical examiners may tailor their findings to fit theories developed by prosecutors and law enforcement."[159] In fact, a former chief medical examiner in El Paso County who resigned her post in 2005 claimed that law enforcement had attempted to interfere with the medical examiner office's death investigations.[160] The *NAS Report* likewise expressed concern that "[f]orensic scientists who sit administratively in law enforcement agencies or prosecutors' offices, or who are hired by those units, are subject to a general risk of bias."[161]

Conclusion

The several instances mentioned above call into question the validity and reliability of forensic tests and testimony linked to Texas's crime laboratories. Coupled with the shortcomings identified in the laboratory accreditation programs, the Assessment Team concludes that Texas only partially complies with Recommendation #1.

B. Recommendation #2

Crime laboratories and medical examiner offices should be adequately funded.

Proper funding helps to ensure that crime laboratories and medical examiner offices maintain the equipment needed to reach accurate and reliable results and to hire and retain a sufficient number of competent forensic scientists and staff for timely analysis of forensic evidence.

Crime Laboratories

There are a large number of laboratories that comprise Texas's crime laboratory system—fourteen state-government laboratories and at least twenty laboratories under the auspices of county and city governments. While a review of these budgets may provide some information on whether crime laboratories are adequately funded, the existence of considerable backlogs at several of these laboratories—in addition to the mistakes at various laboratories described under

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[156] 2009 NAS REPORT, *supra* note 1, at 261.
[157] *Id.* at 184.
[158] Yamil Berard, *Questions Raised about the 'Science' of Autopsies*, FT. WORTH STAR-TELEGRAM, Oct. 1, 2009.
[159] *Id.* (quoting Professor Eric M. Freedman of Hofstra Law School: "The medical examiner [sometimes] considers it his job to support whatever series of theories the prosecutors decide to dream up rather than focus on the objective truth").
[160] *Id.*
[161] 2009 NAS REPORT, *supra* note 1, at 185.

Recommendation #1—better suggest the absence of sufficient resources for forensic service providers in the state.

For example, despite repeated requests by the crime laboratory of the Austin Police Department to expand its budget to employ more analysts, the City of Austin has not "add[ed] new scientists to the crime lab in its nine years of operation."[162] As a consequence, a "mounting backlog of samples awaiting testing" has caused "unprecedented delays in the resolution of criminal cases."[163] Likewise, a joint review by the *Austin American Statesman* and an Austin-based news channel found that, as of late-2012, DPS laboratories have "become overwhelmed and backlogged" as "the number of blood samples submitted to [those laboratories] increased 500 percent" in the past six years.[164] As for the effect of this backlog, the report noted that "[t]he impact of DPS lab delays are felt across the state," adding: "While big cities . . . can afford their own crime labs, the vast majority of the state's 2,500 law enforcement agencies rely on DPS labs to test evidence, read fingerprints and identify illegal drugs."[165]

By contrast, the Houston City Council recently approved a $4.4 million plan "to outsource the testing of 6,600 backlogged rape kits to private labs," an investment predicted to "allow the city's crime lab to focus on incoming cases and explore the possibility of additional forensic capabilities."[166] Such a measure may alleviate demands on the city's crime laboratory, whose past history already warrants extra vigilance in managing staff workloads.[167] Also encouraging are recent reports that the Harris County Institute of Forensic Sciences had, as of 2012, "no testing backlog on [rape and murder] crime[s]," such that the Institute has been able to devote resources to investigating property crimes.[168]

Medical Examiners

Delays in conducting autopsies have been reported with respect to the medical examiner's offices in Dallas County,[169] Lubbock County,[170] and Tarrant County.[171] By contrast, the Bexar County Medical Examiner Office has not been subject to this criticism, perhaps owing to the fact

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[162] Tony Plohetski, *Crime Lab Backlogs Weigh Down Court System*, AM.-STATESMAN (Austin, Tex.), Feb. 2, 2013.

[163] *Id.* Also contributing to the backlog are "[n]ew types of street drugs have [] added to the length of time analysts must spend identifying such substances," which further underscores why the laboratory must hire additional analysts. *Id.*

[164] Tony Plohetski, *DPS Labs Face Backlog in DWI Blood Tests*, AM.-STATESMAN (Austin, Tex.), Dec. 6, 2012.

[165] *Id.*

[166] Anita Hassan, *Crime Backlog Erasure Boosts Lab Capacity*, HOUS. CHRON., Mar. 3, 2013, at B1.

[167] *See* Recommendation #1, *supra* notes 101–142 and accompanying text.

[168] Anita Hassan, *Not Even Gloves Can Cover Up Every Clue: Investigators Are Using Microscopic 'Touch DNA' to Solve Property Crimes*, HOUS. CHRON., Mar. 11, 2012, at B1.

[169] Tori Brock, *Walker County Drops Dallas Morgue in Favor of Montgomery County Facility*, HUNTSVILLE ITEM, July 26, 2011 (noting that Walker County "ha[d] been sending its victims of unnatural death to the Dallas medical examiner's office for examination" but that autopsy reporters were "taking two to three months to complete" "[b]ecause of the backlog at the Dallas morgue").

[170] Walt Nett, *Medical Examiner Trying to Fill Second Doctor Slot*, LUBBOCK AVALANCHE-J., Dec. 27, 2012 (noting that the justices of the peace for Tom Green County had "complained [that] the Lubbock County Medical Examiner's office was taking as much as eight months to complete autopsies").

[171] John D. Harden, *Medical Examiner Has Yet to Finish Autopsy*, CLEBURNE TIMES-REV., June 1, 2012; Steve Campbell, *'State-of-the-Art' Addition to Medical Examiner's Facility Opens This Month*, FT. WORTH STAR-TELEGRAM, Sept. 25, 2011.

that the former chief medical examiner "aggressively pursued better standards and financial compensation for his staff in a field that traditionally pays less than other medical careers,"[172] thereby preventing personnel turnover that can lead to processing delays.[173]

Conclusion

Crime laboratories and medical examiner offices continue to suffer from backlogs, delaying the processing of forensic evidence and conducting of autopsies and, consequently, delaying justice. Accordingly, the State of Texas only partially complies with Recommendation #2.

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Recommendations

The Texas Assessment Team is concerned about the documented occurrences of mistake and fraud in forensic analysis in Texas, many of which appear to be the result of systemic and institutional causes. The power of forensic science to aid in the fair administration of justice is enormous. Just as powerfully, however, is the ability of faulty or fraudulent scientific analysis to contribute to wrongful convictions. Wrongful convictions lead not only to imprisonment—and perhaps even execution—of the innocent, but also permit a guilty perpetrator to remain free to commit more crimes. Importantly, incidents of mistake and fraud cast a pall over cases in which a laboratory or analyst conducted shoddy work. The integrity of *many* criminal prosecutions in the state are cast—albeit unfairly—in to doubt. And finally, wrongful convictions also cost the state a great deal money. Since 1992, Texas has paid over $60 million to those it had wrongfully imprisoned—money that could have more effectively been applied to finding the "right guy" the first time around.[174]

The State of Texas must do more to build credibility in the criminal justice process—particularly when a life is at stake. This process is not served by the current patchwork of state and local, accredited and unaccredited, and formal and informal forensic laboratory analysis. Thus, the Assessment Team sets out a number of recommendations to take full advantage of the power of forensic science to aid in the search for truth and to minimize its potential to contribute to conviction of the innocent.

Crime Laboratories and Medical Examiner Offices

DPS laboratories should be the standard-bearer for accurate, timely, and reliable forensic analysis in Texas. These laboratories must be better funded, particularly because many smaller and rural jurisdictions in the state must rely on DPS for forensic analysis. All laboratories conducting forensic analysis—particularly those engaged in analysis that will be admitted in a potential death penalty case—should adhere to the highest standards for casework, such as

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[172] Vianna Davila, *A Career Spent Unlocking Secrets*, SAN ANTONIO EXPRESS-NEWS, Dec. 31, 2006, at 01B.

[173] *See, e.g.*, Walt Nett, *Medical Examiner Trying to Fill Second Doctor Slot*, LUBBOCK AVALANCHE-JOURNAL, Dec. 27, 2012.

[174] Ryan Murphy and Brandi Grissom, *Interactive: Payouts to Exonerated Texas Prisoners*, TEX. TRIB., Feb. 19, 2013, http://www.texastribune.org/library/data/texas-exoneree-payouts (last visited Apr. 13, 2013).

ISO/IEC 17025.[175] While it is commendable that Texas has enacted legislation which mandates DNA testing in all capital cases, Texas does not require that an ISO/IEC 17025-based accredited laboratory conduct the tests.[176] Further, because accreditation is not full proof for ensuring high quality work, individual laboratory standards must also require continuing education of analysts performing this work. Standards must ensure regular and meaningful verification of a laboratory by an outside authority.

In addition, due to the failures at individual medical examiner offices, the Assessment Team recommends that the State, at minimum, require mandatory accreditation of offices and certification of individuals who conduct such investigations—investigations which are inevitable in capital cases.

Finally, several crime laboratories fall under the ambit of law enforcement in Texas.[177] In at least one instance, a medical examiner resigned from office citing law enforcement interference with death investigations.[178] Thus, the Texas Assessment Team recommends that the state adhere to the recommendations set forth in the 2009 *NAS Report*, which recommended that "[s]cientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed."[179]

Texas Forensic Science Commission

Importantly, with the creation of the Forensic Science Commission (Commission), Texas has formed a unique entity that serves as a valuable external check on the reliability of forensic investigations in the state.

The Assessment Team, however, is particularly troubled by the events surrounding the investigation of the Willingham case. These events reflect an institutional reluctance at the highest levels of state government to address serious and profound questions about the accuracy and efficacy of Texas's criminal justice system. A chief means for avoiding miscarriages of justice in the future is to understand how they occurred in the past. The delays and obstruction, which hampered the Commission's investigation into the case against Cameron Todd

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[175] In Virginia, for example, all of the laboratories used by the Virginia Department of Forensic Science have obtained accreditation through the American Society of Crime Laboratory Directors/Laboratory Accreditation Board International Program, which is based on ISO/IEC 17025. *See Accredited Laboratories*, AM. SOC'Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD. (ASCLD/LAB), http://www.ascld-lab.org/labstatus/accreditedlabs.html (last visited Jun. 3, 2013). Conversely, in Texas, only twenty-seven of the fifty-three in-state DPS accredited laboratories have been accredited based on ISO/IEC 17025 standards (either through the ASCLD/LAB *International Program* or FQS-1). *See List of DPS Accredited Labs from Texas*, *supra* note 26.

[176] *See* S.B. 1292, 83d Leg. Sess. (2013–14), *available at* http://legiscan.com/TX/text/SB1292/id/854833/Texas-2013-SB1292-Enrolled.html.

[177] *See, e.g.*, List of DPS Accredited Labs from Texas, TEX. DEP'T. PUB. SAFETY (Jan. 3, 2013), *available at* http://www.txdps.state.tx.us/CrimeLaboratory/documents/List_Texas_LabsAccredited.pdf (last visited Mar. 29, 2013).

[178] Berard, *supra* note 158.

[179] NAS REPORT 2009, *supra* note 1, at 23 ("Administratively, this means that forensic scientists should function independently of law enforcement administrators. The best science is conducted in a scientific setting as opposed to a law enforcement setting.").

Willingham, poorly serve both this worthwhile process as well as the interests of the State of Texas.

The Assessment Team, while mindful of the criticisms levied against the Commission for its approach to the Willingham case, nevertheless appreciates the Commission's work responding to this and other complaints. The recommendations found within the Commission's substantive reports reflect its members' best efforts to work within the confines of their authority, however limited it is.[180] The Assessment Team also applauds the State of Texas for adopting legislation that expands the Commission's authority to include both accredited and unaccredited crime laboratories, as well as to initiate "for educational purposes an investigation of a forensic analysis without receiving a complaint."[181]

The Assessment Team recommends that the State also adhere to the various recommendations promulgated by the Commission in its 900-page report on the dubious forensic science used to convict Cameron Todd Willingham and Ernest Ray Willis.[182] Such recommendations include promoting national standards for arson investigation, requiring enhanced certification and collaborative training for fire investigators, encouraging periodic curriculum and peer review, evidence preservation, and standards for reexamination of cases. A recent bill enacted by the Texas Legislature aimed at providing post-conviction access to prisoners' whose sentences were based on faulty science is a positive step toward implementation of the Commission's recommendations.[183]

Further, a bill recently considered by the Texas Legislature could also assist the State in determining the extent to which wrongful convictions have been due in whole or in part to admission of faulty forensic science in criminal cases.[184] This legislation would create the Timothy Cole Exoneration Review Commission, charged with investigating "all cases in which an innocent person was convicted and exonerated" in order to "identify the cause of wrongful

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[180] *See* TEX. FORENSIC SCI. COMM., AUSTIN POLICE DEPARTMENT CRIME LABORATORY CONTROLLED SUBSTANCE INVESTIGATION (Oct. 5, 2012), *available at* http://www.fsc.state.tx.us/documents/APDFinalReport102312.pdf; TEX. FORENSIC SCI. COMM., EL PASO POLICE DEPARTMENT CRIME LABORATORY INVESTIGATION (July 27, 2012), *available at* http://www.fsc.state.tx.us/documents/FINAL-EPPDReport082312.pdf; TEX. FORENSIC SCI. COMM., REGARDING AUSTIN POLICE DEPARTMENT FORENSIC SCIENCE DIVISION CRIME LABORATORY INVESTIGATION (Sept. 8, 2011), *available at* http://www.fsc.state.tx.us/documents/M_ APD090811FINALexecuted092811.pdf; TEX. FORENSIC SCI. COMM., BRANDON LEE MOON INVESTIGATION (Sept. 8, 2011), *available at* http://www.fsc.state.tx.us/documents/ Moon091311.pdf.

[181] *See* S.B. 1238, 2013 Leg. Sess., Reg. Sess. (Tex. 2013) (expanding the Commission's jurisdiction to include forensic analyses conducted at unaccredited crime laboratories).

[182] *See* TEX. FORENSIC SCI. COMM., WILLINGHAM/WILLIS INVESTIGATION 39–52 (Apr. 15, 2011), *available at* http://www.fsc.state.tx.us/documents/FINAL.pdf.

[183] The new law, S.B. 344, permits, under very limited circumstances, an inmate to seek a writ of habeas corpus if

> …relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and [] the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and [] the court . . . also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

TEX. CODE CRIM. PROC. ANN. art. 11.073(b)(2) (2013) (effective Sept. 1, 2013).

[184] H.B. 166, 83d Leg. (as passed by House, Apr. 24, 2013).

convictions" and "consider and develop solutions and methods to correct the identified errors and defects through legislation, rule, or procedural change."[185]

[185] *Id*. at § 9.

CHAPTER FIVE

PROSECUTION

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversarial system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused, to enforce the rights of the public, and to instill confidence in the legal system.

Prosecutors preside over a wide range of cases and often have to make decisions that implicate a number of policy concerns. Each prosecutor has responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. S/he must also decide whether to prosecute or dismiss charges or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous discretion in deciding whether or not to seek the death penalty.

In the American legal system, formal law operates as a relatively light check on these decisions, and presumes that prosecutors will be guided by their professional orientation and ethical obligation to seek justice. Thus, the character, quality, and efficiency of the whole system are shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers. When that discretion is exercised in a manner consistent with legal and ethical obligations, prosecutors have enormous potential to do justice. Indeed, given that prosecutors are in many respects the cornerstone of the criminal justice system, they have the opportunity to have tremendous positive influence over the conduct of other actors. For example, they may encourage best law enforcement practices in procuring and documenting evidence. When, however, that discretion is exercised in derogation of legal or ethical duties—whether intentionally, recklessly, or negligently—tremendous harm can flow to criminal defendants, crime victims, and society at large. This Chapter includes all such derogations—whether intentionally, recklessly, or negligently done—within the term prosecutorial misconduct.

Prosecutorial misconduct can encompass various actions, including, but not limited to, failing to disclose exculpatory evidence, abusing discretion in filing notices of intent to seek the death penalty, improper or discriminatory use of peremptory challenges during jury selection, covering-up or endorsing perjury by informants and jailhouse snitches, or making inappropriate comments during closing arguments.[1] The causes of such failings include lack of proper training, inadequate supervision, insufficient resources, excessive workload, cognitive or motivational bias, or even bad faith or ill will.

Nationwide, between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions, or

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[1] Steve Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor Is Cited for Misconduct?*, CTR. FOR PUB. INTEGRITY, June 26, 2003, *available at* http://www.publicintegrity.org/2003/06/26/5517/breaking-rules; *see also Government Misconduct*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited on Aug. 20, 2013).

reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.[2] Importantly, this number does not include those cases in which a court found misconduct, but observed that it was not properly preserved at trial or found that the misconduct was "harmless error."

Ensuring adequate funding to prosecutor offices, adopting standards to ensure manageable workloads for prosecutors, enacting written office policies to guide prosecutors' discretion, and requiring that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the police or prosecution, are all policies that enhance the justice-seeking conduct of prosecutors and help ensure that misconduct does not occur. Importantly, there must be meaningful sanctions for prosecutors who engage in misconduct.[3]

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[2] Weinberg, *supra* note 1.

[3] *See* Imbler v. Pachtman, 424 U.S. 409, 428–29 (1976) ("We emphasize that the immunity of prosecutors from liability in suits under [section 1983] does not leave the public powerless to deter misconduct or to punish that which occurs . . . . [A] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.").

I. FACTUAL DISCUSSION: TEXAS OVERVIEW

A. Prosecution Offices

1. District and County Attorneys

The Texas Constitution provides that district and county attorneys represent the state in criminal prosecutions in their respective district or county.[4] The Texas Legislature determines the scope of their duties in each individual district and county.[5] Texas statutory law describes the various systems in place across Texas. Counties may elect a single district attorney,[6] elect a criminal district attorney,[7] or the county attorney may retain authority to prosecute criminal cases.[8] District and county attorneys are elected to serve four-year terms.[9]

2. State Prosecuting Attorney

The Texas Court of Criminal Appeals appoints a state prosecuting attorney "to represent the state in all proceedings before the court."[10] The state prosecuting attorney serves a two-year term.[11]

3. Attorney General of Texas

The Attorney General of Texas represents the state in federal post-conviction proceedings.[12] The Attorney General or his/her assistants may also "provide assistance in the prosecution of all manner of criminal cases, including participation by an assistant attorney general as an assistant prosecutor" when their assistance is requested by a local district or county attorney.[13]

B. The Texas Disciplinary Rules of Professional Conduct

The State Bar of Texas has established the Texas Disciplinary Rules of Professional Conduct to address the professional and ethical responsibilities of all lawyers in Texas, including prosecutors.[14] The Comments to the Rules state that "[a] prosecutor has the responsibility to see that justice is done, and not simply to be an advocate."[15] As such, in addition to the rules governing the conduct of all lawyers, the Rules impose special responsibilities on prosecutors.[16]

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4 TEX. CONST. art. V, § 21.
5 *Id.*
6 *E.g.*, TEX. GOV'T CODE ANN. § 43.101 (2013).
7 TEX. GOV'T CODE ANN. § 44.001 (2013).
8 *E.g.*, TEX. GOV'T CODE ANN. § 45.142 (2013).
9 TEX. CONST. art. V, § 21.
10 TEX. GOV'T CODE ANN. § 42.001(a) (2013).
11 TEX. GOV'T CODE ANN. § 42.002(b) (2013).
12 *Criminal Justice Divisions*, ATT'Y GEN. OF TEX., https://www.oag.state.tx.us/criminal/criminal.shtml (Aug. 20, 2013).
13 TEX. GOV'T CODE ANN. § 402.028(a) (2013).
14 *See* TEX. DISCIPLINARY R. OF PROF'L CONDUCT.
15 TEX. DISCIPLINARY R. OF PROF'L CONDUCT 3.09 cmt. 1
16 TEX. DISCIPLINARY R. OF PROF'L CONDUCT 3.09. The specific Rules relating to prosecutors are discussed in Recommendation #5, *infra*, notes 211–258 and accompanying text. The Texas Code of Criminal Procedure states

C. *Other Rules and Laws Governing Prosecutors' Responsibilities and Conduct*

1. Capital Charging Decisions

A Texas prosecutor has the discretion to seek the death penalty in any case for which there is probable cause to believe the defendant committed capital murder.[17] Texas statutory law establishes nine circumstances in which "intentionally or knowingly caus[ing] the death of an individual" constitutes capital murder.[18]

2. Discovery Obligations

a. Constitutional Discovery Obligations

Prosecutors have a constitutional duty to disclose to the defendant all exculpatory evidence in the state's possession "where the evidence is material either to guilt or to [level of] punishment, irrespective of the good faith or bad faith of the prosecution."[19] This includes all material exculpatory, mitigating, and impeachment evidence, as well as "favorable evidence known to the others acting on the government's behalf in the case," such as law enforcement officers.[20] Evidence is considered material if there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[21]

b. Discovery Rules Under Texas Law

Currently, Texas law imposes few discovery obligations on prosecutors beyond what is required by the U.S. Constitution. Texas's discovery statute provides that "[u]pon motion of the defendant" and a showing of "good cause," the prosecution must disclose documents and other evidence which "contain evidence material" to the case.[22] However, the statute exempts from discovery the "written statements of witnesses and . . . the work product of counsel in the case and their investigators and their notes or report" in all circumstances.[23]

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that "[i]t shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done." TEX. CODE CRIM. PROC. ANN. art. 2.01 (2013).

[17] Crutsinger v. State, 206 S.W.3d 607, 612–13 (Tex. Crim. App. 2006); TEX. CODE CRIM. PROC. ANN. art. 37.071 (2013); TEX. DISCIPLINARY R. OF PROF'L CONDUCT 3.09(a) (providing that a prosecutor may prosecute a case only if it is supported by probable cause). The prosecutor's discretion to seek the death penalty is discussed further under Recommendation #1, *infra*, notes 34–77 and accompanying text.

[18] TEX. PENAL CODE ANN. §§ 19.02(b)(1), 19.03 (2013).

[19] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[20] Kyles v. Whitley, 514 U.S. 419, 437 (1995); Giglio v. United States, 405 U.S. 150, 154–55 (1972).

[21] United States v. Bagley, 473 U.S. 667, 682 (1985).

[22] TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (2013).

[23] *Id.*

In 2013, however, Texas passed the Michael Morton Act.[24] The law goes into effect on January 1, 2014, and will require prosecutors to disclose, at the request of the defense,

> (1) any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers;
> (2) any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state; and
> (3) any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged.[25]

Under the new law, "the work product of counsel for the state in the case and their investigators and their notes or reports" remain exempt from the disclosure requirements.[26]

D. Investigation and Discipline of Prosecutorial Misconduct

The State Bar of Texas is responsible for disciplining attorneys who engage in "professional misconduct" in Texas, including prosecutors.[27] The disciplinary process begins when an individual files a grievance with one of the Chief Disciplinary Counsel's (CDC) regional offices.[28] The CDC then conducts an investigation to determine if the attorney engaged in misconduct.[29] The complaint will proceed to trial if (1) the CDC finds just cause to believe that misconduct was committed or (2) the CDC does not find just cause but is overruled by a panel of members of the State Bar Grievance Committee known as the Summary Disposition Panel.[30] Sanctions for misconduct include private reprimand, public reprimand, suspension for a term, and disbarment.[31]

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[24] Chuck Lindell, *Perry Signs Morton Act into Law*, AM.-STATESMAN (Austin, Tex.), May 17, 2013.

[25] S.B. 1611, 83rd Leg., Reg. Sess. (Tex. 2013), *available at* http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/SB01611F.pdf#navpanes=0.

[26] *Id.*

[27] *See* TEX. R. DISCIPLINARY PROC. 8.04, 8.05.

[28] TEX. R. DISCIPLINARY PROC. 1.06(R). The State Bar of Texas website also describes the disciplinary process. *Grievance Procedure*, STATE BAR OF TEX., http://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceInfoandEthicsHelpline/GrievanceProcedure.htm (last visited Aug. 20, 2013); *Punishment for Professional Misconduct*, STATE BAR OF TEX., http://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceInfoandEthicsHelpline/PunishmentMisconduct.htm (last visited Aug. 20, 2013).

[29] *See* TEX. R. DISCIPLINARY PROC. 1.06(G), 2.10, 2.12.

[30] TEX. R. DISCIPLINARY PROC. 1.06(BB), 2.12-2.14. The Grievance Committees are composed of lawyers and non-lawyers nominated by the Director of the State Bar and appointed by the President of the State Bar. TEX. R. DISCIPLINARY PROC. 2.02.

[31] TEX. R. DISCIPLINARY PROC. 1.06(Y).

II. ANALYSIS

The Texas Assessment Team submitted surveys to twenty-three Texas District Attorneys, requesting information on their offices death penalty charging practices as well as other information relevant to this Report. These jurisdictions represented both counties that had sentenced the most defendants to death in Texas, as well as represented the geographic diversity of the state.[32] The survey requested aggregate data on the application of the death penalty in the prosecutor's jurisdiction, as well as information on qualification and training requirements of prosecutors who handle capital cases, funding and budget limitations, and capital charging and discovery practices.[33] The survey informed responding offices that any identifying information relative to each respondent would not be included in the Report. The Assessment Team received completed surveys from two District Attorney offices. The survey is reproduced in the Appendix to this Report.

The Assessment Team has relied on publicly available information on the training, discovery and charging practices, and discipline of Texas's prosecutors, including statutory and case law, media reports, and studies conducted by other entities.

A. Recommendation #1

Each prosecutor office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.

Legal Limitations on the Prosecutor's Decision to Seek the Death Penalty[34]

The U.S. Supreme Court has held that the death penalty is reserved for a "narrow category" of the most culpable offenders.[35] A state's capital sentencing statute is supposed to serve a gatekeeping function, thus preventing juries from "wantonly and freakishly impos[ing]" death sentences.[36] In this sense, a statute that carefully limits the prosecutor's power to seek the death penalty can help ensure that the death penalty is fairly applied.

Framework of Texas's Capital Murder Statute[37]

Texas's capital murder statute establishes the absolute limits of the prosecutor's discretion to seek the death penalty. To obtain a death sentence under Texas law, the prosecution must prove that the defendant committed capital murder.[38] A defendant is guilty of capital murder if s/he

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[32] *See infra* Appendix, *Selection of Examined Counties in Texas.*

[33] *See infra* Appendix, *Texas Dist. Att'y Survey*.

[34] Given the wide array of instances in which a prosecutor may exercise his/her discretion, the Assessment Team's analysis contained in Recommendation #1 will be limited to a review of the exercise of discretion in seeking the death penalty.

[35] Atkins v. Virginia, 536 U.S. 304, 319 (2002).

[36] Gregg v. Georgia, 428 U.S. 153, 207 (1976). While juror and prosecutor discretion also limits the application of the death penalty, *Gregg* holds that only "legislative guidelines" can ensure consistency and prevent "freakishly"-imposed death sentences. *Id.*

[37] Texas's capital sentencing procedure is described in more detail in Chapter One.

[38] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (2013).

"intentionally or knowingly causes the death of an individual" and one of the following additional elements is present:

(1) the victim was a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
(2) the defendant intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat;
(3) the defendant commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
(4) the defendant commits the murder while escaping or attempting to escape from a penal institution;
(5) the defendant, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution, or murders with the intent to establish, maintain, or participate in a combination or in the profits of a combination;
(6) the defendant murders another while incarcerated for murder or while serving a sentence of life imprisonment or a term of 99 years for aggravated kidnapping, aggravated sexual assault, or aggravated robbery;
(7) the defendant murders more than one person during the same criminal transaction, or during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct;
(8) the defendant murders an individual under ten years of age; or
(9) the defendant murders another in retaliation for, or on account of, the service or status of the other person as a judge.[39]

If the jury finds the defendant guilty of capital murder in the guilt determination phase and the prosecution is seeking the death penalty, the jury must then decide whether to sentence the defendant to death in the sentencing phase.[40] At the close of the sentencing phase, the court instructs the jury on two to three special sentencing issues that are used to determine the defendant's sentence. The jury must consider "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[41] In cases in which the defendant is charged as a party to the murder, the jury is also asked "whether the defendant actually caused the death of the deceased or intended to kill the deceased or anticipated another human life would be taken."[42] Finally, if the jury answers "yes" to the prior question (or, where applicable, questions), the jury must consider "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed."[43]

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[39] TEX. PENAL CODE ANN. §§ 19.02(b)(1), 19.03 (2013). For the sake of brevity, the language of some of the elements has been paraphrased.
[40] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (2013).
[41] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (2013).
[42] *Id.*
[43] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013).

Prosecutorial Discretion under Texas's Capital Murder Statute

The Texas Court of Criminal Appeals has held that prosecutors have "broad discretion . . . when deciding whether to pursue the death penalty" and may choose "to seek or not to seek the death penalty" in any capital murder case.[44] Most states, including all of the states previously assessed by the American Bar Association Death Penalty Due Process Review Project, require a finding of a specific statutory aggravating factor in the sentencing phase for a defendant convicted of capital murder to be eligible for the death penalty.[45] Prosecutors in these jurisdictions must not only ensure that the offense is eligible for a capital murder charge before seeking the death penalty, but must also ensure that evidence exists to prove at least one aggravating factor to the jury at sentencing should the defendant be convicted of capital murder.[46]

Under Texas law, however, the capital murder statute itself establishes the absolute limits on a prosecutor's discretion to seek the death penalty.[47] Many of the factors that would be considered "aggravating" in other jurisdictions are instead treated as elements of "capital murder" under Texas law—meaning that probable cause to find those factors does not distinguish cases in which the death penalty will be pursued from those cases in which it will not be sought.[48] Texas law does establish that a jury must consider the special sentencing issues before sentencing a defendant to death in the penalty phase.[49] However, these special issues do little to guide a prosecutor's decision to seek the death penalty as they are based on subjective criteria such as the probability that the defendant will "constitute a continuing threat to society."[50]

Thus, given this broad discretion and the relatively unique nature of Texas's statutory scheme for capital cases, little guidance is available from the existing legal framework to assist prosecutors in determining whether s/he should seek the death penalty in a given case. The very nature of the Texas death penalty scheme takes away some of the de facto guidance that exists in other statutory schemes.

Policies and Practices of Individual District Attorney Offices

Given that Texas prosecutors have broad discretion to seek the death penalty, it is imperative for individual District Attorneys to implement policies and procedures to ensure that this discretion is exercised fairly and consistently. A review of the policies and practices of some Texas

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[44] Crutsinger v. State, 206 S.W.3d 607, 612–13 (Tex. Crim. App. 2006).

[45] ALA. CODE § 13A-5-40(a)(2013); ARIZ. REV. STAT. ANN. § 13-751(F) (2013); FLA. STAT. § 921.142(6) (2013); GA. CODE ANN. § 17-10-30 (2013); IND. CODE § 35-50-2-9(b) (2013); KY. REV. STAT. ANN. § 532.025(2)(a) (2013); MO. REV. STAT. § 565.032(2) (2013); OHIO REV. CODE ANN. § 2929.04 (2013); 42 PA. CONS. STAT. § 9711(d) (2013); TENN. CODE ANN. § 39-13-204(i) (2013); VA. CODE ANN. § 19.2-264.4(C) (2013). The Virginia statutory scheme, however, bears some similarity to the Texas scheme, as Virginia recognizes only two statutory aggravating factors, both of which are based on subjective determinations. *See id.*

[46] *Id.*

[47] *See* TEX. PENAL CODE ANN. § 19.03 (2013).

[48] *Compare* TEX. PENAL CODE ANN. § 19.03 (2013) (specifying the several offenses constituting capital murder) *with* KY. REV. STAT. ANN. § 507.020 (defining murder) *and* KY. REV. STAT. ANN. § 532.025(2)(a) (2013) (listing eight possible aggravating circumstances, at least one of which the prosecution must file notice of its intent to seek prior to the commencement of any capital trial).

[49] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (2013).

[50] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (2013).

District Attorneys indicates that while some prosecutors have developed formal procedures for determining whether to seek the death penalty, others have not.

The Dallas County District Attorney has formed a "death penalty review panel" of senior prosecutors in the office.[51] The panel reviews each capital-eligible murder case to determine whether the death penalty should be sought.[52] Under this policy, the office pursued the death penalty in eight cases from 2006 to 2012, and obtained seven death sentences.[53] It is not clear, however, what policies and procedures govern this panel or what factors the panel considers in making its decision.[54]

In 2011, the now-former Harris County District Attorney stated that her office does not seek the death penalty in the "vast majority" of capital murder cases.[55] It is unclear whether this practice was directed by any particular procedures or policies on the selection of death penalty cases. This practice, however, contrasts with past practices in Harris County. The Harris County District Attorney from 1981 to 2000 sought the death penalty in "every single case that could qualify as a capital murder."[56] As a result, over the course of this District Attorney's tenure, over 115 persons were sentenced to death and executed from Harris County—more than twice the number of any other county in the United States—since the death penalty was reinstated in 1976.[57] A new District Attorney was elected in Harris County in 2012, and it is not known what policies that office will pursue.[58]

The Assessment Team received responses from two District Attorney offices it surveyed. One District Attorney who responded to the Assessment Team's survey of prosecutors' offices stated the District Attorney personally decides whether to seek the death penalty in each case.[59] The office also stated that it possessed no specific or general policy on how the decision to seek the death penalty is made, but that the "facts and record" are the most important factors considered in the decision.[60] The District Attorney also stated that s/he consults with the victim's family members before making the decision, but does not typically consult with defense counsel.[61]

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[51] Michael Hewlett, *First Black District Attorney in Texas Speaks to Wake Forest Law Students*; *Has Pushed for Racial Justice Act in Texas*, WINSTON-SALEM JOURNAL (N.C.), Apr. 5, 2013.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] Jeffrey Toobin, *The Mitigator*, NEW YORKER, May 9, 2011, *available at* http://www.newyorker.com/reporting/2011/05/09/110509fa_fact_toobin?currentPage=all.

[56] Bruce Tomaso, *Death Row From Different Perspectives: The District Attorney*, DALLAS MORNING NEWS, Oct. 1, 1995, at 33A (stating that in 1995, Holmes was "responsible for almost 40 percent of the executions in Texas" and that "by itself, Harris County account[ed] for more executions than any other state."). *See also* Mike Tolson and Steve Brewer, *Harris County is a Pipeline to Death Row*, HOUS. CHRON., Feb. 4, 2001, at A1 (quoting John B. Holmes, Jr., the Harris County District Attorney, that "[i]f the death penalty substantively fits a given crime and I have enough stuff so that a jury will give it, tell me why I shouldn't prosecute it. It promotes disrespect for the law if you don't enforce it.").

[57] *Top 15 Counties by Execution Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions-county (last visited Aug. 20, 2013).

[58] *A Day of Renewal: New DA Planning a Quick Start in New Year*, HOUS. CHRON., Jan. 2, 2013, at B2.

[59] Dist. Att'y A Survey Response, provided to Jennifer Laurin, Chair, Tex. Death Penalty Assessment Team, at 6 (Mar. 14, 2013) (on file with author) [hereinafter Dist. Att'y A Survey Response].

[60] *Id.*

[61] *Id.* at 5.

The other responding District Attorney, by contrast, stated that s/he consults with defense counsel before deciding to seek the death penalty, and will consider any mitigating evidence presented to him/her by counsel.[62] The District Attorney described his/her decision-making process as "evidence-based," but it is unclear whether the office has promulgated policy on the decision to seek the death penalty.[63]

Geographic Disparity in Texas's Capital Charging Practices

It appears that there is significant disparity in Texas capital charging and sentencing practices. Most death sentences in Texas have been clustered in a small number of Texas's largest counties. As of March 2012, 50.4% of the 1,060 death sentences handed down in Texas since 1976 have been from just four counties: Harris, Dallas, Bexar, and Tarrant.[64] Notably, 120 of Texas's 254 counties have not imposed *any* death sentence since 1976.[65]

In the 1996 case *Bell v. State*, a death-sentenced defendant alleged on direct appeal that the apparent geographic disparity in Texas death sentences was due to financial constraints in certain counties.[66] The defendant claimed that the Texas death penalty was unconstitutionally arbitrary because "counties with large tax bases, such as Jefferson County [where the defendant was convicted], are able to seek the death penalty more frequently than smaller or rural counties, who 'are unable to seek the death penalty in any case, no matter how worthy the prosecutor may believe that a particular capital defendant is for capital punishment,' or in medium-sized counties, who often 'are able to seek the death penalty in only a tiny fraction of eligible capital cases because of financial restraints.'"[67] The Texas Court of Criminal Appeals dismissed the claim, noting that the defendant had not presented any empirical data.[68]

A similar claim was raised in the 2003 case *Allen v. State*.[69] The defendant offered as evidence "tables from the Texas Department of Criminal Justice's website showing the number of offenders sentenced to death and the number of offenders executed from each county in Texas" as well as press releases discussing financial constraints.[70] However, the Court of Criminal Appeals again denied the claim because the defendant "failed to provide us with budgetary data for each" Texas county.[71]

Finally, in 2006, a defendant raised this disparity claim in *Crutsinger v. State*.[72] While defense counsel sought budgetary data from each Texas District Attorney's Office, "useable data" was received from only about one hundred counties.[73] The Court of Criminal Appeals again rejected

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62 Dist. Att'y B Survey Response, provided to Jennifer Laurin, Chair, Tex. Death Penalty Assessment Team, at 5 (Feb. 27, 2013) (on file with author) [hereinafter Dist. Att'y B Survey Response].
63 *See id.* at 5–6.
64 *See infra* Appendix, *Selection of Examined Counties in Texas*.
65 *Id.*
66 Bell v. State, 938 S.W.2d 35, 55 (Tex. Crim. App. 1996) (en banc).
67 *Id.*
68 *Id.*
69 Allen v. State, 108 S.W.3d 281, 285–86 (Tex. Crim. App. 2003) (en banc).
70 *Id.* at 286.
71 *Id.*
72 Crutsinger v. State, 206 S.W.3d 607, 611–12 (Tex. Crim. App. 2006).
73 *Id.* at 612.

the claim, stating that "the amount of resources available, if a factor at all, is only one of numerous factors that may bear upon the exercise of a prosecutor's discretion."[74] The Court of Criminal Appeals has not determined whether it is acceptable to consider cost in determining whether to seek the death penalty.

Conclusion

Texas prosecutors have nearly absolute discretion to seek the death penalty in a capital murder case. While the Dallas County District Attorney has enacted some policies and procedures governing the exercise of this discretion, other counties have not enacted such policies. A review of the available data also indicates a significant disparity in capital sentencing decisions among Texas counties. However, because the Assessment Team was unable to obtain the policies and practices used by all 254 counties in determining whether to seek the death penalty, the Team could not determine if Texas is in compliance with Recommendation #1.

Recommendation

The Assessment Team recommends that Texas's District Attorneys develop comprehensive written guidelines for the exercise of discretion in death penalty-eligible cases. The guidelines need not describe which cases will and will not be eligible for the death penalty, but they should describe the procedure used to make the decision and state what factors should be considered in the decision-making process.[75]

In addition, while it appears that there is significant geographic disparity in death penalty charging practices, a more comprehensive examination is necessary to determine the cause and full extent of this disparity. To date, there has been no comparative study of charging and sentencing practices among Texas's 254 counties; in particular, no study has analyzed charging practices for comparable crimes.[76] Accordingly, the State of Texas should undertake or commission a comprehensive review of this important question relating to the predictability and fairness of death sentencing in Texas. Such a review should include an analysis of whether various jurisdictions' finances affect the decision to seek the death penalty.[77] In order to ensure the reliability of such an examination, the state should collaborate with social scientists

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[74] *Id.*

[75] Other jurisdictions may provide useful examples as to what kind of information should be contained in written guidelines governing the exercise of discretion in capital cases. *See, e.g.*, U.S. ATT'YS CRIMINAL RES. MANUAL, U.S. ATTORNEY'S OFFICE 9-10.030 (June 2007), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm#9-10.030 (Purposes of the Capital Case Review Process); OFFICE OF THE ILL. ATT'Y GEN. & ILL. STATE'S ATTORNEYS ASS'N, DEATH PENALTY DECISION GUIDELINES 2 (2006); NEW JERSEY COUNTY PROSECUTOR ASS'N, PROSECUTORS' GUIDELINES FOR DESIGNATION OF HOMICIDE CASES FOR CAPITAL PROSECUTION (1989). Illinois repealed the death penalty in 2011; New Jersey repealed the death penalty in 2007.

[76] For an example of a well-controlled study, see Scott Philips's examination of the influence of race on capital cases in Harris County. Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 808 (2008). This study is discussed in detail in Chapter Twelve.

[77] A recent Missouri study on death penalty charging practices could serve as a model for a Texas study. *See* Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-making in Death-eligible Cases*, 51 ARIZ. L. REV. 305 (2009).

experienced in the research collection and proper methodology that must be undertaken for such a comprehensive review.

B. Recommendation #2

Each prosecutor office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

When a person is wrongfully convicted, not only is an innocent person incarcerated or possibly sentenced to death, but a guilty criminal may also remain free to commit other crimes. Thus, it is critically important for prosecutors to establish procedures and policies for evaluating potentially unreliable evidence.

Eyewitness misidentifications, false confessions, and untruthful jailhouse informant testimony are among the most common types of evidence that lead to wrongful convictions in the United States. According to the Innocence Project, eyewitness identification has played "a role in nearly 75% of convictions overturned through DNA testing,"[78] and "[i]n about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty."[79] Moreover, "statements from people with incentives to testify—particularly incentives that are not disclosed to the jury—are [often] the central evidence in convicting an innocent person."[80]

Sound laws and procedures governing the manner by which law enforcement officers gather these types of evidence, as discussed in Chapter Two on Law Enforcement, may help to prevent wrongful convictions. However, it is particularly important for prosecutors to serve a gate-keeping function when unreliable or falsely corroborating evidence is obtained over the course of a criminal investigation. Some of the flaws in this kind of evidence are uniquely difficult to reveal in cross-examination.[81]

It is equally important that prosecutors be made aware of factors that may unconsciously affect their ability to evaluate the reliability of certain kinds of evidence. "Unintentional cognitive biases," for example, which consists of a "set of information-processing biases that we all share, rather than exclusively to ethical or moral lapses," may impede prosecutors' ability to objectively ferret out whether and how such evidence should be presented.[82] For example, due to a form of cognitive bias known as "confirmation bias," which "leads individuals to seek out and prefer information that tends to confirm whatever hypothesis they are testing," "a prosecutor reviewing

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[78] *Understanding the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Aug. 20, 2013). For a discussion of issues related to eyewitness misidentification, see Chapter Three on Law Enforcement.

[79] *False Confessions*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Aug. 20, 2013).

[80] *Understanding the Causes: Informants*, INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Snitches-Informants.php (last visited Aug. 20, 2012) (stating that "[i]n more than 15% of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial").

[81] *See* DAN SIMON, IN DOUBT 150–60 (Harvard Univ. Press, 2012).

[82] Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1607 (2006).

a file to determine a suspect's guilt would be inclined to look only for evidence that supports a theory of guilt."[83] Additionally, another form of cognitive bias, known as "defense bolstering," may adversely affect prosecutorial decision-making, particularly following a decision to pursue the death penalty: in this instance, "psychologists have found that when people must justify a decision to which they have already committed, they . . . hold[] fast to that position even in the face of contrary evidence."[84] This is particularly problematic in the context of the death penalty, where the stakes are inherently much higher.

Accordingly, prosecutors should be trained on and develop policies for evaluating the strength of the evidence in these kinds of cases, as well as ways to minimize the influence of cognitive bias on their decision-making.

Wrongful Convictions in Texas

From 1988 to 2013, 117 persons in Texas were exonerated of crimes they did not commit.[85] This includes forty-seven persons exonerated by DNA testing, more than any other state.[86] A significant number of these wrongful convictions, in both capital and non-capital cases, were due to eyewitness misidentifications, false confessions, and false jailhouse informant testimony. These exonerations compellingly demonstrate the need for prosecutors to carefully scrutinize cases that rely on these types of evidence.

Wrongful Convictions Based on Eyewitness Misidentifications and False Confessions

For example, a review of wrongful convictions catalogued by the National Registry of Exonerations reveals at least sixty-one persons exonerated of serious violent felonies in Texas from 1977 to 2013 whose convictions were, at least in part, due to eyewitness misidentifications.[87] This includes three persons who were sentenced to death.[88] Furthermore, at least five persons in Texas whose convictions were in part or in whole based on false confessions have been exonerated of serious violent felonies from 1989 to 2013.[89] One of these persons received the death penalty at trial.[90] Texas exonerations based on misidentification and false confessions are discussed further in Chapter Two on Law Enforcement.

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[83] Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. LAW & LIBERTY 512, 516–17 (2007).

[84] Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 99, 1004 (2009) (citing Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCH. BULL. 255, 257 (1999)).

[85] Will Weissert, *Texas' Chief Justice Wants Investigation of All Wrongful Convictions*, FT. WORTH STAR-TELEGRAM, Mar. 7, 2013, *available at* http://www.star-telegram.com/2013/03/06/4665880/texas-chief-justice-wants-investigation.html.

[86] *Id.*

[87] Chart prepared by Mark Pickett on May 8, 2013 based on data from the National Registry of Exonerations (on file with author) [hereinafter Texas Exonerations Chart]. *Browse Cases*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (select "Texas" in "State" field) (last visited Aug. 20, 2013).

[88] *Id.*

[89] *Id.*

[90] *Id.*

Wrongful Convictions Based on Jailhouse Informant Testimony

In addition, at least six persons exonerated of serious felonies in Texas were convicted, at least in part, based on the testimony of jailhouse informants and other persons who received a benefit from the prosecution in exchange for their testimony.[91] A death sentence was imposed in three of these cases.[92]

Federico Macias, for instance, was convicted and sentenced to death based largely on the testimony of a co-defendant and a jailhouse informant, both of whom received favorable sentences in exchange for their testimony.[93] Macias had been charged with the 1983 murder and robbery of a married couple in El Paso for whom he had done some work as a handyman.[94] There were three pieces of evidence connecting Macias to the murder presented at trial.[95] The first was the testimony of Pedro Luevanos.[96] Luevanos himself had been arrested two days after the murder when Maria Monteros—a neighbor of the victims—reported to police that "a car with two men in it [and that matched Luevanos's license plate number] made the same repeated trip around her neighborhood, which included driving down an alley behind the [victims'] house."[97] Monteros and her husband subsequently identified Luevanos as the driver in a lineup, but could not identify Macias as the passenger.[98] In a written statement, Luevanos told police that he and Macias had been "driving around town" when Macias got out of the car in a neighborhood and walked down an alley.[99] According to Luevanos, when Macias returned, he was carrying an athletic bag and covered in blood.[100] Luevanos said Macias told him that he "admitted that he had killed some people because they recognized him."[101] In exchange for his testimony against Macias before a grand jury and at trial, Luevanos was promised blanket immunity from prosecution.[102]

Although Luevanos's testimony before the grand jury comported with his written statement described above, he later told a jail inmate that he and Macias planned and carried out the murder together, having selected the victims' house because Macias "had worked for them and knew they had money."[103] The District Attorney revoked Luevanos's immunity deal, but allowed him to "plead guilty to a burglary-of-a-habitation charge on which the District Attorney would recommend a sentence of 25 years in prison," provided Luevanos agreed to testify that he and Macias committed the murder.[104] Luevanos then gave a second written statement to police in which he admitted to being involved in the murder, but which differed significantly from what

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[91] *Id.*
[92] *See Texas Exoneration Chart, Detail List*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.
[93] *See* Martinez-Macias v. Collins, 810 F. Supp. 782 (W.D. Tex. 1991).
[94] *Id.* at 791.
[95] *Id.* at 792.
[96] *Id.*
[97] *Id.* at 791–92.
[98] *Id.* at 791.
[99] *Id.* at 792.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 793.

Luevanos told the inmate with respect to what items he took from the home and what he witnessed.[105] Luevanos' trial testimony was similar to the written statement.[106]

The second piece of evidence against Macias was the testimony of jailhouse informant Edward Parker.[107] Parker testified that he overheard Macias tell another inmate that "he had tied up an old man and assassinated him" and that "he had worked for this man and had been to his house and that [he] had worn a blue shirt with blood stains on it."[108] Finally, a nine-year-old girl testified that she had a sleepover with Macias' daughters at Macias' house one night around the date of the murder.[109] The girl testified that Macias had blood on his shirt and that he "was carrying a gun that looked like a BB gun but was not a BB gun."[110] The prosecution also alleged that Macias had moved to California shortly after the murder to evade the police.[111]

There was, however, no physical evidence linking Macias to the crime and in federal habeas proceedings, evidence of Macias' innocence came to light.[112] Macias' defense counsel had failed to call an alibi witness, Mario Carreon, who owned the convenience store where Macias' wife worked.[113] Carreon would have testified that Macias visited his wife at the store on the day of the murder from 8:30 a.m. to 9:30 a.m.[114] Macias then borrowed Carreon's pickup truck to do some work for a neighbor, returned to the store at 11:30 or 11:45 a.m. wearing the same clothes, and did not leave the store again until 3:30 p.m.[115] Trial evidence indicated that the murder occurred "sometime near noon."[116] Moreover, Carreon's account sharply contradicted that of Luevanos, who had testified that he had been drinking with Macias since 9:00 a.m. on the day of the murder.[117] Carreon also would have testified that, several days before the murder, Macias wife told Carreon that Macias planned to move to California due to marital troubles.[118]

Federal habeas proceedings also revealed that the account told by the nine-year-old girl changed significantly, and that it was not physically possible for her to see Macias through a window washing off blood as she had claimed in her testimony.[119]

Based on this evidence and defense counsel's deficient performance at trial, the U.S. District Court granted Macias habeas petition.[120] Macias was subsequently released from prison.[121]

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[105] *Id*. at 793.
[106] *See id.* There were some inconsistencies in Luevanos's trial testimony as compared to his second written statement. *Id.* 793–94 These inconsistencies are described by the federal district court in detail. *Id.*
[107] *Id*. at 794.
[108] *Id*.
[109] *Id*. at 794.
[110] *Id*.
[111] Martinez-Macias v. Collins, 810 F. Supp. 782, 795 (W.D. Tex. 1991).
[112] *Id*.
[113] *Id*. at 796.
[114] *Id*.
[115] *Id*.
[116] *Id*. at 791.
[117] Martinez-Macias v. Collins, 810 F. Supp. 782, 796 (W.D. Tex. 1991).
[118] *Id*. at 803–04.
[119] *Id*. at 812.
[120] *Id*. at 823.
[121] Judson Hand, *In Capital Cases, Poor Defendants Get What They Pay For*, STAR-LEDGER (Newark, N.J.), Aug. 13, 2000, at 2.

Texas Laws and Policies Governing Unreliable Types of Evidence

Texas law does not require prosecutors to establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse informants and witnesses who receive a benefit for their testimony. In addition, both of the Texas District Attorney Offices that submitted survey responses to the Assessment Team stated that they have not instituted any procedures for evaluating cases that rely on these types of evidence.[122] However, one responding District Attorney stated that s/he is "against show-ups unless the circumstances are exigent" and that "as long as lineups and [photographic] arrays [used in an eyewitness identification procedure] are neutral, we'll consider them."[123]

While Texas does not require a prosecutor to adopt any procedures and policies with respect to cases that rely on eyewitness identifications, custodial interrogations, and informant testimony, the state has taken some recent steps to improve the reliability of these types of evidence by other means. In 2011, Texas enacted a statute requiring law enforcement agencies to "adopt . . . a detailed written policy regarding the administration of photograph and live lineup identification procedures."[124] This law is discussed in more detail in Chapter Two on Law Enforcement.

Notably, in 2007, the Dallas County District Attorney's office established a "Conviction Integrity Unit" (CIU)—the first of its kind in the United States—to "review[] and re-investigate[] legitimate post conviction claims of innocence."[125] As of April 2013, the CIU's investigations have led to thirty-three exonerations in Dallas County cases.[126] Harris County undertook a similar effort in 2011.[127] Given the large proportion of wrongful convictions that occur because of eyewitness misidentifications, false confessions, and false informant testimony, CIUs can provide an important check on convictions that rest on these kinds of evidence. CIUs can also perform an important training function for both prosecutors and police. Information gained from investigating the causes of wrongful convictions can be translated into lessons in improved police and prosecutorial practices.[128]

Conclusion

There are several documented instances of wrongful convictions in Texas based on eyewitness misidentifications, false confessions, and inaccurate testimony of jailhouse informants and persons who received a benefit from the prosecution. As described above, Texas has taken some steps, in recent years, to improve the reliability of these types of evidence. However, none of

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[122] Dist. Att'y A Survey Response, *supra* note 59, at 8; Dist. Att'y B Survey Response, *supra* note 62, at 8.

[123] Dist. Att'y B Survey Response, *supra* note 62, at 8.

[124] TEX. CODE CRIM. PROC. ANN. art. 38.20 § 3(a) (2013).

[125] *Conviction Integrity Unit*, DALLAS CNTY. DIST. ATT'YS OFFICE, http://www.dallasda.co/webdev/division/conviction-integrity-unit/ (last visited Aug. 20, 2013).

[126] Hewlett, *supra* note 51.

[127] Ben Crair, *Pat Lykos: Texas' Capital Punishment Avenger*, DAILY BEAST (Apr. 4, 2011), available at http://www.thedailybeast.com/articles/2011/04/04/pat-lykos-texas-capital-punishment-avenger.html (last visited Aug. 29, 2013).

[128] *See e.g.*, CTR. ON THE ADMIN. OF CRIM. LAW, NYU LAW, ESTABLISHING CONVICTION INTEGRITY PROGRAMS IN PROSECUTORS' OFFICES 17 (Dec. 6, 2011) [hereinafter NYU REPORT].

these statutory changes relate to prosecutor policies, and the Assessment Team is not aware of any Texas District Attorney Offices that have enacted policies relevant to this Recommendation. Because the Assessment Team is unable to determine what policies, if any, are employed by all local jurisdictions in Texas, the Team is unable to determine whether Texas is in compliance with Recommendation #2.[129]

Recommendation

While law enforcement agencies must follow procedures to ensure the accuracy of eyewitness identifications, confessions, and statements of informants, prosecutors also must carefully scrutinize cases that rely on these types of evidence. Many of Texas's 117 wrongful convictions since 1988 might have been avoided had prosecutors realized that the eyewitness identification, confession, or informant testimony was unreliable.

Other institutions and organizational systems outside the legal profession have employed methods to reduce errors in their own contexts that may prove instructive to the criminal justice system. For example, "[w]hen patients suffer or die because of possible medical error, hospitals can ascertain whether the harm was avoidable and, if so, seek ways to avoid such harms in the future."[130] It has been observed that this

> . . . institutional practice may contribute to a culture in which medical professionals are open to learning from mistakes. Medical professionals certainly have other important work to do, and they undoubtedly care about their professional reputations as well as the risk of malpractice liability. But reviewing cases where mistakes may have been made may be worth the effort, not only by leading to better individual and institutional practices, but also by enhancing the institutional culture.[131]

The professional risks faced by prosecutors in disclosing the cause of wrongful conviction are akin to those faced by the medical profession. However, prosecutors, unlike doctors, are immune from liability if their actions lead to mistake or error.

The Texas Legislature considered a bill in 2013 that would create the Timothy Cole Exoneration Review Commission, named for a Texas man who died in prison while serving a sentence for a sexual assault that he did not commit.[132] Elements of this recently-proposed Commission would enable the State to thoroughly investigate the myriad causes of wrongful conviction in the state.

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[129] For a discussion of ABA policies on custodial interrogation and eyewitness identification as they relate to law enforcement, see Chapter Two on Law Enforcement Identifications and Interrogations.

[130] Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2172 (2010).

[131] *Id.*

[132] *Texas Senate Must Move Quickly to Pass Exoneration Bill*, FT. WORTH STAR-TELEGRAM, May 15, 2013. *See also HB 166*, TEX. LEGIS. ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB166 (last visited Aug 20, 2013). The bill ultimately died in the Senate Criminal Justice Committee. *See* Michael Barajas and Callie Enlow, *Newsmonger: Regular Session Round-up*, SAN ANTONIO CURRENT, June 5, 2013, at 13.

The Assessment Team recommends that Texas adopt such legislation, ensuring that members of the Commission are comprised of all affected stakeholders, including members with expertise from the judiciary, prosecution, defense, and forensic science communities. The exoneration commission would be charged with investigating "all cases in which an innocent person was convicted and exonerated" in order to "identify the cause of wrongful convictions" and "consider and develop solutions and methods to correct the identified errors and defects through legislation, rule, or procedural changes."[133]

The Assessment Team also recommends that District Attorney Offices in larger jurisdictions create Conviction Integrity Units to investigate post-conviction claims of innocence. As the work of the Dallas County CIU alone has resulted in over thirty exonerations, the need for replication of this program in order to remedy past miscarriages of justice cannot be overstated. In addition, given the large proportion of wrongful convictions that occur because of eyewitness misidentifications, false confessions, and false informant testimony, CIUs also can and should serve an important role in providing training on risk factors and best practices in criminal investigation—for prosecutors as well as other criminal justice actors.[134]

The Team recognizes that Conviction Integrity Units are resource intensive. Such units may also limit their review to closed cases in which DNA evidence was retained and is testable—evidence which is not available in the vast majority of violent crime investigations.[135] Encouragingly, however, it appears that the Dallas Conviction Integrity Unit "is shifting toward challenging cases where there is no DNA to test, but where questions remain about an inmate's guilt or innocence."[136]

However, additional measures must be implemented statewide to prevent wrongful conviction, particularly in those cases that do not rely on forensic evidence and may rely on more faulty forms of evidence. Thus, the Texas Assessment Team sets out the following recommendations:

- Prosecutors should ensure that eyewitness identification procedures comport with the best practices discussed in Chapter Two on Law Enforcement. Prosecutors could also base their policies on those adopted by the New Jersey

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[133] H.B. 166, 83rd Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/pdf/HB00166E.pdf#navpanes=0.

[134] *See, e.g.*, NYU REPORT, *supra* note 128.

[135] Adam Liptak, *Study of Wrongful Convictions Raises Questions Beyond DNA*, N.Y. TIMES, Jul. 23, 2007, at A1 (quoting Peter Neufeld, a founder of the Innocence Project at Cardozo Law School, who stated that "DNA testing is available in fewer than 10 percent of violent crimes"); SAMUEL R. GROSS AND MICHAEL SHAFFER, NATIONAL REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989—2012 7-8 (2012), *available at* http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (noting that of the 873 individual exonerations from January 1989 through February 2012, "63% were cleared without DNA evidence").

[136] Jennifer Emily, *Dallas County District Attorney's Conviction Integrity Unit to Focus on Non-DNA Cases*, DALLAS MORNING-NEWS, May 23, 2010, http://www.dallasnews.com/news/community-news/dallas/headlines/20100523-Dallas-County-district-attorney-s-conviction-57.ece (last visited Sept. 9, 2013). Similarly, the Brooklyn (New York) District Attorney Office's Conviction Integrity Unit has re-opened fifty cases due to concerns raised regarding the validity of confessions elicited by a police detective in each of those cases—one of which has already resulted in an exoneration. Frances Robles, *Several Murder Confessions Taken by Brooklyn Detective Have Similar Language*, N.Y. TIMES, Jun. 12, 2013.

Attorney General's Office, which promulgated guidelines for prosecutors in 2001 describing the manner in which eyewitness identifications should be conducted.[137]

- With respect to confessions, prosecutors should scrutinize the veracity of a confession in light of other known evidence in the case to consider how any inconsistencies may make the confession unreliable, and should be encouraged to record confessions when possible.
- Prosecutors should adopt a mechanism for determining if a testifying witness has received a benefit, and should work with police to ensure their tracking of informants is as comprehensive as possible.[138] Prosecutors should also carefully review the statement of a jailhouse informant, co-defendant, or other cooperating witness to ensure that, in light of other evidence available in the case, it is credible.

Finally, all Texas prosecutors should be required to receive training on how to evaluate the accuracy of eyewitness identifications, confessions, and jailhouse informant testimony. Importantly, prosecutors should be aware of the ways in which unconscious and unintentional cognitive biases can undermine their effort to conscientiously scrutinize police investigations.[139] Encouragingly, research has demonstrated that training as well as internal procedures can minimize the negative effects of cognitive bias. The Assessment Team, therefore, recommends that prosecutorial training address the dangers of cognitive bias as well as instruct prosecutors on methods to guard against the influence of cognitive bias in their decision-making.[140]

C. Recommendation #3

Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.

The discovery process is critically important to the fair resolution of a criminal case. The prosecution's disclosure of exculpatory and mitigating evidence to the defendant is not only required by the Constitution, but also helps to prevent wrongful convictions and death sentences. Disclosure of other, non-exculpatory evidence, such as witness statements and police reports, helps to facilitate plea agreements and reduces the risk that the outcome of a trial will be

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[137] *See* Memorandum from John J. Farmer, Jr., Att'y Gen. of N.J. to N.J. Prosecutors & Law Enforcement (Apr. 18, 2001), *available at* http://www.state.nj.us/lps/dcj/agguide/photoid.pdf.

[138] *See generally* SNITCHING.ORG, http://snitching.org/resources/index.html (last visited Aug. 20, 2013) for resources on the responsible use of informants. For example, one report referenced on Snitching.org suggests that "states should require the prosecution to make written disclosures regarding the circumstances of cooperation agreements" with jailhouse informants, and "should adopt cautionary jury instructions in all cases where the testimony of a jailhouse [informant] is used." JUSTICE PROJECT, JAILHOUSE SNITCH TESTIMONY: A POLICY REVIEW 2 (2007), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Jailhouse%20snitch%20testimony%20policy%20brief.pdf.

[139] *See generally* Burke *supra*, note 83.

[140] Burke, *supra* note 83, at 522–28 (suggesting a number of "debiasing strategies that could be either incorporated into daily practice by individual prosecutors, or institutionalized as a matter of office policy").

determined by lack of preparedness rather than a fair consideration of the evidence. Adoption of uniform discovery procedures also helps to ensure that defendants are treated equally across the state.

Federal and Texas Law Governing Discovery Practices

Constitutional Obligations

In *Brady v. Maryland*, the U.S. Supreme Court held that prosecutors have an affirmative duty to disclose exculpatory evidence to the defendant "where the evidence is material either to guilt or to [level of] punishment, irrespective of the good faith or bad faith of the prosecution."[141] This includes all material exculpatory, mitigating, and impeachment evidence, as well as "favorable evidence known to the others acting on the government's behalf in the case," such as law enforcement officers.[142]

Texas Discovery Rules Prior to 2014

Prior to January 1, 2014—the date on which Texas's new criminal discovery law goes in to effect—Texas law imposed few disclosure requirements on prosecutors beyond what is required by *Brady*.[143] A 2010 report by the Timothy Cole Advisory Panel on Wrongful Convictions—created by the Texas Legislature to advise the Texas Task Force on Indigent Defense—found that "Texas consistently falls into the narrowest category of discovery policies" in the United States "and is also one of only ten states that places additional conditions on discovery and requires the defendant to demonstrate that the materials are necessary to the preparation of the defense."[144]

In accordance with *Brady*, the Texas Disciplinary Rules of Professional Conduct provide that prosecutors have a special duty to disclose all exculpatory and mitigating evidence to the defendant.[145] However, Texas's discovery statute provided that "[u]pon motion of the defendant" and a showing of "good cause" the trial court must compel the prosecution to

> produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant . . . , books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the State or any of its agencies.[146]

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[141] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[142] Kyles v. Whitley, 514 U.S. 419, 421 (1995); Giglio v. United States, 405 U.S. 150, 154–55 (1972). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985).

[143] *See* TEX. CODE CRIM. PROC. ANN. art. 39.14 (2013).

[144] TIMOTHY COLE ADVISORY PANEL ON WRONGFUL CONVICTIONS, REPORT TO THE TEXAS TASK FORCE ON INDIGENT DEFENSE 27 (2010), *available at* http://www.txcourts.gov/tidc/pdf/FINALTCAPreport.pdf.

[145] TEX. DISCIPLINARY R. OF PROF'L CONDUCT 3.09(d).

[146] TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (2013).

The statute also provided that "written statements of witnesses and . . . the work product of counsel in the case and their investigators and their notes or report" are not discoverable under any circumstances.[147]

Under this system, additional discovery procedures depended on the policies of individual District Attorney Offices. A 2013 report by Texas Appleseed and the Texas Defender Service found significant variation in discovery policies among Texas's counties.[148] Some counties had open file discovery policies, which permitted defense counsel to review the prosecutor's entire case file, including police reports and witness statements.[149] In other instances, prosecutor policies were extremely restrictive, providing little more discovery than what was required by statute.[150] The two Texas District Attorney offices that submitted survey responses to the Assessment Team both stated that they have implemented open file discovery policies.[151]

The Michael Morton Act

In May 2013, Texas enacted the Michael Morton Act, substantially expanding prosecutorial disclosure obligations.[152] The statute goes into effect on January 1, 2014.[153] Most significantly, it will require prosecutors to disclose police reports and witness statements to defense counsel upon request.[154]

The statute states that "as soon as practicable after receiving a timely request from the defendant," the prosecution must disclose to the defense "any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report."[155] The prosecution also must disclose "any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state."[156] "[W]ritten communications between the state and an agent, representative, or employee of the state" are exempted from disclosure requirements under the statute.[157]

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[147] *Id.*

[148] *See* TEX. APPLESEED & TEX. DEFENDER SERV., IMPROVING DISCOVERY IN CRIMINAL CASES IN TEXAS: HOW BEST PRACTICES CONTRIBUTE TO GREATER JUSTICE 21–31 (2013), *available at* http://media.cmgdigital.com/shared/news/documents/2013/02/26/discovery_report.pdf.

[149] *Id.* at 21.

[150] *Id.* at 24–25.

[151] Dist. Att'y A Survey Response, *supra* note 59, at 7; Dist. Att'y B Survey Response, *supra* note 62, at 7.

[152] Chuck Lindell, *Perry Signs Morton Act into Law*, AM.-STATESMAN (Austin, Tex.), May 17, 2013.

[153] *Id.*

[154] S.B. 1611, 83rd Leg., Reg. Sess. (Tex. 2013), *available at* http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/SB01611F.pdf#navpanes=0.

[155] *Id.*

[156] *Id.*

[157] *Id.*

Discovery and Adherence to *Brady* in Texas Cases

In the past, the failure of some Texas prosecutors to disclose evidence to the defense has led to several wrongful convictions. A review of wrongful convictions catalogued by the National Registry of Exonerations reveals at least fifteen persons exonerated of serious felonies in Texas from 1977 to 2013 in which exculpatory or mitigating *Brady* material was not disclosed to the defense at trial.[158] In four of these cases, the person was sentenced to death.[159]

Michael Morton

Michael Morton, the person for whom Texas's new discovery statute is named, demonstrates the clear risk of wrongful conviction that can arise when the prosecution does not disclose evidence to the defense. Morton was charged with murdering his wife in their Williamson County home in 1986.[160] At trial, the prosecution alleged that Morton beat his wife to death with a club following an argument about their relationship.[161] While there was considerable evidence presented that Morton and his wife were having marital troubles, there was no evidence directly linking him to the murder.[162] An expert witness also testified that, based on an examination of the contents of Morton's wife's stomach, she died before Morton left for work in the morning.[163] Morton, who testified in his own defense, admitted to the marital difficulties but stated that his wife must have been killed by an intruder after he left for work.[164] Despite the limited evidence, Morton was convicted and sentenced to life in prison.[165]

The District Attorney who prosecuted the case, Ken Anderson, had provided very little discovery to the defense at trial.[166] He disclosed "the autopsy report and crime-scene photos but fought to keep back virtually everything else, even the comments [Morton] had made to [law enforcement officers] on the day of the murder."[167] In a pretrial hearing, the trial judge had ordered the prosecution to provide the court with the law enforcement reports and notes to determine if any exculpatory *Brady* material was present.[168] The judge, however, found no *Brady* material, and none of the reports were disclosed to the defense.[169]

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[158] *See* Texas Exonerations Chart, *supra* note 87.
[159] *Id.*
[160] Morton v. State, 761 S.W.2d 876, 876–77 (Tex. App. 1988).
[161] *Id.* at 877.
[162] *Id.* In addition to the evidence of marital troubles, the prosecution "introduced evidence of a semen stain on the [Mortons' bed] sheet and a pubic hair on top of [his wife's] hand; both consistent with Morton's blood and hair types." *Id.* at 878.
[163] *Id.* at 877–88.
[164] *Id.* at 877.
[165] *Id.*
[166] Pamela Colloff, *The Innocent Man, Part One*, TEX. MONTHLY, Nov. 2012, http://www.texasmonthly.com/story/innocent-man-part-one?fullpage=1 (last visited Sept. 9, 2013).
[167] *Id.*
[168] Pamela Colloff, *The Innocent Man, Part Two*, TEX. MONTHLY, Dec. 2012, http://www.texasmonthly.com/story/innocent-man-part-two?fullpage=1 (last visited Sept. 9, 2013).
[169] *Id.*

Morton, who continued to claim his innocence after his conviction, eventually sought DNA testing of the evidence in his case, a technology that was not available at the time of his trial.[170] In 2002, the Innocence Project took on Morton's case.[171] While the Williamson County District Attorney who originally prosecuted Morton had become a judge in 2001, his successor repeatedly opposed motions for DNA testing.[172] Despite this, Texas courts eventually granted motions for testing. A 2006 DNA test of evidence found in Morton's home proved inconclusive.[173] In 2010, however, Morton obtained testing of a blood-stained bandana found outside the Morton home after the murder.[174] The testing showed a mixture of Morton's wife's blood and that of an unknown man; Morton's DNA was not present.[175] A subsequent DNA profile search revealed the unknown man to be Mark Alan Norwood, a drifter with a long record of violent felony convictions.[176]

In addition to the DNA evidence, however, the Innocence Project's litigation on behalf of Morton uncovered several pieces of *Brady* material—much of it in the form of police reports—in the possession of the prosecution that was never disclosed to the defense or to the judge at trial.[177] This newly-discovered evidence included an officer's report that several of Morton's neighbors had seen an unknown man get out of a van in a wooded lot behind Morton's home around the time of the murder and a report stating that Morton's son, who was in the house at the time of the murder, had told his grandmother that it was not Morton but a "monster" who killed his mother.[178] Taken together, this evidence might have allowed Morton to prove his innocence at trial.

Morton was released from prison in 2011, having served twenty-five years of his life sentence.[179] Norwood was convicted and sentenced to life in prison for the murder in 2013.[180] While Morton was in prison, however, it appears that Norwood had the opportunity to kill again. He has been charged with murder in the 1988 beating death of a woman in Austin based on a DNA match to a pubic hair found at the crime scene.[181]

Clarence Brandley

Clarence Brandley was charged with the 1980 murder of a student, Cheryl Ferguson, that occurred in the Conroe, Texas high school where he worked as a janitor.[182] The prosecution's case was based largely on the testimony of the other janitors, all of whom were white, who

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[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*
[180] Claire Osborn, *Norwood Given Life in Prison for Morton Slaying*, AM.-STATESMAN (Austin, Tex.), Mar. 28, 2013.
[181] Claire Osborn, *Norwood's DNA Provides Partial Match to Hair Found on Baker's Bed*, AM.-STATESMAN (Austin, Tex.), Mar. 26, 2013.
[182] *Ex parte* Brandley, 781 S.W.2d 886, 888 (Tex. Crim. App. 1989) (en banc).

implicated Brandley, who is black.[183] Law enforcement officers, however, had arrested Brandley before they had spoken to any witnesses.[184] Moreover, all of the janitor witnesses were interviewed by law enforcement at the same time, enabling them to coordinate their stories.[185] Brandley's first trial ended in a hung jury, but in the second trial the jury found him guilty and sentenced him to death.[186]

Subsequent post-conviction proceedings revealed that the prosecution had failed to disclose evidence to defense counsel at trial in violation of *Brady*.[187] Specifically, the prosecution had failed to disclose the statement of Cheryl Bradford, a student at the school.[188] Bradford had told police that she passed the victim in the hallway shortly before her murder, and then "[t]wenty to thirty minutes after last seeing the victim alive, [she] observed two white men rushing through the gymnasium."[189] The police never pursued this lead, and Bradford's statement was never disclosed to defense counsel.[190]

The description of the two men provided by Bradford matched that of two other men: Gary Acreman, one of the janitors who testified against Brandley at trial, and James Dexter Robinson, a former janitor at the school.[191] Other evidence, discovered after Brandley was convicted, strongly suggests that these two men were the actual perpetrators. John Sessum, one of the other janitors, testified in the post-conviction evidentiary hearing that his trial testimony was false and that he had seen Acreman and Robinson grab the victim and heard her scream "No" shortly before she was found dead.[192] Sessum further stated that he testified against Brandley only because he was threatened by both Acreman and law enforcement.[193] In a videotaped statement, Acreman himself stated that Brandley was innocent and that Robinson had committed the murder.[194] Blood found on the victim matched the blood type of Acreman and Robinson, but not of Brandley.[195] Robinson's former girlfriend also testified in the post-conviction proceeding that, the day of the murder, Robinson told her that he had to leave Texas because he had killed a girl.[196] Robinson did, in fact, leave the state the next day.[197]

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[183] *Id.* at 888–91 Steve McGonigle, *High Court Action Ensures Brandley's Freedom*, DALLAS MORNING NEWS, Oct. 2, 1990, at A1.
[184] *Brandley*, 781 S.W.2d at 888.
[185] *Id.*
[186] *Id.* at 887. In both trials, all of the jurors were white. McGonigle, *supra* note 183.
[187] *Brandley*, 781 S.W.2d at 891–92.
[188] *Id.* at 891.
[189] *Id.*
[190] *Id.*
[191] *Id.* at 888, 891.
[192] *Id.* at 888.
[193] *Id.*
[194] *Id.* at 889. Acreman recanted this claim during the post-conviction evidentiary hearing, but he also stated that his trial testimony had been inaccurate. *Id.*
[195] *Id.* at 890. The post-conviction court also found that other witnesses had changed their stories or been threatened by law enforcement, that evidence had not been properly preserved, and that basic forensic testing had not been completed. *See id* at 888–91.
[196] *Id.* at 888 n.4.
[197] *Id.*

Based on these revelations, the Texas Court of Criminal Appeals set aside Brandley's conviction in 1989.[198] The next year, the prosecution dismissed the charges, and Brandley was released from prison.[199]

Conclusion

Several persons have been wrongfully convicted in Texas due to the prosecution's failure to disclose information to the defense. In light of these past problems, Texas has recently enacted the Michael Morton Act, which requires more disclosure than is currently required under Texas law. However, because the Act does not go into effect until 2014, the Assessment Team cannot assess its efficacy; accordingly, the Team is unable to determine if Texas is in compliance with Recommendation #3.

Recommendation

Texas has recently taken a considerable step forward in preventing future miscarriages of justice with the passage of the Michael Morton Act. Most significantly, the new law will require prosecutors to disclose police reports and witness statements, which—as past Texas cases demonstrate—often contain *Brady* material. Adoption of the Act is also a public affirmation of Texas's commitment to the proper role of the prosecutor in seeking justice and ensuring that a defendant receives a fair trial. The law will likely improve the fairness of criminal proceedings by allowing defense counsel to better assess the strength of the evidence before trial.

While inadvertent *Brady* violations will likely be reduced under the Michael Morton Act, the new law is but a first step toward robust and comprehensive discovery in Texas criminal cases. Strengthening disclosure requirements will enable more just and accurate outcomes to be reached, the risk of wrongful convictions minimized, and the public's confidence in judicial independence and vigilance in Texas's criminal justice system improved. Accordingly, the Assessment Team recommends that Texas adopt additional measures to build upon the foundation laid by the Michael Morton Act.[200] The entire case file, including investigation notes, should be disclosed to defense counsel with limited exception for a particularized showing of need for protection of witnesses.

A prosecutor must use careful judgment in determining what evidence must be disclosed or risk convicting the innocent or execution of those undeserving of a death sentence under the law. Importantly, a prosecutor's analysis of what must be disclosed in a capital case must also be more expansive that traditional notions of discoverable material in a criminal case. As the U.S.

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[198] *Id*. at 894–95.

[199] McGonigle, *supra* note 183.

[200] For example, North Carolina's discovery statute could serve as a model for additional amendments to Texas discovery rules. The statute requires disclosure of the "complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices" including "defendant's statements, the codefendants' statements, witness statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." N.C. GEN. STAT. § 15A-903(a)(1) (2013). A witness's identity can be withheld from discovery if the court finds there is a "substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment." N.C. GEN. STAT. § 15A-908(a) (2013).

Supreme Court has held that a capital jury cannot be precluded from considering "any aspect of a defendant's character and record or any of the circumstances of the offense" as mitigating evidence in the sentencing phase,[201] much evidence in the possession of the prosecution could be considered potentially-mitigating *Brady* material.

Although the nature of the adversarial system is that the prosecutor has limited ability to determine what s/he must disclose to the defense, under the new Texas law a great deal of discretion remains with the prosecutor in making this determination. However, as discussed under Recommendation #2, unconscious and unintentional types of cognitive bias can impede prosecutors' ability to exercise this discretion.[202] Thus, in order to better guide prosecutors in their efforts to disclose relevant information, the Assessment Team recommends that prosecutors' offices develop a comprehensive list of the various types of evidence that must be timely disclosed by the prosecution prior to commencement of a criminal trial.[203] This is another area where the lessons observed from the medical profession may prove useful in the reduction of errors in capital cases. For example:

> In response to mounting evidence over the last decade that a large number of preventable errors were attributable to mistake or negligence in the performance of routine care functions, hospitals began to develop and utilize checklist forms to govern a variety of patient care protocols, and provide real-time monitoring of compliance with good practices. The experience of hospitals has been that effective checklists, i.e., those that successfully reduced errors or bad outcomes in patient care, had three essential attributes: (1) They reduced a multi-step procedure to a series of discrete, mandatory tasks to be completed []; (2) they were completed concurrently with the tasks, to force real-time rather than post hoc confirmation that a task has occurred; and (3) they were completed by a third party . . . who had the authority and obligation to halt the process if a checklist task was not performed.

The Assessment Team further recommends that the prosecutors be required to affirm that all *Brady* material has been disclosed. In addition, trial judges should monitor discovery in capital cases, resolving disputes as they occur and ensuring that the case is progressing.

Finally, given the limitations faced by defense counsel in obtaining discovery post-trial, all disclosure obligations under law should also be applicable to state habeas proceedings.

D. Recommendation #4

> **Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their**

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[201] Lockett v. Ohio, 438 U.S. 586, 606 (1978).

[202] *See* O'Brien, *supra* note 84.

[203] For an example of what types of materials should be included on a disclosure checklist, *see* NYU REPORT, *supra* note 128, at 54.

obligation to inform prosecutors about potentially exculpatory or mitigating evidence.[204]

The U.S. Supreme Court has held that a prosecutor's constitutional duty to disclose material exculpatory evidence under *Brady* includes a duty to disclose "favorable evidence known to the others acting on the government's behalf in the case," such as law enforcement officers and crime laboratory technicians, even if the evidence is "known only to police investigators and not to the prosecutor."[205]

As the cases discussed under Recommendation #3 demonstrate, *Brady* evidence, such as police reports and witness statements, is often produced or collected by law enforcement officers, crime laboratories, and other agents of the prosecution.[206] Moreover, beginning in 2014, the newly-enacted Michael Morton Act will require prosecutors to disclose to the defense all material evidence "in the possession, custody, or control of the state *or any person under contract with the state*," including police reports and witness statements.[207] This evidence cannot be disclosed by the prosecution if it is not first disclosed to the prosecution by the state agent. As such, it is imperative for prosecutors to ensure that all evidence in the possession of other state actors is disclosed as soon as possible.

While both of the District Attorney offices that submitted survey responses to the Assessment Team indicated that they have voluntarily implemented open file discovery policies, only one responding District Attorney has implemented procedures to ensure that *Brady* material is obtained from other agencies.[208] That office submits a written request for materials to all investigating agencies.[209]

Conclusion

As discussed in Recommendation #3, several *Brady* violations in Texas cases have involved the failure to disclose evidence that is gathered or produced by agents of the prosecution, such as police reports and witness statements. However, it is unclear whether these violations occurred because the agent failed to disclose the evidence to the prosecution. Moreover, the Assessment Team cannot assess the effect of the Michael Morton Act on the occurrence of *Brady* violations, as the law has not yet been implemented. Accordingly, the Team is unable to determine whether Texas is in compliance with Recommendation #4.

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[204] In *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995), the U.S. Supreme Court has held that a prosecutor's constitutional duty to disclose material exculpatory evidence under *Brady* includes a duty to disclose "favorable evidence known to the others acting on the government's behalf in the case," such as law enforcement officers and crime laboratory technicians, even if the evidence is "known only to police investigators and not to the prosecutor."

[205] *Kyles*, 514 U.S. at 437–38.

[206] *See supra* notes 160–199 and accompanying text.

[207] S.B. 1611, 83rd Leg., Reg. Sess. (Tex. 2013), *available at* http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/SB01611F.pdf#navpanes=0 (emphasis added).

[208] Dist. Att'y B Survey Response, *supra* note 62, at 7.

[209] *Id.* The other responding District Attorney stated that its office has no policies or procedures related to ensuring that *Brady* material is disclosed by other agencies. Dist. Att'y A Survey Response, *supra* note 59, at 7.

Recommendation

Because the duty to seek out and disclose *Brady* material in the possession of *any* state actor ultimately falls on the prosecutor, prosecutors must make certain that they have access to all of the evidence in the case. Furthermore, beginning in 2014 as required by the Michael Morton Act, prosecutors will be required to disclose *all* evidence in the possession of other state actors. This law should decrease the risk of *Brady* error and, in cases where the prosecution's evidence is strong, increase the likelihood that the defendant will accept a plea agreement. However, in order to be effective, the law must be properly implemented.

Therefore, the Assessment Team recommends that all District Attorneys develop procedures to ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with the duty to disclose *all* evidence in a particular case. Ultimately, prosecutors should have in their possession a complete copy of the investigating agencies' case file or must conduct a full inspection of the complete contents of the file. In addition, all law enforcement officers should be required to receive training on the importance of divulging all evidence to the prosecutor in all criminal cases, given the prosecutor's new duty under the Michael Morton Act. The Texas Criminal Justice Integrity Unit, an entity established by the Court of Criminal Appeals in 2008 "due to concerns over the growing number of wrongful convictions throughout Texas," reports that it is "collaborating with the Texas State Bar in the production and distribution" of "a training video for law enforcement on *Brady*."[210] The Assessment Team applauds this important development and encourages the use of this type of material in any required law enforcement training.

E. Recommendation #5

> **Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.**

The text of this Recommendation is addressed only to "misconduct." The Assessment Team recognizes, however, that derogations of legal or ethical duty can arise both from acts for which a prosecutor is culpable—and hence appropriately termed "misconduct"—as well as acts that occur through no fault of the individual—and hence are more appropriately termed "error."

Sorting out "error" from "misconduct" is often challenging, particularly given the quantity and complexity of legal determinations that prosecutors must make in a death penalty case. Indeed, the complexity of the prosecutorial role is an important reason why the U.S. Supreme Court has insisted that prosecutors have broad, absolute immunity from civil suit for violations of the law. As described by the U.S. Supreme Court, without immunity "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility

[210] Email from Sadie Fitzpatrick, Research Att'y to Judge Barbara Hervey, Tex. Ct. of Crim. Appeals, to Sarah Turberville, Dir., Death Penalty Due Process Rev. Project (Feb. 15, 2013) (on file with author).

that he would shade his decisions instead of exercising the independence of judgment required by his public trust."[211]

The Assessment Team believes, however, that respect for the important prosecutorial role also demands acknowledgment of the critical effect that legal error has in death penalty cases—for defendants, for victims and their families, and for public confidence in the criminal justice system. For example, a study evaluating reversals of death penalty cases between 1973 and 1995 found that the second most common error found at the post-trial stage leading to reversal was "prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty."[212]

All violations of a prosecutor's duties merit a response from the legal system. Most importantly, *all* errors, regardless of cause, must be promptly disclosed to the defendant and their prejudicial impact always remedied. Indeed, the gravity of the death penalty, and the complex impact that legal violations can have on determinations of both guilt *and* appropriateness of a death sentence, makes vigorous attention to prejudicial error all the more critical in capital cases. Thus, remedy for the accused should be paramount when responding to error. However, it is also crucial to determine the cause of the violation, in order to prevent it from occurring in the future and to assess what consequence should result for the responsible prosecutor or what systemic response is warranted. The Assessment Team acknowledges that only some violations—those committed with extreme or reckless carelessness, or higher degrees of fault—are appropriately met with individual discipline.

Rules Governing Professional Discipline of Prosecutors in Texas

Texas State Bar Professional Rules and Disciplinary Procedures

The U.S. Supreme Court has stated that disciplinary authorities can ensure that a prosecutor "who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment."[213] While the U.S. Supreme Court has held that prosecutors are immune from federal civil lawsuits alleging violations of constitutional rights,[214] the Court has "emphasize[d] that the immunity of prosecutors from liability . . . does not leave the public powerless to deter misconduct or to punish that which occurs" because "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers."[215]

[211] Imbler v. Pachtman, 424 U.S. 409, 423 (1976).
[212] James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000).
[213] Connick v. Thompson, 131 S. Ct. 1350, 1362–63 (2011).
[214] *Imbler*, 424 U.S. at 431.
[215] *Id.* at 429.

In addition to the rules that apply to all attorneys practicing in the state, the Texas Disciplinary Rules of Professional Conduct impose some special rules governing prosecutor conduct. A prosecutor must:

(a) refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause;
(b) refrain from conducting or assisting in a custodial interrogation of an accused unless the prosecutor has made reasonable efforts to be assured that the accused has been advised of any right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
(c) not initiate or encourage efforts to obtain from an unrepresented accused a waiver of important pre-trial, trial or post-trial rights;
(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and
(e) exercise reasonable care to prevent persons employed or controlled by the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under [the Rules of Professional Conduct].[216]

Generally, allegations of prosecutorial misconduct that may constitute a violation of the Rules of Professional Conduct are investigated through the state bar complaint process—the discipline process that is applicable to all attorneys practicing law in the State of Texas.[217]

The Texas State Bar disciplinary process begins when an individual files a grievance with one of the Chief Disciplinary Counsel's (CDC) regional offices.[218] If the CDC determines that the grievance alleges professional misconduct, it is classified as a complaint and the respondent attorney—i.e. the subject of the complaint—is contacted for a response.[219] Otherwise, the grievance is dismissed.[220] Following the attorney's response to the complaint, the CDC must investigate the complaint and determine if there is just cause to believe that the attorney committed misconduct.[221] The complaint will proceed to trial if (1) the CDC finds just cause or

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[216] TEX. DISCIPLINARY R. OF PROF'L CONDUCT 3.09.
[217] *See Grievance Procedure*, STATE BAR OF TEX., http://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceInfoandEthicsHelpline/GrievanceProcedure.htm (last visited Aug. 21, 2013).
[218] TEX. R. DISCIPLINARY PROC. 1.06(R). The State Bar of Texas website also describes the disciplinary process. *Grievance Procedure*, STATE BAR OF TEX., http://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceInfoandEthicsHelpline/GrievanceProcedure.htm (last visited Aug. 21, 2013); *Punishment for Professional Misconduct*, STATE BAR OF TEX., http://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceInfoandEthicsHelpline/PunishmentMisconduct.htm (last visited Aug. 21, 2013).
[219] TEX. R. DISCIPLINARY PROC. 1.06(G), 2.10.
[220] TEX. R. DISCIPLINARY PROC. 2.10. The person who filed the grievance may appeal this determination to the Board of Disciplinary Appeals. *Id.*
[221] TEX. R. DISCIPLINARY PROC. 2.12.

(2) the CDC does not find just cause but is overruled by a panel of members of the State Bar Grievance Committee known as the Summary Disposition Panel.[222]

The attorney may elect to have his/her complaint tried before either an Evidentiary Panel of the Grievance Committee or a district court.[223] At trial, the CDC has the burden of proving misconduct by a preponderance of the evidence.[224] Available sanctions for misconduct include private reprimand, public reprimand, suspension for a term, and disbarment.[225]

Court of Inquiry

The Texas Code of Criminal Procedure also permits district court judges to conduct a "Court of Inquiry."[226] The statute provides that "[w]hen a judge of any district court . . . has probable cause to believe that an offense has been committed against the laws of this state, he may request that the presiding judge of the administrative judicial district appoint a district judge to commence a Court of Inquiry."[227] The court of inquiry serves as a judicial investigation, permitting the court to "summon and examine any witness in relation to the offense."[228] If it appears from the evidence presented at the court of inquiry "that an offense has been committed, the Judge shall issue a warrant for the arrest of the offender."[229]

The Texas judiciary has convened courts of inquiry to investigate accusations of public corruption and wrongful convictions.[230] In the first case of its kind, a court of inquiry has also been used to investigate Ken Anderson, the District Attorney who prosecuted Michael Morton.[231]

Effectiveness of Texas's Disciplinary System

The Texas State Bar has not consistently disciplined prosecutors who engage in misconduct. In 2012, the Innocence Project examined Texas trial and appellate court decisions addressing allegations of prosecutorial misconduct from 2004 to 2008.[232] According to the study, courts found prosecutorial error or misconduct in ninety-one Texas cases in this period, including

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[222] TEX. R. DISCIPLINARY PROC. 1.06(BB), 2.12-2.14. The Grievance Committees are composed of lawyers and non-lawyers nominated by the Director of the State Bar and appointed by the President of the State Bar. TEX. R. DISCIPLINARY PROC. 2.02.

[223] TEX. R. DISCIPLINARY PROC. 2.15.

[224] TEX. R. DISCIPLINARY PROC. 2.17(M).

[225] TEX. R. DISCIPLINARY PROC. 1.06(Y).

[226] TEX. CODE CRIM. PROC. ANN. art. 52.01(a) (2013).

[227] *Id.*

[228] *Id.*

[229] TEX. CODE CRIM. PROC. ANN. art. 52.08 (2013).

[230] Holly Heinrich, *Texplainer: What Is a Court of Inquiry*, TEX. TRIB., Jan. 30, 2012, http://www.texastribune.org/texas-dept-criminal-justice/michael-morton/texplainer-what-court-inquiry/.

[231] Pamela Colloff, *The Innocent Man, Part Two*, TEX. MONTHLY, Dec. 2012, *available at* http://www.texasmonthly.com/story/innocent-man-part-two?fullpage=1.

[232] Press Release, Innocence Project, *Panel Discussion at University of Texas Law School Will Address Systemic and Legal Approaches for Reducing Prosecutorial Error and Misconduct* (Mar. 29, 2012), *available at* http://www.innocenceproject.org/Content/New_Research_Illustrates_Lack_of__Accountability_for_Prosecutors_in_Texas.php# (last visited Sept. 9, 2013) [hereinafter Innocence Project Press Release]; Brandi Grissom, *Study: Prosecutors Not Disciplined for Misconduct*, TEX. TRIB., Mar. 29, 2012, http://www.texastribune.org/2012/03/29/study-prosecutors-not-disciplined-misconduct (last visited Sept. 9, 2013).

nineteen cases in which the error was not harmless and merited reversal.[233] Notably, however, those cases that did not result in reversal may underrepresent the actual extent of prosecutorial negligence, error, or misconduct due to the doctrines of procedural default and harmless error.

Common types of misconduct or error included improper argument, improper examination, failure to disclose evidence, and violation of the defendant's rights under the Fifth Amendment.[234] Despite this, only one prosecutor was publicly disciplined by the State Bar.[235] During this same time period, a total of 928 Texas attorneys were publicly disciplined for other forms of misconduct.[236]

A 2012 study by the Texas District and County Attorneys Association (TDCAA) challenged these findings.[237] The TDCAA claimed that, of the ninety-one cases identified by the Innocence Project, only "six bore indications of actual prosecutorial misconduct."[238] Significantly, none of the six cases identified by the TDCAA resulted in public discipline by the State Bar.[239]

A review of Texas wrongful convictions similarly reveals cases in which the prosecutors involved do not appear to have been investigated or disciplined. In 2012, the Texas Tribune studied eighty-six Texas exonerations between 1989 and 2011, and found that in twenty-one–nearly a quarter–violations of a prosecutorial duty were the basis for granting relief.[240] Six of those cases, including the Clarence Brandley case discussed in Recommendation #3, involved defendants sentenced to death.[241] None of the prosecutors involved was disciplined by the State Bar.[242]

It is difficult to determine why the State Bar has not disciplined prosecutors in cases where courts have found misconduct to have occurred. Because the disciplinary process is largely

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[233] Innocence Project Press Release, *supra* note 232.

[234] *Id.*

[235] *Id.* In a 2011 case, the withholding of exculpatory evidence was so egregious the judge ordered a directed verdict in favor of the defendant. However, the district attorney has yet to be disciplined by the State Bar. *See* Robert Stanton, *Innocent Texas City Man Wants $3M After 10 Months in Jail*, HOUS. CHRON., July 15, 2013, http://www.chron.com/news/houston-texas/houston/article/Innocent-Texas-City-man-wants-3M-after-10-months-4666189.php (last visited Sept. 9, 2013).

[236] Innocence Project Press Release, *supra* note 232.

[237] *See* TEX. DIST. & CNTY. ATT'YS ASS'N, SETTING THE RECORD STRAIGHT ON PROSECUTORIAL MISCONDUCT 5 (2012), *available at* http://www.tdcaa.com/sites/default/files/page/Setting%20the%20Record%20Straight%20on%20Prosecutorial%20Misconduct.pdf.

[238] *Id.* Importantly, the TDCAA eliminated 59 cases because they involved harmless error; in fact, however, error could be deemed "harmless" even if the error involved serious misconduct. *See* Chapman v. California, 386 U.S. 18, 23 (1967) ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.") (quoting Fahy v. Connecticut, 375 U.S. 85, 86–67 (1963)).

[239] The one instance that resulted in public discipline by the State Bar was the case of Terry McEachern, who prosecuted the well-known drug cases in Tulia, Texas. *See* Brandi Grissom, *supra* note 232.

[240] *See* Brandi Grissom, *Courts Found DA Error in Nearly 25% of Reversed Cases*, TEX. TRIB., Jul. 5, 2012, http://www.texastribune.org/texas-dept-criminal-justice/texas-court-of-criminal-appeals/courts-found-prosecutors-erred-25-exonerations (last visited Sept. 9, 2013); Ryan Murphy, *Interactive: The Texas Wrongful Conviction Explorer*, TEX. TRIB., Jul. 5, 2012, http://www.texastribune.org/library/data/texas-wrongful-conviction-explorer (last visited Sept. 9, 2013).

[241] *See* Murphy, *supra* note 240.

[242] *See* Grissom, *supra* note 240.

confidential and shielded from public view, it is impossible to assess whether such cases did not result in a grievance, did not trigger an investigation by the State Bar, or were the subject of an investigation that terminated in a conclusion that no discipline was warranted.[243] Possible barriers to bar sanction even in meritorious cases include the following: difficulties faced by prisoners in filing bar grievances, reluctance by judges and lawyers to file grievances against prosecutors, lack of information about the existence of a violation (as in the case of an undiscovered *Brady* violation), or lack of resources in the State Bar disciplinary infrastructure to adequately investigate claims.[244]

Notably, however, Ken Anderson—the District Attorney who prosecuted Michael Morton—is facing discipline for his alleged misconduct. As discussed in Recommendation #3, Morton was wrongly convicted of murdering his wife in 1987 in a trial at which several key pieces of clearly exculpatory *Brady* material were withheld from the defense.[245] In 2012, the State Bar of Texas filed a disciplinary petition against Anderson, alleging that he engaged in professional misconduct by falsely telling the trial court that all evidence favorable to the defense had been disclosed.[246] Anderson has elected to have the petition resolved in a district court trial, but as of May 2013, the case is still pending.[247]

Furthermore, in 2013, a court of inquiry investigated Anderson and found probable cause to believe that he intentionally withheld evidence in the case.[248] As of May 2013, the criminal case against Anderson is still pending.[249]

Additionally, in 2013 the Texas Legislature passed a bill designed to facilitate disciplinary sanctions in response to the withholding of exculpatory evidence by prosecutors.[250] The law extended the statute of limitations for filing a bar grievance involving evidence suppression by prosecutors, to begin the four-year time limit when a wrongly convicted individual is released from prison.[251] The new law will also require the State Bar to issue a public reprimand, rather than a lesser sanction, when prosecutors commit such violations.[252] Critically, however, this legislation will not extend the filing time for prisoners who are never formally exonerated but

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[243] The fact of a grievance has been filed is made publicly available only if the Chief Disciplinary Council files a case in district court or issues a public reprimand in the case; pending and dismissed grievances are never made known. *Grievance Procedure*, STATE BAR OF TEX., http://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceInfoand EthicsHelpline/GrievanceProcedure.htm (last visited Aug. 21, 2013).

[244] David Keenan, Deborah Jane Cooper, David Lebowitz, & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 211–13 (2011).

[245] *See supra* notes 160–181 and accompanying text.

[246] Chuck Lindell, *State Bar Files Ethics Suit Against Morton Prosecutor*, AM.-STATESMAN (Austin, Tex.), Oct. 19, 2012.

[247] *See id.*

[248] Chuck Lindell, *Judge Finds that Anderson Hid Evidence in Morton Murder Trial*, AM.-STATESMAN (Austin, Tex.), Apr. 20, 2013.

[249] *See id.*

[250] *See* S.B. 825, 83rd Leg., Reg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB00825F.htm.

[251] *Id.*

[252] *Id.*

who nevertheless have a legitimate grievance due to prosecutorial conduct. Nor does it affect cases not involving the withholding of exculpatory evidence.

Conclusion

The Texas State Bar has established procedures by which attorneys who engage in misconduct, including prosecutors, can be disciplined. Moreover, Texas's court of inquiry statute provides an additional means to discipline prosecutors whose misconduct rises to the level of a criminal violation. However, a number of prosecutors in Texas appear not to have been disciplined, even when courts have found intentional error. Accordingly, Texas is in partial compliance with Recommendation #5.

Recommendation

The following Assessment Team recommendations have two aims: First, misconduct by prosecutors needs to be consistently and reliably investigated, and appropriate and transparent disciplinary action must be taken. Second, erroneous derogations of prosecutorial duty–even where unintentional–must be consistently and reliably identified so that prosecutors, District Attorney offices, and the criminal justice system can learn from past errors and prevent future errors.

Given the known instances of misconduct by prosecutors, Texas must implement a more effective mechanism to ensure that these cases are investigated by the State Bar and that those cases rising to the level of misconduct result in discipline. As the U.S. Supreme Court has implied, bar discipline—or the specter of discipline—may be the only way to enforce discovery rules, *Brady* obligations, and other prosecutorial responsibilities. Given the paucity of disciplinary actions against prosecutors when compared to Texas attorneys as a whole, it is clear that the current disciplinary system, which requires an individual to file a grievance before an investigation can begin, is inadequate.

First, the Assessment Team recommends that the Texas State Bar disciplinary process be assessed and strengthened. As the TDCAA noted in its report on prosecutorial misconduct, "[i]t is impossible to accurately assess the efficacy of the State Bar's discipline of prosecutors because of a lack of data regarding the number of complaints made against prosecutors, the nature of those complaints, and the outcomes of those complaints." Therefore, we echo the TDCAA's recommendation that "the State Bar . . . develop more robust data reporting for the purposes of identifying grievances involving prosecutors and detecting any trends, shortcomings, or changes needed in relation to those grievances."[253] The State Bar disciplinary authorities must also be better resourced financially, and Texas must ensure that investigations of prosecutorial misconduct are conducted by individuals "knowledgeable in the intricacies of criminal justice and the role of prosecutors."[254] Finally, the State Bar should undertake a review of its grievance filing procedures, and consider further measures to make the grievance process accessible not only to the general public but also to prisoners.

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[253] SETTING THE RECORD STRAIGHT ON PROSECUTORIAL MISCONDUCT, *supra* note 237, at 26.

Second, the Assessment Team recommends that the required training of judges and members of the Texas State Bar should encourage them to report misconduct and ineffective lawyering to the appropriate disciplinary entity.[255] Reporting of misconduct by other members of the Bar is an especially important safeguard to ensure that cases in which misconduct occurred, but is not on the record or is found to be harmless error or procedurally defaulted by the courts, will be investigated. Bar counsel should be better resourced financially, as well as ensure that investigations of prosecutorial misconduct are conducted by individuals "knowledgeable in the intricacies of criminal justice and the role of prosecutors."[256]

Finally, individual District Attorney offices that have not already done so should establish disciplinary practices and procedures to reduce, identify, investigate, and track instances where prosecutors—whether unwittingly or knowingly—run afoul of legal or ethical duties.[257] The aim of such internal policies and practices must be not simply to respond to blameworthy conduct, but to proactively address individual or systemic misunderstanding about the legal and ethical precepts governing prosecutors. In furtherance of this goal, Texas District Attorneys should establish office-level professional integrity programs: initiatives to receive and investigate claims of prosecutorial error or misconduct—whether from judicial opinions, individual complaints, or other sources—and to assess both the need, if any, for attorney discipline as well as the need for systemic response in the form of changes to training, policies, or supervision.[258]

F. Recommendation #6

The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.

All active members of the State Bar of Texas, including prosecutors, are required to complete fifteen hours of continuing legal education each year, including three hours devoted to ethics and professional responsibility.[259] In addition, in 2013, the Texas legislature passed a bill requiring that new prosecutors, "within 180 days of assuming duties as an attorney representing the state . . . receive one hour of instruction relating to the duty of a prosecuting attorney to disclose exculpatory and mitigating evidence in a criminal matter."[260] In addition, the new law requires

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[255] For a discussion on the duty of trial judges to report attorney misconduct in capital cases, see Chapter Eleven on Judicial Independence and Vigilance, Recommendations #4 and #5.

[256] David Keenan, Deborah Jane Cooper, David Lebowitz, & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 244 (2011).

[257] Both of the District Attorney offices that submitted surveys to the Assessment Team indicated that they have not enacted any procedures or policies for discovering or disciplining prosecutors in their respective offices who engage in misconduct. Dist. Att'y A Survey Response, *supra* note 59, at 9; Dist. Att'y B Survey Response, *supra* note 62, at 9.

[258] Differing models for such programs exist. *See, e.g.*, *About Us*, U.S. DEP'T OF JUSTICE, OFFICE OF PROF'L RESPONSIBILITY (OPR), http://www.justice.gov/opr/ (last visited Aug. 21, 2013) (describing OPR's role to investigate allegations of misconduct involving Department attorneys). A similar unit was established by the Dallas County, Texas, District Attorney in 2007. Terri Moore, *Prosecutors Reinvestigate Questionable Evidence: Dallas Establishes "Conviction Integrity Unity"*, 26-FALL CRIM. JUST. 4, 4 (2011).

[259] TEX. STATE BAR R. art. XII, § 6(A)–(B).

[260] H.B. 1847, 83rd Leg., Reg. Sess. (Tex. 2013), *available at* http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/HB01847F.pdf#navpanes=0.

prosecutors to receive regular training "specific with respect to a prosecuting attorney's duties regarding the disclosure of exculpatory and mitigating evidence in a criminal case."[261] The law becomes effective on January 1, 2014.[262]

Texas law does not require prosecutors to complete any other training programs. However, several different Texas organizations offer attorney training programs specific to prosecutors.

The Center for American and International Law (CAIL), a nonprofit organization in Plano, Texas that offers continuing legal education courses, has received a grant from the Texas Court of Criminal Appeals for capital litigation courses.[263] It appears that the Court of Criminal Appeals grant was, in turn, partly funded by a United States Department of Justice "Capital Case Litigation Grant" provided to the Texas Court of Criminal Appeals in 2011.[264] The court received the federal grant following a 19% reduction to its own Judicial and Court Personnel Training Fund.[265] In 2013, CAIL offered a "Capital and Non-capital Training" course for prosecutors, which was funded by the Court of Criminal Appeals grant.[266]

The State Bar of Texas also offers a number of training courses related to the practice of criminal law.[267] Although none of the programs are directed specifically at prosecutors, the 2013 Advanced Criminal Law course includes sessions on the death penalty, eyewitness identifications, and the prosecutor's *Brady* obligation.[268] Additionally, the Texas District and County Attorneys Association (TDCAA) offers several training programs for prosecutors each year.[269] The July 2013 Prosecutor Trial Skills Course includes a course on "*Brady* and Other Ethical Issues for Prosecutors."[270] None of the other listed programs appear to include courses relevant to capital litigation or other issues discussed in this Chapter.

Of the two District Attorney offices that responded to the Assessment Team's survey, one office reported that its capital prosecutors have received capital litigation training from CAIL and the State Bar of Texas.[271] The office selects prosecutors to handle capital cases based on their experience and work load, but the precise requirements were not described in the survey

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[261] *Id.*

[262] *Bill: HB 1847*, TEX. LEGIS. ONLINE ACTIONS, http://www.legis.state.tx.us/billlookup/Actions.aspx?LegSess=83R&Bill=HB1847 (last visited Aug. 21, 2013).

[263] *About CAIL*, CTR. FOR AM. & INT'L LAW, http://www.cailaw.org/About-the-Center/index.html (last visited Aug. 21, 2013); *Capital & Non-capital Training for the Prosecution*, CTR. FOR AM. & INT'L LAW, http://www.cailaw.org/Criminal-Justice/Events/2013/capital-non-capital-training-for-the-prosecution.html (last visited Aug. 21, 2013).

[264] Press Release, Tex. Ct. Crim. Appeals, *Texas Court of Criminal Appeals Receives a Capital Case Litigation Grant from the Department of Justice* (Sept. 9, 2011), *available at* http://www.cca.courts.state.tx.us/pdf/CapitalCasePressRelease.pdf.

[265] *Id.*

[266] *Capital & Non-capital Training for the Prosecution*, *supra* note 263.

[267] *Seminars*, TEXASBARCLE, http://www.texasbarcle.com/CLE/COSearchResults.asp (last visited Aug. 21, 2013).

[268] *Advance Criminal Law Course*, TEXASBARCLE, http://www.texasbarcle.com/materials/Programs/2728/Brochure.pdf (last visited Aug. 21, 2013).

[269] *2012–2013 Training Calendar*, TEX. DIST. & CNTY. ATT'YS ASS'N, http://www.tdcaa.com/training (last visited Aug. 21, 2013).

[270] *Prosecutor Trial Skills Course*, TEX. DIST. & CNTY. ATT'YS ASS'N, *available at* http://www.tdcaa.com/sites/default/files/seminar/July%20Trial%20Skills%20brochure.pdf.

[271] Dist. Att'y B Survey Response, *supra* note 62, at 3.

response.[272] The other responding District Attorney stated that its capital prosecutors attend training programs offered by the State Bar, the TDCAA, and the National District Attorneys Association.[273] The office's capital prosecutors also must have five years of felony trial experience, and they must serve as second chair counsel before they are permitted to prosecute a capital case as lead counsel.[274] Neither office appears to offer any in-house capital training programs.[275]

Conclusion

The Texas Court of Criminal Appeals provides some funding for the training of prosecutors, including training programs related to capital cases. Training is available from other sources as well. However, aside from the newly-required, one-hour training on the duty to disclose *Brady* evidence, Texas prosecutors are not required to attend any training directly related to the prosecution of criminal cases, capital or otherwise. Thus, under the current system, even if training programs are available, there is no mechanism to ensure that all prosecutors are trained. Accordingly, Texas is in partial compliance with Recommendation #6.

Recommendation

As discussed in Chapter Six on Defense Services, Texas already requires special training for defense counsel who handle capital cases.[276] The Texas Assessment Team strongly encourages Texas to impose similar training requirements, accompanied by adequate funding to support participation in such trainings, for Texas prosecutors assigned to capital cases. The Team notes, however, that any trainings related to the prosecutor's role in capital cases should reflect upon the prosecutor's obligation to seek justice and ensure a fair trial—imperatives which recently gave rise to the State's passage of the Michael Morton Act. As prosecutors are ministers of justice, it is critical that such trainings emphasize the unique responsibilities and obligations imposed on the prosecutor.

Encouragingly, it appears that several entities offer training on *Brady* issues to Texas prosecutors each year. And the Assessment Team commends Texas for enacting a statute requiring prosecutors to receive special training on their duty to disclose evidence under *Brady*. The Team recommends that such training include not only instruction on *Brady*, but also the statutory duties imposed under the Michael Morton Act, which requires prosecutors to disclose *all* evidence in the State's possession, subject to specific limitations. The training must necessarily include a discussion on the special disclosure obligations in death penalty cases and the importance of erring on the side of disclosure. To this end, it may be helpful for the required training to include instruction from defense attorneys.

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[272] *Id.*
[273] Dist. Att'y A Survey Response, *supra* note 59, at 3.
[274] *Id.*
[275] Dist. Att'y A Survey Response, *supra* note 59, at 3; Dist. Att'y B Survey Response, *supra* note 62, at 3.
[276] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(2)(G) (2013).

CHAPTER SIX

DEFENSE SERVICES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Defense counsel competency is perhaps the most critical factor determining whether an individual will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study showed definitively that poor representation has been a major cause of serious errors in capital cases, as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.[1]

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern capital cases in a given jurisdiction, in addition to the resources to conduct a complete, independent, and timely investigation. Full and fair compensation to the lawyers who undertake such cases is also essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—that is, there must be a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different.[2] The 2000 study found that, from 1973 through 1995, state and federal courts reviewing capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68% of the cases.[3] In many of those cases, more effective trial counsel might have averted the constitutional errors that ultimately provided the basis for relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. In some jurisdictions, these defendants sometimes must rely on new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, pro bono representation in capital cases, most pro bono representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally-mandated—responsibility to ensure adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

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[1] James S. Liebman et al., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at ii (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman. In the 2000 study, "innocent" refers to both factual and legal innocence: A death-sentenced inmate who later is released from prison qualifies as "innocent" if s/he was "released from death row on the grounds that [his/her] conviction[] [was] faulty, and there was too little evidence to retry the prisoner." *Id.* at 136 n.81.

[2] Strickland v. Washington, 466 U.S. 668 (1984).

[3] Liebman et al., *supra* note 1, at 4–5.

I. FACTUAL DISCUSSION: TEXAS OVERVIEW

In Texas, an indigent capital defendant or death-sentenced inmate may be represented by a public defender office, locally-appointed counsel, or nongovernmental organization. The standards and practices of each of these entities are described below.

A. Texas's Indigent Capital Defense System

Although the State of Texas has long guaranteed legal counsel in capital cases,[4]

> [p]rior to 1991, state law was silent regarding standards—Texas judges could appoint any member of the bar to represent an indigent capital defendant. Most judges appointed members of the bar who were criminal defense experts. But others were more cavalier, appointing friends who had no experience in the area, such as real-estate specialists or local state legislators.[5]

In response to criticism,[6] the Texas Legislature began in 1995 to construct the framework for its present-day system of indigent capital defense.[7] This framework came to include, as of 2002, statewide standards for counsel appointed to represent indigent capital defendants at trial and on direct appeal and, as of 2009, a public defender office dedicated to the representation of indigent death-sentenced inmates during state habeas proceedings.[8] The progression of a capital case, as well as a defendant's or inmate's right to counsel at each stage, is summarized in the following chart:

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[4] *See* Marin v. State, 891 S.W.2d 267, 269 (Tex. Crim. App. 1994) (recounting that the Texas Code of Criminal Procedure as long ago as 1857 included a provision that stated, "When the defendant is brought into Court, for the purpose of being arraigned, if it appear that he has no counsel, and is too poor to employ counsel, the Court shall appoint one or more practicing attorneys to defend him."). *See also* TEX. CONST. art. I, § 10 (2013) ("[The accused in a criminal prosecution] shall have the right of being heard by himself or counsel, or both[.]").

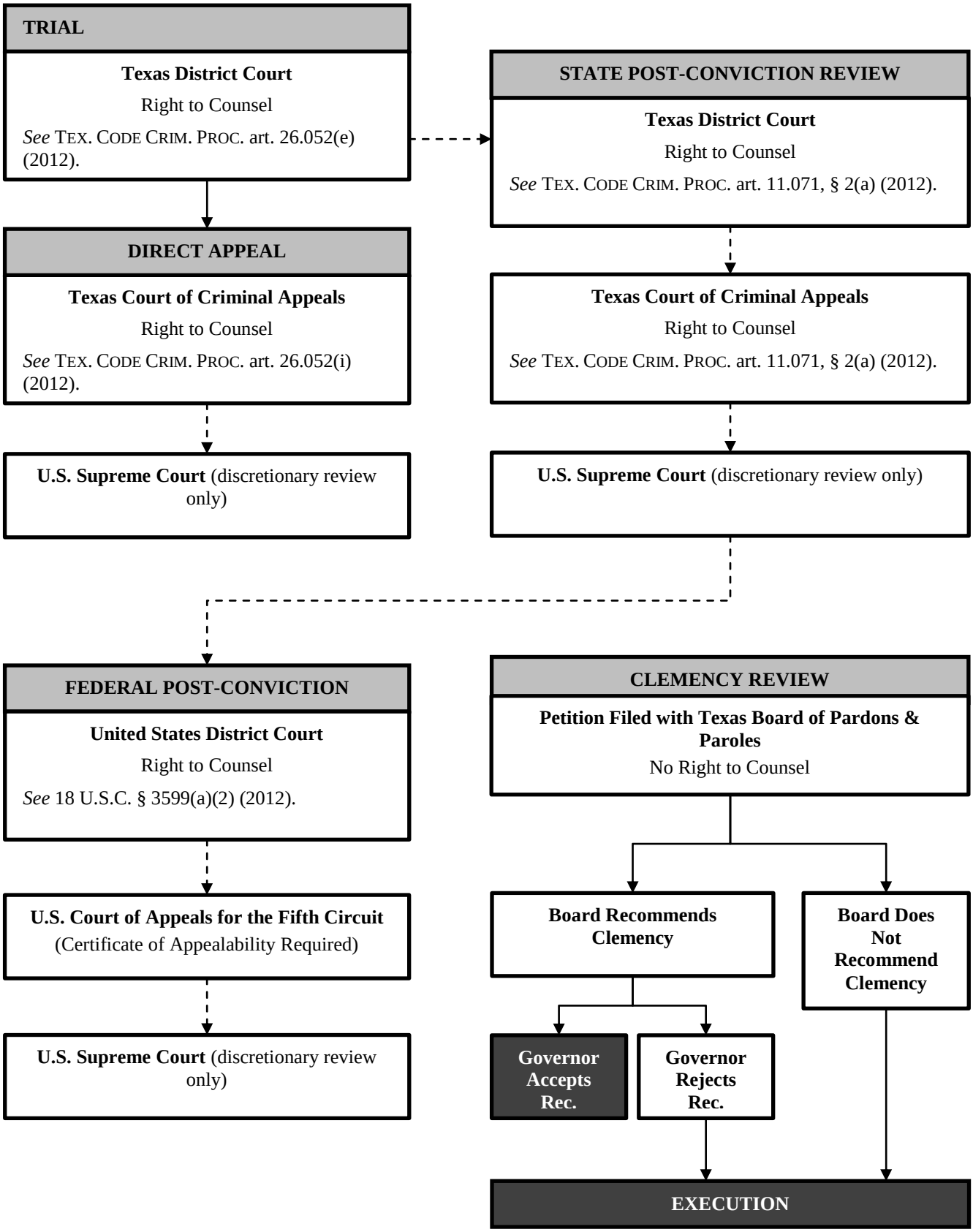
[5] Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 717, 723 (2009).

[6] *See, e.g.*, Martinez-Macias v. Collins, 810 F. Supp. 782, 790 (W.D. Tex. 1991) ("[Defendant's] three attorneys spent a total of 540.50 hours on this case and were paid a total of $6,400 in attorneys' fees, resulting in an hourly rate of $11.84. The errors that occurred in this case are inherent in a system which paid attorneys such a meager amount." (citations omitted)); *The Fair Defense Report: Analysis of Indigent Defense Practices in Texas*, TEX. APPLESEED FAIR DEF. PROJECT (2000), *available at* http://www.texasappleseed.net/pdf/projects_fairDefense_fairref.pdf; Diane Jennings, *Defense Called Lacking for Death Row Indigents: But System Supporters Say Most Attorneys Effective*, DALLAS MORNING NEWS, Sept. 10, 2000, at 1A; TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS (2002). *See also* Jeffrey Toobin, *The Mitigator*, NEW YORKER, May 9, 2011, at 36 ("The national embarrassment of the sleeping-lawyer case [involving capital defendant Calvin Burdine] prompted a successful push for reform in Texas. In 2001, the legislature passed the Texas Fair Defense Act, which set certain basic standards for lawyers appointed to represent indigent defendants.").

[7] *See generally* Act of June 7, 1995, ch. 319, 1995 Tex. Sess. Law (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 26.052 (2013)).

[8] Act of June 14, 2001, ch. 906, 2001 Tex. Sess. Law (amending TEX. CODE CRIM. PROC. ANN. art. 26.052 (2002)); Act of June 19, 2009, ch. 781, 2009 Tex. Sess. Law (codified as amended at TEX. GOV'T CODE ANN. § 78.052(a) (2013)).

Capital Case Progression



Ultimately, indigent capital defendants and death-sentenced inmates continue to receive defense services through two distinct avenues: public defender offices and locally-appointed counsel. These defendants and inmates also may receive legal services through nongovernmental organizations. In addition to addressing each of these entities, this subsection also will describe the Texas Indigent Defense Commission (once the Task Force on Indigent Defense), which plays a direct role in the funding of capital-case defense services.

1. Public Defender Offices

Article 26.052 of the Texas Code of Criminal Procedure specifies that, "[i]f a county is served by a public defender's office, trial counsel . . . may be appointed as provided by the guidelines established by the public defender's office."[9] The two public defender offices providing capital-case trial services—the El Paso Public Defender's Office and the Regional Public Defender for Capital Cases (RPDO)—assist their clients at the pretrial and trial levels.[10] Both public defender offices primarily receive their funding from the counties they serve: El Paso County in the case of the El Paso Public Defender's Office[11] and, in the case of RPDO, the counties that have agreed to have RPDO provide defense services to capitally-charged indigent defendants in their jurisdiction.[12] Advance payment of expenses or reimbursement for expenses already incurred may also be requested.[13]

Established in 2007, RPDO arose out of an agreement between counties in the Seventh and Ninth Administrative Judicial Regions for the Lubbock-based West Texas Regional Public Defender Office to provide trial-level representation to those counties' indigent capital defendants.[14] Today, RPDO has agreed to provide these services to defendants in more than 190 of Texas's 254 counties. Because RPDO cannot, according to the terms of its grant, operate in counties whose populations equal or exceed 300,000, major metropolitan areas throughout Texas—for example, the Cities of Houston, Dallas, San Antonio, and Fort Worth—are not covered by RPDO.[15]

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[9] TEX. CODE CRIM. PROC. ANN. art. 26.052(b) (2013).

[10] Survey from Carole J. Powell, Deputy Chief Pub. Defender, El Paso Cnty. Pub. Defender, at 2 (Oct. 9, 2012) (on file with author) [hereinafter Powell Survey II]; Survey from Philip Wischkaemper, Deputy Dir., Regional Pub. Defender for Capital Cases, at 2 (Sept. 27, 2012) (on file with author) [hereinafter Wischkaemper Survey II]. Although the Dallas County Public Defender's Office once handled capital cases, the office last served as lead trial counsel in the case of Jedidiah Isaac Murphy, who was tried in 2001. Email from Paul J. Blocker, Jr., First Assistant Public Defender, Dallas Cnty. Pub. Defender, to Ryan Kent (July 26, 2012).

[11] EL PASO CNTY., TEX., FY 2012 ADOPTED BUDGET 563 (2011) (for fiscal years 2010 and 2011, listing general fund appropriations of $4,783,767 and $5,040,389, respectively). For fiscal year 2012, the El Paso County Public Defender received no budget increase, whereas the El Paso District Attorney received a modest budget increase of $109,037—a 0.8% increase over fiscal year 2011. *Id.* at 568.

[12] *See Sample Interlocal Agreement*, REG'L PUB. DEFENDER FOR CAPITAL CASES 1–2 (2012), *available at* http://rpdo.org/forms/interlocal%20agreement.pdf.

[13] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(f)–(h) (2013). *See also infra* notes 23–25 and accompanying text.

[14] *Reg'l Pub. Defender Office for Capital Cases, Planning Document Summer 2012* (2012), *available at* http://rpdo.org/publications/RPDO%20Planning%20Document%20(Summer%202012).pdf; *see also* TEX. CODE CRIM. PROC. ANN. art. 26.044(b) (2013).

[15] Email from Jack Stoffregen to Sarah Turberville, Apr. 18, 2013, Statement of Grant Award, 2013 Lubbock County Discretionary Grant Application Narrative, at 5 (on file with author).

An indigent defendant convicted of a capital felony and sentenced to death "is entitled to be represented by competent counsel on appeal and to apply for a writ of certiorari to the United States Supreme Court."[16] The El Paso Public Defender's Office is the only public defender office currently providing representation services on direct appeal.[17] Texas law also guarantees representation during state habeas proceedings.[18] Since 2009, these services have been provided by the Office of Capital Writs (OCW).[19] Prior to OCW's establishment, state habeas defense services were assumed exclusively by list-qualified appointed counsel.[20]

2. Locally-appointed Counsel

All indigent capital defendants not served by the El Paso Public Defender's Office or RPDO are represented by local counsel appointed by the trial court. Furthermore, a substantial majority of Texas's indigent capital defendants receive appellate counsel who qualify for appointments under the Code of Criminal Procedure and additional standards promulgated by local selection committees.[21] Such counsel is appointed by the presiding judge of the convicting court "[a]s soon as practicable after a death sentence is imposed in a capital felony case."[22]

The Code also states that "[a]ll payments [to list-qualified appointed counsel] . . . shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held and may be included as costs of court."[23] All funding requests must be approved by the trial court,[24] and counsel may appeal a denial of payment "by filing a motion with the presiding judge of the administrative judicial region."[25]

With respect to state habeas counsel, "[i]f the office of capital writs does not accept or is prohibited from accepting an appointment . . . , the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions . . . ."[26] Since its establishment in 2009, OCW only has refused one appointment to represent a death-sentenced inmate during state habeas proceedings.[27]

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[16] TEX. CODE CRIM. PROC. ANN. art. 26.052(i) (2013).

[17] Powell Survey II, *supra* note 10, at 2; Wischkaemper Survey II, *supra* note 10, at 2.

[18] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(a) (2013).

[19] *See* Act of June 19, 2009, ch. 781, 2009 Tex. Sess. Law (codified as amended at TEX. GOV'T CODE ANN. § 78.052(a) (2012)).

[20] A primary reason for OCW's establishment was the sustained criticism of the performance of several list-qualified state habeas attorneys. Chuck Lindell, *Sloppy Lawyers Failing Clients on Death Row*, AM. STATESMAN (Austin, Tex.), Oct. 29, 2006, at A1. For a representation of this criticism, see TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS (2002); *see also* notes 155–157, *infra*, and accompanying text.

[21] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(c)–(d) (2013); *see also* notes 148–158, *infra*, and accompanying text (discussing list-qualified appointed counsel qualifications).

[22] TEX. CODE CRIM. PROC. ANN. art. 26.052(j) (2013).

[23] TEX. CODE CRIM. PROC. ANN. art. 26.05(f) (2013); *see also* TEX. CODE CRIM. PROC. ANN. art. 26.052(*l*) (2013) ("An attorney appointed under this article to represent a [capital] defendant at trial or on direct appeal is compensated as provided by Article 26.05 from county funds.").

[24] TEX. CODE CRIM. PROC. ANN. art. 26.052(g)–(h) (2013).

[25] *Id.* at art. 26.05(c). "In reviewing the disapproval . . . , the presiding judge of the administrative judicial region may conduct a hearing." *Id.*

[26] *Id.* at art. 11.07 (f) (2013).

[27] Survey from Brad D. Levenson, Dir., Office of Capital Writs, at 3 (Sept. 19, 2012) (on file with author).

3. Nongovernmental Organizations

Several nongovernmental organizations provide pro bono representation to indigent capital defendants and death-sentenced inmates within the State of Texas. Among these organizations are the Texas Defender Service (TDS), the Gulf Region Advocacy Center (GRACE), and the Capital Punishment Center at the University of Texas School of Law.

Established in 1995, TDS offers defense services at many stages of a capital case, usually in partnership with private counsel.[28] Staff attorneys employed by TDS are required to possess knowledge and skills widely regarded as necessary for effective capital-case representation.[29] In addition to its work representing capital clients, TDS proposes and advocates for policy reforms,[30] publishes studies examining aspects of Texas's criminal justice system,[31] and provides training and other resources to capital-case practitioners throughout the State of Texas.[32]

Similarly, GRACE, established in 2002, provides mitigation and other defense services "to indigent persons charged with capital crimes in the state courts of Texas and Louisiana."[33] GRACE staff also "serve as unpaid faculty members and small group leaders in dozens of capital defense seminars and workshops every year through national, state and local bar associations and public defender systems around the country." The organization also "host[s] [its] own three-day intensive mitigation skills training at least once per year."[34]

The Capital Punishment Center at the University of Texas School of Law also provides pro bono defense services to capital defendants and inmates. Specifically, at the Center's Capital Punishment Clinic, law students "work closely with experienced attorneys in the representation of indigent defendants charged with or convicted of capital offenses. The death penalty cases are at the trial, appellate, and post-conviction stages of litigation."[35]

4. The Texas Indigent Defense Commission

With the passage of the Fair Defense Act in 2001, the Texas Legislature established the Task Force on Indigent Defense (Task Force).[36] As originally conceived, the Task Force was responsible for "develop[ing] policies and standards for providing legal representation and other

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[28] *About*, TEX. DEFENDER SERV., http://www.texasdefender.org/about (last visited Sept. 1, 2013); Survey from Kathryn M. Kase, Exec. Dir., Tex. Defender Serv., at 1 (Oct. 11, 2012) (on file with author) [hereinafter Kase Survey].

[29] Kase Survey, *supra* note 28, at 2.

[30] *Programs*, TEX. DEFENDER SERV., http://www.texasdefender.org/programs (last visited Sept. 1, 2013).

[31] *See, e.g.*, TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS (2002); TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY (2000).

[32] *Programs*, TEX. DEFENDER SERV., http://www.texasdefender.org/programs (last visited Sept. 1, 2013).

[33] *About GRACE*, GULF REGION ADVOCACY CTR., http://gracelaw.org/AboutUs.html (last visited Sept. 1, 2013); *see also* Jeffrey Toobin, *The Mitigator*, THE NEW YORKER, May 9, 2011, at 32.

[34] *Services: Training and Education*, GULF REGION ADVOCACY CTR., http://gracelaw.org/services.html (last visited Sept. 1, 2013).

[35] *Capital Punishment Clinic*, UNIV. OF TEX. SCH. OF LAW, http://www.utexas.edu/law/clinics/capital/ (last visited Sept. 1, 2013).

[36] Act of June 14, 2001, ch. 906, 2001 Tex. Sess. Law.

defense services to indigent defendants at trial, on appeal, and in postconviction proceedings."[37] With respect to capital counsel, the Fair Defense Act explicitly required that "[a]ny qualification standards adopted by the Task Force . . . must be consistent with the standards specified under . . . the Code of Criminal Procedure."[38] "An attorney who is identified by the task force as not satisfying [these] performance or qualification standards . . . may not accept an appointment in a capital case."[39]

In 2011, the Texas Legislature reorganized the State's agencies responsible for providing representation to indigent defendants in criminal cases. The Task Force provisions were repealed and, in their stead, the Texas Indigent Defense Commission (Commission) was established.[40] Like the Task Force, the Commission's jurisdiction encompasses the provision of indigent defense services in both capital and non-capital cases.[41] Presently, the Commission "provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems" and "require[s] local planning for indigent defense and reporting of expenditures."[42] However, the Commission currently "covers only 15 percent of the total indigent defense expenditures in Texas."[43] The Commission is also empowered to "develop policies and standards for providing legal representation and other defense services to indigent defendants at trial, on appeal, and in postconviction proceedings."[44]

B. Appointment, Qualifications, Training, Compensation of and Resources Available to Capital Counsel at Trial, on Direct Appeal, and During State Habeas Proceedings

1. Appointment of Capital Counsel

According to the Texas Code of Criminal Procedure,

> [t]he presiding judge of the district court in which a capital felony case is filed shall appoint two attorneys, at least one of whom must be qualified under this chapter, to represent an indigent defendant as soon as practicable after charges are filed, *unless the state gives notice in writing that the state will not seek the death penalty*.[45]

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[37] The Fair Defense Act suggested several policies and standards for the Task Force's consideration but did not mandate that any particular policy or standard be recommended by the Task Force. *See* TEX. GOV'T CODE ANN. § 71.060(a)(1)–(12) (2001), *repealed by* Act of June 17, 2011, ch. 984, 2011 Tex. Sess. Law. The Texas Judicial Council bore the responsibility of adopting or rejecting the Task Force's recommendations. *Id.* at § 71.060(b).

[38] *Id.* at § 71.060(c).

[39] *Id. See also See also* Catherine Greene Burnett et al., *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 670 (2001) (criticizing the composition of the Task Force as insufficiently independent of state government and as having too few members who were defense practitioners).

[40] Act of June 17, 2011, ch. 984, 2011 Tex. Sess. Law (in part, repealing TEX. GOV'T CODE ANN. §§ 71.051–71.063 (2011) and enacting TEX. GOV'T CODE ANN. §§ 79.001–79.039 (2013)).

[41] *See* TEX. GOV'T CODE ANN. §§ 79.034–79.035 (2013).

[42] *TIDC Home*, TEX. INDIGENT DEFENSE COMM., http://www.txcourts.gov/tidc/ (last visited Sept. 1, 2013).

[43] Cohen, *infra* note 89.

[44] TEX. GOV'T CODE ANN. § 79.034(a) (2013).

[45] TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (2013) (emphasis added).

If the county is served by a capital public defender, that office may be appointed in lieu of list-qualified counsel.[46]

If a death sentence is imposed, "the presiding judge of the convicting court shall appoint counsel to represent an indigent defendant on appeal and to apply for a writ of certiorari, if appropriate."[47] This appointment is to occur "[a]s soon as practicable."[48] In addition, appointed appellate counsel cannot be the same as appointed trial counsel, unless "the defendant and the attorney request the appointment on the record" and "the court finds good cause to make the appointment."[49] Appellate counsel must satisfy requirements for appointment, which include those specified under the Texas Code of Criminal Procedure.[50]

Under Texas law, collateral review, known as state habeas corpus, of a death sentence is concurrent with the direct appeal.[51] "If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint [OCW] to represent the defendant."[52] Should OCW refuse the appointment, "the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions."[53] Appointed state habeas counsel cannot be the same as appointed trial or appellate counsel, unless "the applicant and the attorney request the appointment on the record" and "the convicting court finds good cause to make the appointment."[54]

2. Qualifications of Capital Counsel

Minimum standards for appointment were established by Texas in 1995. Subsequent amendments to the Texas Code of Criminal Procedure imposed training and experience standards for list-qualified lead trial counsel and lead direct appellate counsel.[55] The nine local selection committees may require more of list-qualified appointed counsel; although most local selection committees have imposed additional requirements, each region's standards predominantly reflect only the seven criteria established by the Code of Criminal Procedure.[56] Individual counties likewise may require more of list-qualified trial or appellate counsel.[57]

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[46] *Id.* at art. 26.052(b).

[47] TEX. CODE CRIM. PROC. ANN. art. 26.052(j) (2013).

[48] *Id.*

[49] *Id.* at art. 26.052(k).

[50] *See id.* at art. 26.052(d)(3) (establishing qualifications for list-qualified appellate counsel).

[51] *See id.* at art. 11.071, §§ 2(c), 4(a).

[52] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(b) (2013).

[53] *Id.* at § 2(f).

[54] *Procedures Regarding Eligibility for Appointment of Attorneys as Counsel Under Article 11.071, Section 2(f), Code of Criminal Procedure, and Regarding the Maintenance of a Statewide List of Attorneys Eligible for Appointment as Required by Section 78.056, Government Code*, TEX. CTS. ONLINE, http://www.courts.state.tx.us/courts/pdf/ProceduresCapitalWritsApptList.pdf (last visited Sept. 1, 2013) (procedures taking effect January 1, 2010).

[55] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(2) (imposing minimum appointment standards for lead trial counsel), (d)(3) (imposing minimum appointment standards for lead direct appellate counsel) (2013).

[56] *Compare id.* at art. 26.052(d)(2)(A)–(G), *with* STANDARDS FOR APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES PROMULGATED PURSUANT TO ART. 26.052 C.C.P., FIRST ADMIN. JUD. REGION OF TEX., at 1–2 (rev. Nov. 13, 2009), *and* APPLICATION FOR APPROVAL AS QUALIFIED TRIAL COUNSEL IN DEATH PENALTY CASES, SECOND ADMIN. JUD. REGION OF TEX., at 1–2 (2012), *and* APPLICATION FOR APPROVAL AS QUALIFIED APPELLATE COUNSEL IN DEATH PENALTY CASES, SECOND ADMIN. JUD. REGION OF TEX., at 1 (2012), *and* STANDARDS FOR THE

Fewer statutory requirements apply for list-qualified state habeas counsel. These require that counsel "exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases," and that counsel not have been found "to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case."[58] As with list-qualified trial and appellate counsel, administrative judicial regions and individual counties may require more of list-qualified appointed counsel in state habeas cases.[59]

The Texas Code of Criminal Procedure provides that a county served by one of Texas's public defender offices may appoint counsel to represent an indigent capital defendant "as provided by the guidelines established by the public defender's office."[60] Accordingly, the El Paso Public Defender's Office explicitly requires attorney employees who may represent indigent defendants in capital cases to satisfy the Code's requirements for list-qualified appointed counsel, in addition to other specified knowledge and skills requirements.[61] RPDO also lists as "qualification requirements" in its job description for assistant public defenders six of the seven Code requirements for list-qualified appointed counsel.[62] The only statutory qualification to serve as an OCW attorney employee is that one "[can]not have been found by a state or federal

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QUALIFICATIONS OF LEAD TRIAL COUNSEL FOR APPOINTMENT IN DEATH PENALTY CASES, THIRD ADMIN. JUD. REGION OF TEX., at 1 (2011), *and* STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT IN THE FOURTH ADMINISTRATIVE JUDICIAL REGION, FOURTH ADMIN. JUD. REGION OF TEX., at 1–2 (2011), *and* STANDARDS AND RULES FOR QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES PURSUANT TO ARTICLE 26.052, TEXAS CODE OF CRIMINAL PROCEDURE, FIFTH ADMIN. JUD. REGION OF TEX., at 1–4 (eff. Nov. 17, 2011), *and* 2011 PLAN: STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE, SIXTH ADMIN. JUD. REGION OF TEX., at 1–5 (2011), *and* STANDARDS FOR QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES PURSUANT TO ARTICLE 26.052, TEXAS CODE OF CRIMINAL PROCEDURE, SEVENTH ADMIN. JUD. REGION OF TEX., at 1–3 (eff. Oct. 1, 2011), *and* STANDARDS FOR THE QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES IN THE EIGHTH ADMINISTRATIVE JUDICIAL REGION OF TEXAS PURSUANT TO ARTICLE 26.052 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, EIGHTH ADMIN. JUD. REGION OF TEX., at 1–4 (Sept. 11, 2006) [hereinafter EIGHTH ADMIN. REGION STANDARDS], *and* 2011 PLAN: STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE, NINTH ADMIN. JUD. REGION OF TEX., at 1–5 (2011) (all on file with author).

[57] *See generally Indigent Defense Data for Texas*, TEX. INDIGENT DEFENSE COMM., http://tidc.tamu.edu/public.net/ (last visited Sept. 1, 2013).

[58] TEX. GOV'T CODE ANN. § 78.056(a) (2013). Although Texas law does not state explicitly that these standards may be enlarged on a county-by-county or regional basis, at least one administrative judicial region has elected to do so. *See* EIGHTH ADMIN. REGION STANDARDS, *supra* note 56, at 2 (Sept. 11, 2006) (requiring that list-qualified state habeas counsel "must have previously served as defense trial counsel, as appellate counsel, or as post-conviction habeas counsel, in at least one prior death penalty case that was tried to verdict").

[59] *See, e.g.*, EIGHTH ADMIN. REGION STANDARDS, *supra* note 56, at 2 (Sept. 11, 2006). *See generally Indigent Defense Data for Texas*, TEX. INDIGENT DEFENSE COMM., http://tidc.tamu.edu/public.net/ (last visited Sept. 1, 2013).

[60] TEX. CODE CRIM. PROC. ANN. art. 26.052(b) (2013).

[61] *See* Powell Survey II, *supra* note 10, at 2.

[62] *Job Description: Assistant Public Defender*, LUBBOCK CNTY. (June 2010) (on file with author). The job description does not include the Code's requirement that appointed counsel must not have "been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case." *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(2)(C) (2013).

court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case."[63]

3. Training of Capital Counsel

No statutory authority requires list-qualified or public-defender appointed counsel to complete any particular training program prior to receiving appointments in capital cases. To the extent that training is demanded of list-qualified appointed counsel, that demand is limited to the continuing legal education requirements imposed by the Texas Code of Criminal Procedure and counsel's local selection committee.[64] Internal guidelines of each public defender office will determine the training requirements for an office's attorney employees.

4. Compensation of and Resources Available to Capital Counsel

a. Trial and Direct Appeal Counsel

For the most part, Texas's indigent capital defense system is funded on a county-by-county basis. The Texas Code of Criminal Procedure states that "[a]ll payments [to list-qualified appointed counsel] . . . shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held and may be included as costs of court."[65] Similarly, the public defender offices that presently handle capital cases primarily receive their funding from the counties they serve: El Paso County in the case of the El Paso Public Defender's Office[66] and, in the case of RPDO, the counties that have agreed to have RPDO provide defense services to capitally-charged indigent defendants in their jurisdiction.[67]

County funding for capital indigent defense services is also supported through Texas Legislature appropriations to the Texas Indigent Defense Commission (Commission), which in turn awards grants to counties under its various grant programs.[68] The Commission grants may be used to pay attorney, ancillary, and expert services fees and other approved expenses allowed by the Commission.[69] Commission grants also offset counties' required contributions to RPDO's

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[63] TEX. GOV'T CODE ANN. § 78.053(b) (2013).

[64] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(1), (d)(2)(G), (d)(3)(G) (2013).

[65] *Id.* at art. 26.05(f); *see also id.* at art. 26.052(*l*) ("An attorney appointed under this article to represent a [capital] defendant at trial or on direct appeal is compensated as provided by Article 26.05 from county funds.").

[66] EL PASO CNTY., TEX., FY 2012 ADOPTED BUDGET 563 (2011) (for fiscal years 2010 and 2011, listing general fund appropriations of $4,783,767 and $5,040,389, respectively). For fiscal year 2012, the El Paso County Public Defender received no budget increase, whereas the El Paso District Attorney received a modest budget increase of $109,037—a 0.8% increase over fiscal year 2011. *Id.* at 568.

[67] *See Sample Interlocal Agreement*, REG'L PUB. DEFENDER FOR CAPITAL CASES 1–2 (2012), *available at* http://rpdo.org/forms/interlocal%20agreement.pdf.

[68] TEX. GOV'T CODE ANN. § 79.037(a)(2)-(3) (2013) (empowering the Commission to issue grants from the Fair Defense Account); 1 TEX. ADMIN. CODE § 173.101, *et seq.* (2013) (detailing the Commission's various grant programs).

[69] 1 TEX. ADMIN. CODE § 173.202 (2013).

operating budget.[70] The El Paso County Public Defender's Office also receives annual grant funding from the Commission.[71]

Finally, the Texas Court of Criminal Appeals is required under Texas law to "grant legal funds to . . . criminal defense attorneys who regularly represent indigent defendants in criminal matters."[72] The Court has provided funding to the Texas Criminal Defense Lawyers Association and the Center for American and International Law for training attorney employees at the El Paso Public Defender's Office and RPDO, as well as list-qualified appointed counsel.[73]

b. State Habeas

At the state habeas level, OCW receives funding "(1) as specified in the General Appropriations Act; and (2) from the fair defense account . . . , in an amount sufficient to cover personnel costs and expenses not covered by appropriations . . . ."[74] In the event that OCW is unable to accept appointment in a capital habeas case, list-qualified counsel is appointed who will be "reasonably" compensated as provided by the Texas Code of Criminal Procedure.[75] This state-funded reimbursement to the county is capped at $25,000, and "[c]ompensation and expenses in excess . . . are the obligation of the county."[76]

C. Representation During Federal Habeas and Clemency Proceedings

OCW "may not represent a defendant in a federal habeas review."[77] Nevertheless, a death-sentenced inmate "who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services" is entitled to federally-funded representation during federal habeas corpus proceedings[78] if "the interests of justice so

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[70] *Sample Interlocal Agreement*, REG'L PUB. DEFENDER FOR CAPITAL CASES 1–2 (2012), *available at* http://rpdo.org/forms/interlocal%20agreement.pdf.

[71] *See* Survey from Carole J. Powell, Deputy Chief Pub. Defender, El Paso Cnty. Pub. Defender, at 2 (Oct. 9, 2012) (on file with author) [hereinafter Powell Survey I].

[72] TEX. GOV'T CODE ANN. § 56.003(f) (2013).

[73] Powell Survey II, *supra* note 10, at 5 ("The major source of funding for our training comes from the Texas Indigent Defense Commission through CAIL and TCDLA . . ."); Wischkaemper Survey II, *supra* note 10, at 5.

[74] TEX. GOV'T CODE ANN. § 78.052(b) (2013).

[75] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(f) (2013).

[76] *Id.* at § 2A(a). The Code makes clear, however, that

> [t]he limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement,

and that "a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement." *Id.* at § 2A(c). The cap on state reimbursement was introduced in 1999 when the Texas legislature shifted the burden for compensating state post-conviction counsel from the Texas Court of Criminal Appeals (using state funds) to the convicting court (using county funds). *Compare* TEX. CODE CRIM. PROC. art. 11.071, § 2(h) (1995), *with* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2A(a) (1999).

[77] TEX. GOV'T CODE ANN. § 78.054(b) (2013).

[78] 18 U.S.C. § 3599(a)(2) (2013). *See also* 28 U.S.C. § 2254 (establishing federal habeas procedures for inmates held in state custody).

require."[79] Defense services at this stage of review also may be provided by staff attorneys with the Texas Defender Service or by the Capital Punishment Center at the University of Texas School of Law.[80]

The State of Texas has not promulgated laws, regulations, or rules requiring that counsel be appointed to represent death-sentenced inmates petitioning for clemency, and no agency of state or local government currently provides such representation.[81]

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[79] *Id*. at § 3006A(a)(2). Texas is divided into four federal judicial districts: (1) the Northern District of Texas; (2) the Southern District of Texas; (3) the Eastern District of Texas; and (4) the Western District of Texas. 28 U.S.C. § 124 (2013).

[80] Kase Survey, *supra* note 28, at 2; *Capital Punishment Center: About the Capital Punishment Clinic*, UNIV. OF TEX. SCH. OF LAW, http://www.utexas.edu/law/centers/capitalpunishment/clinic.html (last visited Mar. 25, 2013).

[81] Powell Survey II, *supra* note 10, at 2; Wischkaemper Survey II, *supra* note 10, at 2. It appears as though Texas law forbids OCW from assisting inmates with clemency petitions. *See* TEX. GOV'T CODE ANN. § 78.054(b) (2013); *see also* note 118, *infra*. Nevertheless, the U.S. Supreme Court recently clarified that federal law permits "federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation." Harbison v. Bell, 556 U.S. 180, 194 (2009) (interpreting 18 U.S.C. § 3599(e) (2009)).

II. ANALYSIS

This Chapter relies heavily on the 2003 *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* [hereinafter *ABA Guidelines*].[82] These guidelines are cited regularly by state and federal courts, including the United States Supreme Court, to assess counsel performance and ensure adequate funding and resources for defense services in capital cases.[83] In addition, several states have formally adopted the *ABA Guidelines*—whether through legislation or court rule—in addition to numerous bar associations and defender organizations.[84]

A. Recommendation #1

> **In order to ensure high-quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings—pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings.**
>
> **a. At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the *ABA Guidelines*): At least two attorneys at every stage of the proceedings qualified in accordance with Guideline 5.1 of the *ABA Guidelines* (reproduced below as Recommendation #2), an investigator, and a mitigation specialist.**

As recognized by the *ABA Guidelines*,

> [t]he period between an arrest or detention and the prosecutor's declaration of intent to seek the death penalty is often critically important. In addition to enabling counsel to counsel his or her client and to obtain information regarding guilt that may later become unavailable, effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty.[85]

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[82] *See* ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984–85 (2003).

[83] *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 387 (2005) ("We long have referred to these ABA Standards as guides to determining what is reasonable . . ." (internal quotations and citations omitted)); Phillips v. Bradshaw, 607 F.3d 199, 226 (6th Cir. 2010) (using the *ABA Guidelines* to determine whether counsel's investigation of his defendant's background was deficient); Smith v. Mullin, 379 F.3d 919, 942 (10th Cir. 2004) (same); State v. Andriano, 161 P.3d 540, 554 n.11 (Ariz. 2007), *abrogated by* State v. Ferrero, 274 P.3d 509 (Ariz. 2012); State v. Young, 172 P.3d 138, 142 (N.M. 2007); State v. Loftin, 922 A.2d 1210, 1230 (N.J. 2007); Commonwealth v. Spotz, 896 A.2d 1191, 1226 (Pa. 2006).

[84] For information on the jurisdictions and entities that have adopted some or all of the *ABA Guidelines*, see ABA DEATH PENALTY REPRESENTATION PROJECT, *Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Jan. 2012). Among these entities is the State Bar of Texas, which unanimously adopted a "Texas-specific version" of the *ABA Guidelines*. *Legal Services to the Poor in Criminal Matters Standing Committee of the State Bar of Texas*, STATE BAR OF TEX., http://www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/CriminalMatter.htm (last visited Sept. 1, 2013).

[85] ABA, *supra* note 82, at 921 (history of Guideline 1.1).

Indeed, appointing the defense team as early as possible in a potential death penalty case affects not only the defense team's ability to effectively prepare for trial but also may prevent unnecessary litigation regarding the defendant's eligibility for the death penalty.[86] Establishing a constructive relationship with the client also may require substantial effort on the part of counsel, as "[m]any capital defendants are . . . severely impaired in ways that make effective communication difficult."[87]

The *ABA Guidelines* anticipate that the "core members" of the capital defense team include two qualified attorneys, an investigator, and a mitigation specialist. A capital case "requires skills and expertise not generally possessed by attorneys, most notably for the investigation of the offense and the extensive investigation of social history that must be done."[88] The *ABA Guidelines*' emphasis on qualified attorneys is especially important, for unqualified counsel may commit errors during the representation which contribute to the prosecution's decision to seek a death sentence or otherwise ill-serve the client's—and the state's—interest in obtaining a fair and just outcome in the case.

Prior to the 2007 establishment of the Regional Public Defender for Capital Cases (RPDO)—which represents indigent capital defendants at trial in an increasing number of Texas's 254 counties—and the 2009 establishment of the Office of Capital Writs (OCW)—which represents indigent death-sentenced inmates during state habeas proceedings—the State of Texas relied almost exclusively on locally-appointed counsel to represent indigent capital defendants and death-sentenced inmates. The creation of these offices, staffed by attorneys and support staff specially qualified to represent capital defendants at trial and during state habeas proceedings, has improved significantly the quality of representation available to Texas's indigent defendants and inmates in death penalty cases.

However, in the most active death penalty jurisdictions in the state, counties continue to rely on a fragmented, uneven system of representation for capital defendants at trial and on direct appeal. As the Chief Justice of the Texas Supreme Court recently lamented, legal aid currently only meets the needs of twenty percent of indigent Texans, and Texas ranks forty-eighth in the country in per capita funding for indigent defense.[89]

Representation at Trial

The Texas Code of Criminal Procedure specifies that, "[i]f a county is served by a public defender's office, trial counsel . . . may be appointed as provided by the guidelines established by the public defender's office."[90] The two public defender offices providing capital-case trial services—the El Paso Public Defender's Office and RPDO—assist their clients at the pretrial

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[86] Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1120 (2003) ("Today, the defense team concept, in which clients are provided with two attorneys, a mitigation specialist, and an investigator, is well-established and has become the accepted 'standard of care' in the capital defense community.").

[87] ABA, *supra* note 82, at 1007 (commentary to Guideline 10.5).

[88] Miller, supra note 86, at 1122–23 (discussing *ABA Guideline* 10.4(C)(2)(a)).

[89] Andrew Cohen, *In Texas, From a Chief Justice, Welcome Candor About Unequal Justice*, ATL. MAG. (D.C.), Mar. 10, 2013, http://www.theatlantic.com/national/archive/2013/03/in-texas-from-a-chief-justice-welcome-candor-about-unequal-justice/273872/ (last visited Sept. 1, 2013).

[90] TEX. CODE CRIM. PROC. ANN. art. 26.052(b) (2013).

and trial levels.[91] Although the El Paso Public Defender's Office commences representation "[w]ithin 24 hours of arrest,"[92] RPDO reports that "[s]ome courts appoint immediately after arrest, [while] others may wait for some time before appointment."[93] Both offices report that, in every instance, two qualified attorneys, an investigator, and a mitigation specialist are assigned to represent the capital defendant.[94]

All indigent capital defendants not served by the El Paso Public Defender's Office or RPDO are represented by private counsel appointed by the trial court. According to the Texas Code of Criminal Procedure, unless the state "gives notice in writing that [it] will not seek the death penalty," two attorneys must be appointed "as soon as practicable."[95] Only one of these attorneys must meet the qualification standards set by the Code.[96] Of the seven counties with the highest use of the death penalty, six rely on list-qualified appointed counsel to represent indigent capital defendants: Harris, Dallas, Bexar, Tarrant, Nueces, and Jefferson.[97]

While Texas statutory law reflects the need to quickly appoint qualified counsel in capital cases,[98] this does not always occur.[99] For example, judges have delayed appointing qualified counsel until after the prosecution notifies the defendant of its intent to seek the death penalty, a practice inconsistent with the Texas Code of Criminal Procedure. In addition, prosecutors are able to circumvent the Code's capital-case appointment requirements by initially filing non-capital charges against defendants for alleged conduct that conceivably supports the filing of capital charges.[100] The failure to appoint qualified counsel in the early stages of a *potentially* capital case may adversely affect counsel's efforts "to negotiate a plea that will allow the defendant to serve a lesser sentence, to persuade the prosecution to forego seeking a death sentence at trial, or to uncover facts that will make the client legally ineligible for the death penalty."[101]

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[91] Powell Survey II, *supra* note 10, at 2; Wischkaemper Survey II, *supra* note 10, at 2.

[92] Survey from Carole J. Powell, Deputy Chief Pub. Defender, El Paso Cnty. Pub. Defender, at 3 (Oct. 9, 2012) (on file with author) [hereinafter Powell Survey I].

[93] Survey from Philip Wischkaemper, Deputy Dir., Regional Pub. Defender for Capital Cases, at 3 (Sept. 21, 2012) (on file with author) [hereinafter Wischkaemper Survey I].

[94] Powell Survey II, *supra* note 91, at 2; Wischkaemper Survey II, *supra* note 91, at 2.

[95] TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (2013).

[96] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (2013); *see also* notes 148–158, *infra*, and accompanying text (discussing list-qualified appointed counsel qualifications).

[97] As of September 1, 2013, these six counties accounted for 578 of Texas's 1,062 death sentences. *Total Number of Offenders Sentenced to Death from Each County*, TEX. DEP'T CRIM. JUST., http://www.tdcj.state.tx.us/stat/dr_number_sentenced_death_county.html (last visited Sept. 1, 2013).

[98] *See* ABA, *supra* note 82, at 925 (discussing the importance of "[c]omprehensive pretrial investigation").

[99] *See, e.g.*, Harvey Rice, *Death Penalty Sought in Baby's Stomping Death*, HOUS. CHRON., Aug. 12, 2008 ("The decision to seek the death penalty means that [the trial court] must appoint a second defense attorney, [Defense Attorney Robert] Loper said."). *See also Kirk*, 199 S.W.3d at 473 (in a capital case in which the prosecution later waived the death penalty, the trial court failed to appoint two attorneys even after capital charges were filed against the defendant).

[100] *See, e.g.*, Sean Kimmons, *Daycare Owner Indicted for Capital Murder in Baby's Death*, HAYS FREE PRESS, Feb. 16, 2011 (noting that defendant indicted for capital murder "had previously been charged with injury to a child, a first degree felony").

[101] ABA, *supra* note 82, at 925 (commentary to Guideline 1.1).

Defendants represented by list-qualified appointed counsel are also not, as a matter of course, provided the services of an investigator and a mitigation specialist. The Texas Code of Criminal Procedure makes clear that advance payment for investigative and expert services should be provided "if the request is reasonable"[102] and that payment for these services obtained without prior approval of the court should be provided "if the expenses are reasonably necessary and reasonably incurred."[103] Thus, indigent capital defendants receive these ancillary services only if counsel enlists them and the court approves of them.

As an additional concern, the Texas Defender Service reports that "appointed lawyers [frequently] don't seek the legally required second defense lawyer, perform mitigation or push for court-funded resources until after the prosecution has declared it will seek the death penalty," at which point "the case is months, if not a year, down the road."[104] This course of conduct is especially troubling considering that one of counsel's chief responsibilities is uncovering mitigating evidence that may encourage the State not to seek the death penalty.[105]

Representation on Direct Appeal and During State Habeas

An indigent defendant convicted of a capital felony and sentenced to death "is entitled to be represented by competent counsel on appeal and to apply for a writ of certiorari to the United States Supreme Court."[106] The El Paso Public Defender's Office—but not RPDO—provides representation services on direct appeal.[107] Thus, a majority of Texas's indigent death-sentenced inmates receive appellate counsel who qualify for appointments under the Code of Criminal Procedure and additional standards promulgated by local selection committees.[108] Such counsel is appointed by the presiding judge of the convicting court "[a]s soon as practicable after a death sentence is imposed in a capital felony case."[109] Texas law does not require the appointment of two appellate attorneys.[110]

State habeas defense services are guaranteed under Article 11.071 of the Texas Code of Criminal Procedure.[111] Principally, these services are provided by the Office of Capital Writs (OCW), established in 2009 "after repeated embarrassing instances of shoddy legal work by appeals attorneys representing capital murder convicts."[112] "If the office of capital writs does not accept

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[102] TEX. CODE CRIM. PROC. ANN. art. 26.052(g) (2013).

[103] *Id.* at art. 26.052(h). *See also id.* at arts. 26.05(h), 26.052(*l*) (providing that "[r]eimbursement of expenses incurred for purposes of investigation or expert testimony may be paid directly to a private investigator . . . or to an expert witness").

[104] Survey from Kathryn M. Kase, Exec. Dir., Tex. Defender Serv., at 4 (Oct. 11, 2012) (on file with author) [hereinafter Kase Survey].

[105] *See* ABA, *supra* note 82, at 994.

[106] TEX. CODE CRIM. PROC. ANN. art. 26.052(i) (2013).

[107] Powell Survey II, *supra* note 91, at 2; Wischkaemper Survey II, *supra* note 91, at 2.

[108] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(c)–(d) (2013); *see also infra* notes 148–158 and accompanying text (discussing list-qualified appointed counsel qualifications).

[109] TEX. CODE CRIM. PROC. ANN. art. 26.052(j) (2013).

[110] *Compare id.*, *with* TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (2013).

[111] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(a) (2013).

[112] *See* Act of June 19, 2009, ch. 781, 2009 Tex. Sess. Law (codified as amended at TEX. GOV'T CODE ANN. § 78.052(a) (2013)); Michael Graczyk, *Year-old State Office Challenges Death Sentences*, AP ALERT—TEX., Aug. 21, 2011.

or is prohibited from accepting an appointment . . . , the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions . . . ."[113] Death-sentenced inmates only are entitled to one qualified attorney during state habeas proceedings.[114]

As for the appointment of an investigator and mitigation specialist, a death-sentenced inmate appealing his/her conviction or pursuing a writ of habeas corpus will receive these ancillary services only if appellate or state habeas counsel enlists them and the court approves of them.[115]

Representation During Federal Habeas and Clemency

An indigent death-sentenced inmate seeking a writ of habeas corpus in federal court cannot be represented by OCW,[116] but s/he is entitled under federal law to representation by at least one attorney who has "been admitted to practice in the court of appeals for not less than five years" and who has "had not less than three years experience in the handling of appeals in that court in felony cases."[117] The State of Texas does not guarantee counsel—or investigators and mitigation specialist services—during state clemency proceedings, and it appears as though Texas law forbids OCW from assisting inmates with these petitions.[118] The El Paso Public Defender's Office and RPDO also do not provide these representation services.

b. At least one member of the defense team should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.

The El Paso Public Defender's Office and RPDO report that at least one member of their capital defense teams must be qualified by training and experience to screen individuals for the presence

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[113] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(f) (2013).

[114] *Compare* TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (2013), *with id.* at art. 11.071, § 2(f).

[115] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(g)–(h) (2013); TEX. CODE CRIM. PROC. ANN. art. 11.07, at § 3(c)–(d) (2013). The El Paso County Public Defender's Office does not assign an investigator or mitigation specialist to the capital cases it appeals. Powell Survey II, *supra* note 91, at 2.

[116] TEX. GOV'T CODE ANN. § 78.054(b) (2013).

[117] 18 U.S.C. § 3599(a)(2), (c) (2013).

[118] If the Texas Court of Criminal Appeals denies a death-sentenced inmate state habeas relief, the OCW attorney appointed under the Code of Criminal Procedure to represent the inmate must "move for the appointment of counsel in federal habeas review," TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(e) (2013), and OCW cannot under Texas law "represent a defendant in a federal habeas review." TEX. GOV'T CODE ANN. § 78.054(b) (2013). Thus, the representation of the inmate by OCW effectively ends at the close of state habeas proceedings. While the representation could resume for actions or proceedings in state court consistent with the statutorily-specified powers and duties of OCW, clemency proceedings technically do not qualify as "action[s] or proceeding[s] in state court." *Id.* at § 78.054(b)(1)–(3). *See also id.* at § 508.082 (empowering the Board of Pardons and Paroles to adopt administrative regulations for the purpose of carrying out its executive functions). As a consequence, Texas does not guarantee appointed counsel for death-sentenced inmates during state clemency proceedings. *See also* 18 U.S.C. § 3599(e) (2013); Harbison v. Bell, 556 U.S. 180, 194 (2009) (interpreting federal law to allow federal habeas counsel to be compensated for representation of an indigent death-sentenced inmate during state clemency proceedings).

of mental or psychological disorders or impairments,[119] but there is no requirement under Texas law that all indigent capital defendants receive this quality of service. The Texas Code of Criminal Procedure does require list-qualified appointed counsel to have experience in "the use of and challenges to mental health . . . expert witnesses,"[120] but this experience cannot serve as a proxy for the skill to screen individuals for mental or psychological disorders or impairments.

As for the choice of investigators and experts, neither the El Paso Public Defender's Office nor RPDO report that these decisions are influenced by an individual's prior work for the prosecution or professional status with the state.[121] The El Paso Public Defender's Office, which funds expert services through its operating budget and therefore need not depend on trial courts for reimbursement, "tr[ies] to find experts who recognize funding constraints faced by public defenders" but reports that "quality is the most important" criterion.[122]

Ultimately, Texas law does not impose upon defense counsel specific criteria in selecting investigator or expert services, but reimbursement for those services depends on the presiding judge's assessment that the expense was "reasonable."[123] In confronting this often difficult decision whether to approve funding for expert services, judges necessarily must weigh the interest of the defendant in presenting his/her strongest possible case against that of a county with limited resources. Moreover, the Texas Code of Criminal Procedure provides judges with little guidance in determining whether an expense is "reasonable,"[124] which may lead some judges to consider factors—such as an expert's prior work for the prosecution or professional status with the State—contrary to the *ABA Guidelines*.[125]

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[119] Powell Survey II, *supra* note 91, at 6; Wischkaemper Survey II, *supra* note 91, at 6.

[120] TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(2)(F)(i), (d)(3)(F)(i) (2013).

[121] Powell Survey II, *supra* note 91, at 8, 10; Wischkaemper Survey II, *supra* note 91, at 8, 11.

[122] Powell Survey II, *supra* note 91, at 10. Similarly, the Texas Defender Service sometimes selects experts "on the basis of cost of services" due to funding limitations. Kase Survey, *supra* note 104, at 13.

[123] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(g)–(h) (2013) ("The court shall grant the request for advance payment of expenses in whole or in part if the request is reasonable. If the court denies in whole or in part the request for expenses, the court shall: (1) state the reasons for the denial in writing; (2) attach the denial to the confidential request; and (3) submit the request and denial as a sealed exhibit to the record.").

[124] *See* TEX. CODE CRIM. PROC. art. 26.052(g)–(h) (2013). Article 26.05 specifies that counsel may appeal a denial of payment "by filing a motion with the presiding judge of the administrative judicial region." *Id.* at art. 26.05(c). "On the filing of a motion, the presiding judge of the administrative judicial region shall review the disapproval of payment . . . and determine the appropriate amount of payment. In reviewing the disapproval . . . , the presiding judge of the administrative judicial region may conduct a hearing." *Id.*

[125] ABA, *supra* note 82, at 957 (commentary to Guideline 4.1).

c. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high-quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

i. Counsel should have the right to seek such services through ex parte proceedings, thereby protecting confidential client information.

ii. Counsel should have the right to have such services provided by persons independent of the government.

iii. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

The concern behind this part of Recommendation #1 is that "public funding [should] not diminish the quality of the assistance that counsel is able to obtain from experts."[126] This is especially relevant to Texas since elected judges are ultimately responsible for approving defense-services expenses for indigent capital defendants,[127] and they may be particularly mindful that "resources are not unlimited."[128]

Encouragingly, the Texas Code of Criminal Procedure does specify that "[a]ppointed [trial and appellate] counsel may file with the trial court a pretrial ex parte confidential request for advance payment of expenses to investigate potential defenses."[129] This likewise is true of state habeas counsel.[130]

Texas statutory law, however, does not state whether indigent defendants have the right to have ancillary services provided by persons independent of the government. The Texas Court of Criminal Appeals nevertheless has held that an indigent defendant is "entitled to more than an expert to testify on his behalf—he [is] also entitled to technical assistance to help evaluate the strength of that defense, and to identify the weaknesses in the State's case, if any, by preparing counsel to cross-examine opposing experts."[131] In *Rey v. State*, for example, an indigent defendant was afforded access to his own pathologist, at an estimated cost of $2,000.[132]

It also appears that counsel generally enjoy the right to keep confidential their communications with persons providing ancillary services.[133] However, if defense counsel decides to "designate[] a particular person as an expert that he may use as a witness at trial, that person is no longer a

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[126] *Id.*

[127] TEX. CODE CRIM. PROC. ANN. art. 26.052(g)–(h) (2013).

[128] ABA, *supra* note 82, at 957 (commentary to Guideline 4.1). *See also* note 207, *infra*, and accompanying text (discussing potential conflicts of interest in granting judges the authority to make capital-case appointments).

[129] TEX. CODE CRIM. PROC. ANN. art. 26.052(f) (2013). "The request for expenses must state: (1) the type of investigation to be conducted; (2) specific facts that suggest the investigation will result in admissible evidence; and (3) an itemized list of anticipated expenses for each investigation." *Id.*

[130] *Id.* at art. 11.071, § 3(b).

[131] Rey v. State, 897 S.W.2d 333, 343 (Tex. Crim. App. 1995) (internal quotations omitted).

[132] *Id.* at 335–36, 340.

[133] Pope v. State, 207 S.W.3d 352, 359–60 (Tex. Crim. App. 2006) (discussing the distinction between "consulting experts" and "testifying experts").

'consulting' expert . . . and the [State] . . . may seek further information from or about him for use at trial."[134]

Conclusion

The State of Texas only partially complies with Recommendation #1.

The Assessment Team applauds Texas for establishing RPDO to provide, through its attorneys, investigators, and mitigation specialists, high-quality representation in capital trials. Similarly, the creation of OCW in 2009 marked an important step toward providing meaningful review of constitutional claims in capital cases. The Assessment Team further commends the State for recognizing the necessity of ex parte requests for expert assistance, as well as for providing funds to investigate state habeas claims before a death-sentenced inmate must file his/her habeas petition.

Although Texas has improved its indigent defense services in capital cases, continued improvements must be made to ensure that all capital defendants and death-sentenced inmates receive high-quality legal representation. At present, Texas law does not establish the right to two qualified attorneys at *every* stage of the legal proceedings. Only one of two assigned trial attorneys must be qualified to handle death penalty representation, while no more than one attorney will be appointed to undertake representation of a capital case on direct appeal or during state habeas proceedings. Furthermore, as capable pre-trial representation often determines whether a defendant will face a maximum sentence of death versus life without possibility of parole, it is inconsistent with the *ABA Guidelines* for a death-eligible defendant to be without high-quality representation unless and until the prosecutor gives notice that s/he intends to seek the death penalty. Texas law also provides no right to counsel during clemency proceedings, which is a death-sentenced inmate's final opportunity to investigate and present the government with information "'to reassess this irrevocable punishment,'"[135] including issues never reached by the courts due to procedural default or because the underlying evidence is newly-discovered.

It is clear that, in capital cases, the guiding hand of counsel is necessary, but investigators also are "indispensable to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings,"[136] and mitigation specialists "possess clinical and information-gathering skills and training that most lawyers simply do not have."[137] While Texas is commended for its efforts to provide funding to support these positions within public defender offices, such services are not guaranteed to assist list-qualified appointed counsel in Texas's most active death penalty jurisdictions.

Finally, with respect to the funding of ancillary professional services for indigent capital defendants and death-sentenced inmates, the Assessment Team observes that a system which assigns to trial courts the authority to approve or deny funding requests invites uneven treatment.

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[134] *Id.* at 360; *see also* TEX. R. EVID. 705 (regarding disclosure of facts or data underlying expert opinion).

[135] Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 214 (1993).

[136] ABA, *supra* note 82, at 958.

[137] *Id.* at 959.

Some counties—and, correspondingly, the judges who serve them as elected officials—will face greater budgetary pressures than others. The unequal distribution of resources, however, cannot and does not provide justification for unequal justice.

The Assessment Team applauds the Texas Legislature for helping to ameliorate these disparities at the state habeas level by providing counties up to $25,000 in state funds to offset those counties' reimbursement obligations to appointed state habeas counsel,[138] as well as at trial and direct appeal through the Texas Indigent Defense Commission's "[e]xtraordinary disbursements" to counties "for actual extraordinary expenses [incurred by] providing indigent defense services in a case or series of cases."[139] However, Texas's system for providing indigent defendants constitutionally-guaranteed defense services continues to impose upon the trial courts the responsibility for guarding county coffers. Such a responsibility unnecessarily complicates the judge's role as a neutral arbiter.

One recent case illustrates the necessity of ancillary defense services "to ensur[ing] the accuracy of [] verdicts and the integrity of [Texas's] [criminal justice] system."[140] Upon hearing the testimony of expert witnesses testifying to recent advances in the field of biomechanics, a state habeas court ruled that a death-sentenced inmate "ha[d] proved by clear and convincing evidence that no reasonable juror would have convicted her of the capital murder."[141] Twelve years earlier, however, the trial court had denied the defense funding—properly sought through a pre-trial motion—"to employ a biomechanical expert."[142] While it cannot be said for certain whether this expert testimony would have affected the outcome in the inmate's capital trial, capital defendants must be afforded necessary investigative, mitigation, and expert resources *in the first instance*—not months before the defendant is to be executed.[143]

Recommendations

To ensure high-quality legal representation for every capital defendant and death-sentenced inmate in Texas, the State should

- Guarantee that every capital defendant and death-sentenced inmate has access to two qualified attorneys, an investigator, and a mitigation specialist at every stage of the legal proceedings, including state habeas and clemency proceedings;

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[138] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2A(a) (2013).

[139] 1 TEX. ADMIN. CODE § 173.102(8) (2013). In 2012, these extraordinary disbursements totaled $300,000 which was used to offset capital trial expenses. Email from Wesley Shackelford, Deputy Dir. and Special Counsel, Tex. Indigent Defense Comm. to Sarah Turberville (April 22, 2013) (on file with author).

[140] *Ex parte* Henderson, 384 S.W.3d 833, 851 (Tex. Crim. App. 2012) (Cochran, J., concurring) (internal quotations omitted). *See also* Hannah Jacobs Wiseman, *Pro Bono Publico: The Growing Need for Expert Aid*, 60 S.C. L. REV. 493, 495–96 (2008) (noting that initial studies of the trials of 217 individuals "exonerated post-conviction using DNA evidence" reveal that "a majority involved improper testimony by the prosecutions' forensic experts, including exaggeration of the probative significance of the evidence and erroneous scientific conclusions," and that, "of the sixty-one trials initially studied, only two defendants had a forensic expert" (internal quotations omitted)).

[141] *Id.* at 848–49.

[142] *Id.* at 843.

[143] *Ex parte* Henderson, 246 S.W.3d 690, 691–92 (Tex. Crim. App. 2007).

- Require that at least one member of the defense team be trained to screen capital clients for mental and psychological disorders;
- Adhere to Article 26.052(e) of the Texas Code of Criminal Procedure by ensuring that counsel is appointed at the earliest stage of the proceedings, even if capital charges have not been filed but the case could be death-eligible; and
- Establish an Appellate Defender Office, similar in structure to the Office of Capital Writs, to be staffed by attorneys specially trained to investigate and present the unique issues raised in capital appeals.

Finally, the Assessment Team recommends that Texas unburden their trial courts of the difficult pecuniary decisions that they must currently make in capital cases. This authority could be transferred to, for example, the Office of Court Administration. In so doing, the state's judges would be empowered to focus on their role as "an arbiter of facts and law for the resolution of disputes," improving the public's confidence in the impartiality of the judiciary in criminal cases.[144]

B. Recommendation #2

Qualified Counsel (Guideline 5.1 of the *ABA Guidelines*):

a. The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high-quality legal representation.

b. In formulating qualification standards, the jurisdiction should ensure:

i. That every attorney representing a capital defendant has:

(a) Obtained a license or permission to practice in the jurisdiction;

(b) Demonstrated a commitment to providing zealous advocacy and high-quality legal representation in the defense of capital cases; and

(c) Satisfied the training requirements set forth in Guideline 8.1 of the *ABA Guidelines*.

ii. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high-quality legal representation. Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:

(a) Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;

(b) Skill in the management and conduct of complex negotiations and litigation;

(c) Skill in legal research, analysis, and the drafting of litigation documents;

(d) Skill in oral advocacy;

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[144] *Preamble*, TEX. CODE JUD. CONDUCT (2013). *See generally* Bill Piatt, *Reinventing the Wheel: Constructing Ethical Approaches to State Indigent Legal Defense Systems*, 2 ST. MARY'S J. LEGAL MAL. & ETHICS 372, 400–03 (2012) (discussing conflicts of interest inherent to indigent defense systems).

(e) Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
(f) Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
(g) Skill in the investigation, preparation, and presentation of mitigating evidence; and
(h) Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

According to the *ABA Guidelines*, "the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master."[145] Indeed, "the abilities that death penalty defense counsel must possess in order to provide high quality legal representation differ from those required in any other area of law."[146] Therefore, it is imperative that the attorneys representing capital clients "be qualified by training and experience to undertake such representation and provide high quality advocacy."[147]

List-qualified Appointed Counsel

The Texas legislature has developed and published qualification standards for defense counsel in capital cases. The Texas Code of Criminal Procedure imposes minimum standards for list-qualified lead trial counsel and list-qualified lead direct appellate counsel.[148] In particular, lead trial counsel must

(A) be a member of the State Bar of Texas;
(B) exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;
(C) have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case . . . ;
(D) have at least five years of criminal law experience;
(E) have tried to a verdict as lead defense counsel a significant number of felony cases . . . ;
(F) have trial experience in:
  (i) the use of and challenges to mental health or forensic expert witnesses; and
  (ii) investigating and presenting mitigating evidence at the penalty phase of a death penalty trial; and
(G) have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.[149]

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[145] ABA, *supra* note 82, at 923 (commentary to Guideline 1.1).
[146] *Id.* at 963–64 (commentary to Guideline 5.1).
[147] Jill Miller, *supra* note 86, at 1124.
[148] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(2) (imposing minimum appointment standards for lead trial counsel), (d)(3) (imposing minimum appointment standards for lead direct appellate counsel) (2013).
[149] *Id.* at art. 26.052(d)(2)(A)–(G). List-qualified appointed counsel may overcome the ineffective-assistance disqualifier provided "the local selection committee determines . . . that the conduct underlying the finding no longer

For the most part, these minimum standards apply to lead direct appellate counsel, with three modifications: (1) qualified lead appellate counsel will "have authored a significant number of appellate briefs"; (2) such counsel will "have trial *or appellate* experience" in the same areas as required of lead trial counsel; and (3) such counsel will "have participated in continuing legal education courses or other training relating to criminal defense in *appealing* death penalty cases."[150]

The nine local selection committees may require more of list-qualified appointed counsel; although most local selection committees have imposed additional requirements, each region's standards predominantly reflect only the seven criteria established by the Code of Criminal Procedure.[151]

Fewer statutory requirements apply for list-qualified state habeas counsel. "Each attorney on the list,"

> (1) must exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases; and
> (2) may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case.[152]

While these statewide criteria hold list-qualified appointed counsel to *some* standard, in most respects they fall short of ensuring high-quality legal representation in capital cases.

First, the Texas Code of Criminal Procedure criteria are not specific enough to assure indigent defendants that their list-qualified appointed counsel possess the knowledge and skills required for effective capital-case representation. The Code's experiential criteria embraces some of the skills mentioned in the *ABA Guidelines*—for example, skill in the use of expert witnesses and familiarity with common areas of forensic investigation, and skill in the investigation, preparation, and presentation of evidence bearing upon mental status and evidence pertaining to mitigation. Other important skills, however, would not be captured in an application requiring little more than that the Code's seven criteria be satisfied, such as skill in the management and conduct of complex negotiations and litigation, in oral advocacy or in jury selection.

Second, Texas's standards emphasize experiential requirements instead of a demonstrated commitment to providing zealous advocacy and high-quality legal representation. While experience certainly is relevant, the *ABA Guidelines* emphasize that "quantitative measures of

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accurately reflects the attorney's ability to provide effective representation." *Id.* at art. 26.052(d)(2)(C), art. 26.052(d)(3)(C); *see also id.* at art. 26.052(n).

[150] *Id.* at art. 26.052(d)(3)(E)–(G) (emphasis added). The "appellate brief authorship" requirement replaces the "tried to a verdict" requirement. *Compare id.* at art. 26.052(d)(2)(E), *with id.* at art. 26.052(d)(3)(E).

[151] *See supra* note 56.

[152] TEX. GOV'T CODE ANN. § 78.056(a) (2013). Although Texas law does not state explicitly that these standards may be enlarged on a county-by-county or regional basis, at least one administrative judicial region has elected to do so. *See* EIGHTH ADMIN. REGION STANDARDS, *supra* note 56, at 2 (Sept. 11, 2006) (requiring that list-qualified state habeas counsel "must have previously served as defense trial counsel, as appellate counsel, or as post-conviction habeas counsel, in at least one prior death penalty case that was tried to verdict").

experience are not a sufficient basis to determine an attorney's qualifications for the task" of representing capital clients.[153] "An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster."[154]

As one capital punishment expert has noted, "[s]tandards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications."[155] Such qualification standards may "guarantee no more than experienced incompetence."[156] Counsel who currently satisfy Texas's standards and who have obtained certification very well may include practitioners whose past performance raises doubts as to the zealousness of their advocacy. One Houston-based attorney, for example, has had at least twenty clients sentenced to death, a fact which gives some indication as to the limits of experiential requirements for ensuring indigent capital defendants receive high-quality legal representation.[157]

Third, and as discussed in greater detail under Recommendation #5, list-qualified appointed counsel need not satisfy the training requirements set forth in Guideline 8.1 of the *ABA Guidelines*.[158]

Finally, only forty-nine attorneys in the Second Administrative Judicial Region—which includes the City of Houston and is among the more active regions in terms of capital cases—currently are qualified to represent these defendants as lead trial counsel; in that same region, only twenty-six attorneys currently are qualified to represent these defendants on direct appeal.[159] Other regions' rosters are even more limited, reflecting a limited pool of attorneys available to represent death-eligible defendants.[160]

Public-defender Appointed Counsel

No Texas law, regulation, or rule requires counsel to demonstrate, prior to appointment, the necessary skills and commitment to zealous advocacy required by the *ABA Guidelines*. The

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[153] ABA, *supra* note 82, at 964 (commentary to Guideline 5.1).

[154] *Id.*

[155] Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1871 n.209 (1994).

[156] Jeremy P. White, *Establishing a Capital Defense Unit in Virginia: A Proposal to Increase the Quality of Representation for Indigent Capital Defendants*, 13 CAP. DEF. J. 323, 343 (2001).

[157] Adam Liptak, *A Lawyer Known Best for Losing Capital Cases*, N.Y. TIMES, May 17, 2010; Stephen Bright, *Massive Indifference: Denial of Competent Lawyers in Death Penalty and Other Criminal Cases*, DEWITT HIGGS MEMORIAL LECTURE (Jan. 18, 2012).

[158] See *infra* notes 350–356 and accompanying text.

[159] *List of Attorneys Qualified in Death Penalty Cases*, SECOND ADMIN. JUD. REGION OF TEX. (Feb. 9, 2012).

[160] *See, e.g.*, *List of Attorneys Qualified in Death Penalty Cases*, SEVENTH ADMIN. JUD. REGION OF TEX. (rev. Feb. 14, 2012) (listing two and zero attorneys as qualified to represent indigent capital defendants as lead trial counsel and on direct appeal, respectively); *List of Attorneys Qualified in Death Penalty Cases*, EIGHTH ADMIN. JUD. REGION OF TEX. (eff. June 2, 2011) (listing eleven and five attorneys as qualified to represent indigent capital defendants as lead trial counsel and on direct appeal, respectively).

Texas Code of Criminal Procedures, however, does provide that a county served by one of Texas's public defender offices may appoint counsel "as provided by the guidelines established by the public defender's office."[161]

The El Paso Public Defender's Office, for example, explicitly requires attorney employees who may represent indigent defendants in capital cases to satisfy the seven Code of Criminal Procedure requirements for list-qualified appointed counsel.[162] These attorneys also must have demonstrated the knowledge and skills listed in *ABA Guideline* 5.1.[163]
Similarly, RPDO lists as "qualification requirements" in its job description for assistant public defenders six of the seven Code requirements for list-qualified appointed counsel.[164] It also lists, under the job description's "Knowledge, Skills, and Abilities" section, most of the knowledge and skills described in *ABA Guideline* 5.1.[165]

In terms of training, no statutory authority requires public-defender appointed counsel to satisfy the training requirements set forth in the *ABA Guidelines*. Nevertheless, the El Paso Public Defender's Office aims to provide training to its attorney employees, as does RPDO.[166] (This training is discussed in detail under Recommendation #5).

With respect to the Office of Capital Writs (OCW)—the third Texas government agency currently providing indigent defense services in capital cases—the Assessment Team was unable to determine the qualification standards for this office's attorneys.

Federal Habeas Counsel and Clemency Counsel

OCW is forbidden under Texas law from "represent[ing] a defendant in a federal habeas review."[167] Nevertheless, indigent death-sentenced inmates who seek a writ of habeas corpus in federal court are entitled under federal law to representation by at least one attorney who has "been admitted to practice in the court of appeals for not less than five years" and who has "had

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[161] TEX. CODE CRIM. PROC. ANN. art. 26.052(b) (2013) (emphasis added).

[162] Powell Survey II, *supra* note 91, at 2. In fact, several senior trial attorneys employed by the El Paso Public Defender's Office are listed individually in the Sixth Administrative Judicial Region's list of list-qualified appointed counsel. *Compare List of Attorneys Qualified in Death Penalty Cases*, SIXTH ADMIN. JUD. REGION OF TEX. (2012) (on file with author) (listing, for example, Bruce John Ponder and Gregorio S. Velasquez as qualified for appointment as lead trial or lead appellate counsel in capital cases), *with Government Employee Salaries*, TEX. TRIB., http://www.texastribune.org/library/data/government-employee-salaries (last visited Sept. 28, 2012) (listing, for example, Bruce John Ponder and Gregorio S. Velasquez as senior trial employed by the El Paso Public Defender's Office).

[163] Powell Survey II, *supra* note 91, at 2.

[164] *Job Description: Assistant Public Defender*, LUBBOCK CNTY., TEX. (June 2010) (on file with author). The job description does not include the Code's requirement that appointed counsel must not have "been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case." *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(2)(C) (2013).

[165] *Job Description: Assistant Public Defender*, LUBBOCK CNTY., TEX. (June 2010) (on file with author). The only discrepancy involves part (b)(ii)(f), which mentions "[s]kill in the investigation, preparation, and presentation of evidence bearing upon mental status." Although the job description does not include this language, it does mention "[skill] in developing effective defense strategies" and "[skill] in analyzing cases and applying legal principles." *Id.*

[166] *See* Powell Survey II, *supra* note 91, at 3–5; Wischkaemper Survey II, *supra* note 91, at 3–5.

[167] TEX. GOV'T CODE ANN. § 78.054(b) (2013).

not less than three years experience in the handling of appeals in that court in felony cases."[168] "[T]he [federal] court, for good cause, may appoint another attorney whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of the litigation."[169] These qualification standards are not specific enough to satisfy the terms of *ABA Guideline* 5.1.

The State of Texas does not guarantee, nor has it adopted qualification standards for, counsel during state clemency proceedings. Neither the El Paso Public Defender's Office nor RPDO provide such representation. Furthermore, it appears that Texas law forbids OCW from providing defense services during state clemency proceedings.[170]

Conclusion

The State of Texas only partially complies with Recommendation #2. While Texas has developed and published statewide qualification standards for defense counsel in capital cases, these standards only apply to list-qualified appointed counsel and, even then, do not require that counsel demonstrate the knowledge and skills necessary to ensure zealous and effective advocacy in capital cases. Furthermore, the local selection committees in the nine administrative judicial regions have not improved upon these standards to ensure that appointed counsel will have satisfied the *ABA Guidelines* training, knowledge, and skills requirements. To the extent that public-defender appointed counsel meet the qualifications set forth by the *ABA Guidelines*, this occurs at the discretion of the individual public defender office.

While the Assessment Team applauds the State of Texas for establishing minimum standards for list-qualified appointed, as well as for differentiating between lead trial and lead appellate counsel within those statewide standards, the criteria for evaluating capital counsel must include additional objective and subjective measurements. For example, only the Second, Sixth, and Eighth Administrative Judicial Regions include a peer review process, and only the Eighth Administrative Judicial Region requires its list-qualified appointed counsel to "exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases consistent with . . . the State Bar of Texas Guidelines and Standards for Texas Capital Counsel."[171] It also is important to note that many death-sentenced inmates currently awaiting execution received their sentences in the 1980's and 1990's when the provision of counsel in death penalty cases was fragmented statewide and the State of Texas imposed no standards for appointed counsel in capital cases.[172]

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[168] 18 U.S.C. § 3599(a)(2), (c) (2013).
[169] 18 U.S.C. § 3599(d) (2013).
[170] *See supra* note 118 and accompanying text.
[171] EIGHTH ADMIN. REGION STANDARDS, *supra* note 56, at 1.
[172] *See Offenders on Death Row* (current through Aug. 1, 2013), TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_offenders_on_dr.html (last visited Sept. 1, 2013) (listing offenders currently on death row sentenced from 1976 to present). See also *Executed Offenders* (current through August 1, 2013), TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_executions_by_year.html (last visited Jan. 24, 2013) (listing the names of 503 offenders executed by the State of Texas from 1982 through July 2013).

Finally, the Assessment Team applauds the State Bar of Texas for adopting in 2006 its *Guidelines and Standards for Texas Capital Counsel* (*SBOT Guidelines*). Those guidelines and standards "are a Texas-specific version of the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*."[173] *SBOT Guideline* 4.1 is, in fact, largely identical to the *ABA Guidelines*' qualification requirements.[174] While this development is encouraging, its effect on the overall quality of capital defense services in Texas remains unclear. While it may be true that "[t]here is greater awareness on the part of attorneys and judges that [these] standards exist and should be adhered to,"[175] the guidelines and standards contain no enforcement mechanism and the Assessment Team could find no instance in which *SBOT Guidelines* formed the basis of a disciplinary complaint against ineffective capital counsel, regardless of whether that complaint succeeded or failed.[176]

Recommendations

Capital cases present uniquely complex and demanding challenges to defense counsel. To better ensure that appointed counsel possess the knowledge and skills necessary to meet these challenges, and to guarantee that each capital defendant is afforded the high-quality legal representation, the Assessment Team recommends that the State of Texas

- Adopt statewide qualification standards that include an assessment of the knowledge, skills, and commitment to zealous advocacy specified in Recommendation #2;
- Develop mechanisms to evaluate the proficiency and performance of attorneys seeking capital-case appointments at trial, on direct appeal, or during state habeas or clemency proceedings through locally-based authorities comprised of individuals with demonstrated knowledge and expertise in capital representation. These mechanisms should include a review of
    - Applicant writing samples;
    - Copies of motions and briefs actually filed by the applicant in previous cases;
    - Information regarding the applicant's current and foreseeable caseload;
    - Verification that there are no prior sustained complaints against the applicant before the State Bar of Texas; and

[173] State Bar of Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B.J. 966, 967 (2006).

[174] *Compare* State Bar of Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B.J. 966, 968 (2006), *with* ABA, *supra* note 82, at 961–62.

[175] Kase Survey, *supra* note 104, at 4.

[176] The Assessment Team is aware of Texas appellate courts' citation of the State Bar of Texas Guidelines (SBOT Guidelines) for varying purposes in only three instances since their inception. *See* Fisher v. State, 2012 WL 5450828, fn. 1 (Tex. App. Beaumont 2012) (unpublished opinion) (stating that when defense counsel failed to request the appointment of co-counsel in a capital case, which later served as the basis of a claim of ineffective assistance of counsel in habeas proceedings, the *SBOT Guidelines* requirement that two counsel to be appointed was advisory and that any ineffective assistance counsel claim must be judged in light of all of the circumstances of the particular case); *Ex parte* Medina, 361 S.W.3d 633, 638 fn. 13 (Tex. Crim. App. 2011) (explaining that an application for habeas corpus relief "may, and frequently does, also contain affidavits, associated exhibits, and a memorandum of law to establish specific facts that might entitle the applicant to relief" and citing the *SBOT Guidelines* duties of post-trial counsel to support this assertion); *Ex parte* Van Alstyne, 239 S.W.3d 815, 822–23 (Tex. Crim. App. 2007) ("Both the American Bar Association and the State Bar of Texas recognize the important role of experts in screening defendants for mental health issues, including mental retardation").

- A catch-all provision to allow applicants to submit any other information they believe relevant to establish their qualifications—for example, extensive training or research in the field of capital defense—to better enable the independent appointing authorities to assess applicants and, therefore, to ensure high-quality representation within their respective regions.

Other capital jurisdictions have instituted rigorous qualification standards that could serve as a model for Texas. The Superior Court of Maricopa County, Arizona—one of the most active capital jurisdictions in the country—recently established, by administrative order, a "Capital Defense Review Committee," which is comprised of the presiding criminal judge of the county, the heads of the Maricopa County public defender agencies, and four members of the criminal defense bar. The Committee evaluates and re-evaluates prospective and current list-qualified capital counsel along the lines described above.[177] The administrative order also requires applicants to, at a minimum, establish that they meet the qualifications prescribed by Guideline 5.1 of the *ABA Guidelines*.[178] Likewise, the State of Louisiana has adopted rigorous statewide qualification standards for appointed counsel in all capital cases, as well as a thorough certification and review process for counsel seeking appointment to any Louisiana capital case.[179]

Ultimately, the State of Texas must ensure that its capital-case certification system is not a mere formality and that attorneys approved to represent indigent capital defendants and death-sentenced inmates manifest their commitment to providing zealous advocacy and high-quality legal representation.

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[177] MARICOPA CNTY. SUPERIOR CT., ADMINISTRATIVE ORDER NO. 2012-008: IN THE MATTER OF ADOPTING A PLAN FOR REVIEW OF APPOINTED DEFENSE COUNSEL 3-4 (adopted Jan. 11, 2012) (also stating that the criminal defense bar committee members may not hold a current public defender contract or have a contract application pending, nor may they be employed by a Maricopa County indigent defense agency).

[178] *Id.* at 5.

[179] La. Pub. Defender Bd., *Capital Defense Guidelines* §§ 915(A) (qualifications of defense counsel), 915(C) (certification process).

C. Recommendation #3

The selection and evaluation process should include:

a. A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (*see* ABA Policy Recommendations on Death Penalty Habeas Corpus, paras. 2–3, app. B (proposing amendments to 28 U.S.C. § 2254(h)(1), (h)(2)(i)), *reprinted in* 40 AM. U. L. REV. 1, 9, 12, 254 (1990); Guideline 3.1 of the *ABA Guidelines*), such as:

i. A defender organization that is either:

(a) A jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

(b) A jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or

ii. An "Independent Authority," that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

The *ABA Guidelines* require that a statewide agency "independent of the judiciary" be responsible for the provision of high-quality legal representation for a state's capital defendants and death-sentenced inmates.[180] This requirement reflects "two realities that have become overwhelmingly clear: (1) judges . . . are subject to political pressures in connection with capital punishment cases; and (2) lawyers whom judges have appointed in capital punishment cases have frequently been of far lower quality than [those who] could have been selected."[181] Accordingly, under the *ABA Guidelines* the independent appointing authority would "assess the qualifications of attorneys who wish to represent capital defendants, conducting a meaningful review of each request for inclusion on the roster of qualified counsel."[182]

With regard to capital cases, no such independent appointing authority exists within the State of Texas. Instead, many of the duties that the *ABA Guidelines* hold should be assigned to a defender organization or statewide independent appointing authority belong, in part or in full, to members of Texas's elected judiciary. Other duties mentioned under Recommendation #3 are performed by a patchwork of statewide and countywide agencies, a framework also inconsistent with the *ABA Guidelines*.

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[180] ABA, *supra* note 82, at 946 (recounting the history of Guideline 3.1).

[181] Ronald J. Tabak, *Why an Independent Appointing Authority is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases*, 31 HOFSTRA L. REV. 1105, 1105 (2003).

[182] ABA, *supra* note 82, at 950 (commentary to Guideline 3.1).

Regarding the selection of capital counsel, the power to appoint an attorney to represent an indigent capital defendant or death-sentenced inmate rests with the elected judges of Texas's court system.[183] At the trial and direct-appeal stages of a capital case, Texas law provides that

> [t]he presiding judge of the district court in which a capital felony case is filed shall appoint two attorneys, at least one of whom must be qualified under [the Texas Code of Criminal Procedure], to represent an indigent defendant as soon as practicable after charges are filed, unless the state gives notice in writing that the state will not seek the death penalty.[184]

During state habeas proceedings, the convicting court is likewise responsible for "determin[ing] if the defendant is indigent" and for "appoint[ing] the office of capital writs to represent the defendant" or—if OCW does not accept or is prohibited from accepting an appointment—for "appoint[ing] counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions."[185]

b. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.

In Texas, the responsibility for developing and maintaining the roster of counsel eligible to be appointed in capital cases is diffused: For counsel eligible to represent a defendant at trial or on direct appeal, this responsibility belongs to the local selection committees in each of Texas's nine administrative judicial regions;[186] for counsel eligible to represent a death-sentenced inmate during state habeas review, this responsibility belongs to the presiding judges in each of those nine regions.[187] As neither of these authorities are a statewide independent appointing authority consistent with the terms of Recommendation #3, the State of Texas does not comply with this part of the Recommendation.

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[183] *See* TEX. CONST. art. V, §§ 2(c), 4(a), 6(b), 7, 15 (2013) (providing that Texas's Supreme Court justices and the judges of its Court of Criminal Appeals, courts of appeals, district courts, and county courts shall be elected); TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (2013). *See generally* Chapter Eleven on Judicial Independence and Vigilance.

[184] TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (2013).

[185] *Id.* at art. 11.071, § 2(b), (f).

[186] *Id.* at art. 26.052(d)(4), (m).

[187] *Id.* at art. 11.071, § 2(f); TEX. GOV'T CODE ANN. § 78.056(a) (2013).

c. The statewide independent appointing authority should perform the following duties:

- **i. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and**
- **ii. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;**
- **iii. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;**
- **iv. Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;**
- **v. Draft and periodically publish rosters of certified attorneys;**
- **vi. Establish minimum standards for performance of all counsel in death penalty cases;**
- **vii. Implement mechanisms to ensure that the workload of defense attorneys in death penalty cases enables counsel to provide each client with high quality legal representation consistent with the ABA Guidelines;**
- **viii. Monitor the performance of all attorneys providing representation in capital proceedings;**
- **ix. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.**
- **x. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with the *ABA Guidelines*.**

No statewide independent appointing authority bears responsibility for training, selecting, and monitoring attorneys who will or may represent indigent capital defendants or death-sentenced inmates. Accordingly, the State of Texas does not comply with this part of Recommendation #3. The remainder of the analysis will focus on list-qualified appointed counsel and address the extent to which Texas governmental entities—whether statewide or countywide—are performing the ten duties listed under this part.

Conduct, Sponsor, and Approve Specialized Training Programs

No statewide authority is responsible for conducting, sponsoring, or approving specialized training programs for attorneys representing defendants in capital cases. In the State of Texas, such training is available primarily through the Plano-based Center for American and International Law (CAIL) and the Texas Criminal Defense Lawyers Association (TCDLA), but these entities do not operate under the auspices of state or local government.[188] That said, these training programs are facilitated by the Texas Court of Criminal Appeals through grant awards.[189] Training is discussed in greater detail under Recommendation #5.

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[188] *About the Center*, CTR. FOR AM. & INT'L LAW, http://www.cailaw.org/about.html (last visited Sept. 1, 2013) (describing the Center as "a nonprofit institution dedicated to the continuing education of lawyers and law enforcement officials in the United States and throughout the world."); *About TCDLA*, TEX. CRIM. DEFENSE LAWYERS ASS'N, http://www.tcdla.com/about/about.htm (last visited Sept. 1, 2013) (describing the Association as "the largest state association for criminal defense attorneys in the nation").

[189] TEX. GOV'T CODE ANN. §§ 56.001(a) (establishing the Judicial and Court Personnel Training Fund), 56.003(f) (specifying the appropriate uses for the Judicial and Court Personnel Training Fund) (2013).

Draft and Publish Certification Standards and Procedures

Certification standards for list-qualified trial and appellate counsel come from the Texas Code of Criminal Procedure and the local selection committees in each of Texas's nine administrative judicial regions.[190] The standards for public-defender appointed counsel, however, originate in each public defender office.[191]

Both public defender offices and the local selection committees in each of Texas's nine administrative judicial regions bear responsibility for evaluating and certifying capital counsel. Each committee must include as members "the administrative judge of the judicial region" and "at least one district judge."[192] With regard to public-defender appointed counsel—whether of the El Paso Public Defender's Office, RPDO, or OCW—this evaluation is manifested by the hiring and retention decisions of counsel's office.[193] With regard to list-qualified appointed counsel—in particular, those representing the capital defendant at trial and on direct appeal—the local selection committee determines whether an attorney will have his/her name added to, or retained on, the region's list of qualified counsel.[194] The presiding judge of each administrative judicial region also bears responsibility for maintaining the appointment list for non-OCW state habeas counsel.[195]

While certification standards for list-qualified appointed counsel must be published periodically by the local selection committees,[196] no statutory provision requires similar disclosure of public defender offices. As for the certification standards for list-qualified state habeas counsel, the Texas Government Code imposes only two requirements, and few counties and administrative judicial regions have elected to enlarge these standards.[197]

Recruit and Certify Qualified Attorneys

The local selection committees and presiding judges in each of Texas's nine administrative judicial regions are responsible for certifying list-qualified appointed counsel.[198] However, there do not appear to be systemic efforts underway to recruit such counsel, albeit some local selection

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[190] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(c)–(d) (2013).

[191] *See id.* at art. 26.052(b). The policies of a public defender office must conform to the recommendations of the office's corresponding oversight board. *See id.* at art. 26.045(c)(2).

[192] *Id.* at art. 26.052(c). The Texas Code of Criminal Procedure also requires that the committee include as members "a representative from the local bar association" and "at least one practitioner who is board certified by the State Bar of Texas in criminal law." *Id.*

[193] Although the Texas Indigent Defense Commission has the authority to develop "policies and standards governing the organization and operation of a public defender's office consistent with recognized national policies and standards," the Commission has not yet developed such policies and standards. TEX. GOV'T CODE ANN. § 79.034(a)(6) (2013). *See also* TEX. CODE CRIM. PROC. ANN. art. 26.044(h) ("A public defender's office may employ attorneys, licensed investigators, and other personnel necessary to perform the duties of the public defender's office as specified by the commissioners court or commissioners courts . . . .") (2013).

[194] TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(1), (d)(5), (m) (2013).

[195] *Id.* at art. 11.071, § 2(f); TEX. GOV'T CODE ANN. § 78.056(a) (2013).

[196] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(4) (2013).

[197] *See, e.g.*, EIGHTH ADMIN. REGION STANDARDS, *supra* note 56, at 2.

[198] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(4) (2013); *id.* at art. 11.071, § 2(f); TEX. GOV'T CODE ANN. § 78.056(a) (2013); *Article 11.071 Appointment Procedures*, *infra* note 204.

committees have sought to do so.[199] Furthermore, while the El Paso Public Defender's Office reports that "the available pool of attorneys is adequate" to ensure that capital defendants and death-sentenced inmates receive high-quality legal representation, it notes that "many attorneys in this community are aging out" and that there is "not [] much activity in recruiting new attorneys in either the initial litigation of capital cases or the appellate and post-conviction area."[200]

Assign Attorneys to Represent the Defendant

If the State of Texas seeks the death penalty, "[t]he presiding judge of the district in which a capital felony case is filed shall appoint two attorneys . . . to represent an indigent defendant as soon as practicable after charges are filed."[201] If a death sentenced is imposed, "the presiding judge of the convicting court shall appoint counsel to represent an indigent defendant on appeal and to apply for a writ of certiorari, if appropriate."[202] The presiding judge of the convicting court is also responsible for appointing either OCW or list-qualified appointed counsel to represent indigent death-sentenced inmates on state habeas review.[203]

With respect to list-qualified state habeas counsel, procedures adopted by the presiding judges of the administrative judicial regions hold that "[t]he convicting court will appoint an attorney from the list of eligible attorneys maintained by the Regional Presiding Judges, if the Office of Capital Writs does not accept or is prohibited from accepting an appointment."[204] This is in line with the appointment procedures outlined in the Texas Code of Criminal Procedure.[205]

These provisions generally empower the presiding judge to make all attorney appointments. Thus, without an independent appointing authority, assignment of counsel to capital cases may be influenced by factors irrelevant to ensuring effective representation.[206] In fact, the experiences of practitioners in Harris County underscore the wisdom of limiting trial courts' discretion with respect to the appointment decision. As recounted by Professor Scott Phillips:

> A criminal defense attorney from Harris County confirmed the charge of political partisanship: "I have been refused appointments because I cannot afford to give money to the judge's reelection campaign . . . those attorneys who contribute the most money receive the most work." In fact, budget records indicate that funds spent on appointed counsel increase during election years, raising the possibility

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[199] Email from Jack Stoffregen to Sarah Turberville, Apr. 18, 2013 (confirming that the Ninth Administrative Judicial Region has sought to recruit counsel for its appointment list) (in file with author).

[200] Powell Survey II, *supra* note 91, at 3.

[201] TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (2013).

[202] *Id.* at art. 26.052(j). This appointment must be made "[a]s soon as practicable." *Id.*

[203] *Id.* at art. 11.071, § 2(c), (f).

[204] *Procedures Regarding Eligibility for Appointment of Attorneys as Counsel Under Article 11.071, Section 2(f), Code of Criminal Procedure, and Regarding the Maintenance of a Statewide List of Attorneys Eligible for Appointment as Required by Section 78.056, Government Code*, TEX. CTS. ONLINE, http://www.courts.state.tx.us/courts/pdf/ProceduresCapitalWritsApptList.pdf (last visited Sept. 1, 2013) (procedures taking effect January 1, 2010).

[205] *See* TEX. CODE CRIM. PROC. ANN. art. 11.071(c) (2013).

[206] *See generally* TEX. CODE CRIM. PROC. ANN. art. 26.04 (2013).

> (though clearly not proving) that judges become more generous with the expectation of a quid pro quo.[207]

In response to these invidious pressures, individual counties have—in accordance with the broad limits of Article 26.04 of the Texas Code of Criminal Procedure—adopted their own mechanisms for assigning counsel to indigent defendants.[208] For example, the district judges of Tarrant County created an Office of Attorney Appointments to administer a plan by which indigent defendants receive counsel in capital as well as non-capital cases; if a judge wishes to "deviate from the rotation system and appoint an [otherwise qualified] attorney," s/he may do so "upon a finding of good cause to deviate from the rotation system."[209]

Draft and Publish the Attorney Roster

The local selection committees and presiding judges in each of Texas's nine administrative judicial regions are responsible for drafting and periodically publishing rosters of list-qualified appointed counsel.[210] These entities and persons have, in turn, made these rosters available through the Texas Courts Online website.[211]

Establish Attorney Performance Standards

While Texas law establishes qualifications for counsel who seek to be appointed in capital cases, there are no standards for counsel performance specific to capital cases.[212] While the Texas Indigent Defense Commission could promulgate "performance standards for counsel appointed to represent indigent defendants," it thus far has declined to do so.[213]

Attorney Workloads

Only the Eighth Administrative Judicial Region explicitly requires list-qualified appointed counsel to maintain "a manageable workload," one that would "enable[] high-quality representation to be provided to each client."[214] In all other administrative regions, as well as under Texas statutory and regulatory law, there are no standards governing acceptable workloads

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[207] Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 717, 730 (2009).

[208] *See generally* TEX. CODE CRIM. PROC. ANN. art. 26.04 (2013).

[209] *Tarrant County District Courts Plan*, TARRANT CNTY. DIST. CTS., http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=117 (last visited Apr. 1, 2013). *But see* Nolan Hicks, *Changes in Defending Indigents Move Closer*, SAN ANTONIO EXPRESS, Oct. 23, 2012 ("State law requires that the appointments be made neutrally from a list, known locally as 'the wheel,' but the investigations found that local judges [of Bexar County] had long ignored it.").

[210] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(4) (2013); *id.* at art. 11.071, § 2(f); TEX. GOV'T CODE ANN. § 78.056(a) (2013); *Article 11.071 Appointment Procedures*, *supra* note 204.

[211] *See Administrative Judicial Regions*, TEX. CTS. ONLINE, http://www.courts.state.tx.us/courts/ajr.asp (last visited Apr. 1, 2013) (click hyperlink to "Approved Attorney Appointment List").

[212] Texas law states only that (1) counsel must "exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases," and (2) counsel must not have been "found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any[/a] capital case." TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(2)(B)–(C) (2013); TEX. GOV'T CODE ANN. § 78.056(a)(1)–(2) (2013).

[213] *See* TEX. GOV'T CODE ANN. § 79.034(a)(1) (2013).

[214] EIGHTH ADMIN. REGION STANDARDS, *supra* note 56, at 4.

of capital-case attorneys. As with other duties listed under this part of Recommendation #3, the Texas Indigent Defense Commission could promulgate statewide "standards for ensuring appropriate appointed caseloads for counsel appointed to represent indigent defendants," but it thus far has declined to do so.[215]

Monitor Attorney Performance

The *ABA Guidelines* contemplate that an effective system for monitoring capital counsel performance would go "considerably beyond" investigating and maintaining records of complaints—tasks also assigned to the independent appointing authority under the *ABA Guidelines*.[216] In particular, such a system would require "[t]he performance of each assigned lawyer [to] be subject to systematic review based upon publicized standards and procedures."[217] Both the Assessment Team and the *ABA Guidelines* recognize that "this is not an easy task" and that "there obviously are difficulties present in having third parties scrutinize the judgments of private counsel. On the other hand, the difficulty of the task should not be an excuse for doing nothing."[218]

It appears that local selection committees and the presiding judges of the administrative judicial regions do possess some capacity to monitor the performance of counsel. The Texas Code of Criminal Procedure requires the local selection committee to "annually review the list of attorneys [qualified for appointment as lead trial or lead appellate capital counsel] to ensure that each listed attorney satisfies the [Code's] requirements."[219] Among those requirements is that such counsel "not [have] been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case."[220]

Similarly, the presiding judges of the nine administrative judicial regions also must "maintain [the] statewide list of competent counsel available for appointment" during state habeas proceedings, and a member of that list "may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case."[221]

Despite these legislative commands, there is concern that the local selection committees and presiding judges have not fulfilled the spirit of these monitoring requirements.[222] One Houston-based attorney has missed federal filing deadlines in at least three capital cases,[223] yet the attorney remains on the Second Administrative Judicial Region's list of capitally-qualified

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[215] TEX. GOV'T CODE ANN. § 79.034(a)(3) (2013).
[216] ABA, *supra* note 82, at 973 (commentary to Guideline 7.1).
[217] *Id.*
[218] *Id.* (internal quotations omitted).
[219] TEX. CODE CRIM. PROC. ANN. art. 26.052(m) (2013).
[220] *Id.* at art. 26.052(d)(2)(C), (d)(3)(C).
[221] TEX. GOV'T CODE ANN. § 78.056(a) (2013).
[222] *But see* Catherine Greene Burnett, *Guidelines and Standards for Texas Capital Counsel: The Dilemma of Enforcement*, 34 AM. J. CRIM. L. 165, 182 (2007) ("[I]t is unclear how complaints concerning attorney performance are brought to the attention of the local selection committee and the standard against which counsel's performance will be measured.").
[223] Lise Olsen, *Lawyers' Late Filings Can Be Deadly For Inmates*, HOUS. CHRON., Mar. 22, 2009.

counsel.[224] Likewise, the Fourth Administrative Judicial Region continues to list a San Antonio-based attorney as qualified for second-chair capital trial appointments, even though the attorney was held in contempt by the Texas Court of Criminal Appeals for missing state filing deadlines in three capital cases.[225]

Investigate and Maintain Records Concerning Complaints

There currently is no formal mechanism for lodging complaints against attorneys providing representation in capital cases short of alleging professional misconduct pursuant to the Texas Rules of Disciplinary Procedure. The grounds for disciplining a member of the State Bar are several and include "[a]cts or omissions by an attorney . . . that violate one or more of the Texas Disciplinary Rules of Professional Conduct."[226] By their terms, the Rules of Professional Conduct do not require members of the State Bar of Texas to provide high-quality legal representation consistent with the *ABA Guidelines*, which necessarily elevates the expected standard of performance due to "the unique and irrevocable nature of the death penalty."[227] Thus, while attorney disciplinary procedures may be instituted in reaction to some variations of "substandard performance,"[228] no avenue for disciplinary action exists to object to the varying forms of misconduct or poor performance on the part of capital counsel.

Review the Attorney Roster and Withdraw Certification

Texas statutory law narrowly specifies the circumstances in which a list-qualified attorney will have his/her certification withdrawn. The Texas Code of Criminal Procedures requires a list-qualified attorney to periodically "present proof to the [local selection] committee that [s/he] has successfully completed the minimum continuing legal education requirements of the State Bar of Texas," and the Code calls upon "[t]he committee [to] remove the attorney's name from the list of qualified attorneys if the attorney fails to provide the committee with proof of completion of the continuing legal education requirements."[229] Thus, with respect to list-qualified trial and appellate counsel, there is no statewide, established mechanism by which a local selection committee or other government agency may withdraw certification for failure to provide high-quality legal representation consistent with the *ABA Guidelines*.[230] By contrast, list-qualified

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[224] *List of Attorneys Qualified in Death Penalty Cases*, SECOND ADMIN. JUD. REGION OF TEX., at 1 (Apr. 30, 2013). This same attorney's name also appears on the list of counsel qualified to represent death-sentenced inmates during state habeas proceedings. *Approved Attorney Appointment List*, TEX. OFFICE CT. ADMIN., at 1 (Aug. 22, 2012).

[225] *In re* Kramer, Nos. WR-70510-01, WR-70511-01, WR-70512-01, WR-70513-01, 2009 WL 4696063, at *1 (Tex. Crim. App. Dec. 7, 2009); *List of Attorneys Qualified in Death Penalty Cases–2nd Chair*, FOURTH ADMIN. JUD. REGION OF TEX., at 1 (2012).

[226] *See* TEX. DISCIPLINARY PROC. R. 1.06(V) (defining "Professional Misconduct").

[227] ABA, *supra* note 82, at 974 (commentary to Guideline 7.1).

[228] *Id*.

[229] TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(5) (2013).

[230] Some local selection committees provide for the removal of attorneys' names from the roster. *See, e.g.*, 2011 PLAN: STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE, NINTH ADMIN. JUD. REGION OF TEXAS, at 6 (2011) (on file with author). However, the articulated grounds for removal are based on the local selection committee's criteria and not the more demanding criteria found within the *ABA Guidelines*. *See also* Chuck Lindell, *Sloppy Lawyers Failing Clients on Death Row*, AM. STATESMAN (Austin, Tex.), Oct. 29, 2006, at A1.

state habeas counsel may be removed from the attorney roster by majority vote of the regional presiding judges "if they determine that the attorney has [] in any application for writ of habeas corpus filed in the trial court or forwarded to the Court of Criminal Appeals exhibited substandard proficiency in providing quality representation to defendants in death-penalty cases," among other reasons.[231]

As with other duties listed under this part of Recommendation #3, the Texas Indigent Defense Commission could perform this review and withdrawal function. The Texas Government Code empowers the Commission to adopt "qualification standards under which attorneys may qualify for appointment to represent indigent defendants"[232] and also provides that "[a]n attorney who is identified by the commission as not satisfying performance or qualification standards adopted by the board . . . may not accept an appointment in a capital case."[233]

At present, no policies and standards specific to capital counsel have been adopted by the Commission's governing board, nor has the Commission sought to identify unqualified counsel to prevent such counsel from accepting an appointment in a capital case.[234] The Assessment Team remains concerned at the prospect of list-qualified attorneys' continued certification to represent indigent capital defendants and death-sentenced inmates despite those attorneys' well-established histories of failing to provide high-quality legal representation.[235]

Conclusion

The State of Texas does not comply with Recommendation #3. In Texas, elected judges are responsible for appointing capital counsel, whether such counsel are list-qualified or instead employed by a public defender office.[236] Furthermore, while the evaluation of public-defender appointed counsel—that is, counsel employed by the El Paso Public Defender's Office, RPDO, and OCW—does not depend on the state judiciary, list-qualified appointed counsel are evaluated by those judges serving on an administrative judicial region's local selection committee or by the presiding judges in each of the nine administrative judicial regions. These same judges, and other members of the local selection committees, also develop and maintain the roster of counsel eligible to be appointed in capital cases.[237] Each of these provisions contravenes the *ABA Guidelines*.

The creation of a regional public defender to handle capital cases at trial, as well as the Office of Capital Writs to represent death-sentenced inmates during state habeas proceedings, are marked

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[231] *Article 11.071 Appointment Procedures*, *supra* note 204.

[232] TEX. GOV'T CODE ANN. § 79.034(a)(2) (2013). The Code explicitly recognizes the Commission's authority to enlarge the qualification standards for capital counsel. *See* TEX. GOV'T CODE ANN. § 79.034(c) (2013) ("Any qualification standards adopted by the board . . . that relate to the appointment of counsel in a death penalty case must be consistent with the standards specified under Article 26.052(d), Code of Criminal Procedure.").

[233] TEX. GOV'T CODE ANN. § 79.034(c) (2013) (emphasis added).

[234] Email from Wesley Shackelford, Deputy Dir. and Special Counsel, Tex. Indigent Defense Comm. to Sarah Turberville (April 22, 2013) (on file with author).

[235] *See supra* notes 223–225 and accompanying text.

[236] *But see* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(b) (2013) (requiring that the convicting court appoint OCW to represent an indigent death-sentenced inmate who "desires appointment of counsel for the purpose of [filing an application for] a writ of habeas corpus").

[237] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(f) (2013); TEX. GOV'T CODE ANN. § 78.056(a) (2013).

improvements toward assuring effective representation in Texas capital cases. However, the majority of defendants facing a capital trial in Texas continue to be represented by list-qualified appointed counsel. Applicants are not rigorously screened and monitored, nor does a complaint and remedy process for cases in which counsel did not provide high-quality legal representation exist. The ill effects of this system remain well-documented.[238]

Recommendation

To ensure that every defendant in a capital case and every death-sentenced inmate receive high-quality representation, the Assessment Team recommends that the State of Texas empower regional or countywide authorities to make selection and evaluation determinations, at least with respect to list-qualified appointed counsel. As with the appointing authorities established in other capital jurisdictions—for example, the Capital Defense Review Committee of Maricopa County, Arizona—these local authorities should be comprised of individuals with demonstrated knowledge and expertise in capital representation, and their membership should be, to the extent possible, independent of the elected judiciary.[239]

Attention must be paid to monitoring the performance of capital counsel. In fact, the State of Texas has not promulgated performance standards, and the anecdotal evidence raises doubts that corrective action is taken whenever performance-related complaints do arise. "The level of

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[238] Phillips, *supra* note 207; RAYMOND PATERNOSTER ET AL., THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT (2008); DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW (2005); Stephen B. Bright, *The Politics of Capital Punishment: The Sacrifice of Fairness for Executions*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 127 (James R. Acker et al. eds., 2003); John H. Blume & Stacey D. Neumann, *"It's Like Déjà Vu All Over Again":* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 159–60 (2007); TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS (2002); Rebecca Copeland, *Getting It Right from the Beginning: A Critical Examination of Current Criminal Defense in Texas and Proposal for a Statewide Public Defender System*, 32 ST. MARY'S L.J. 493 (2001); Samy Khalil, *Doing the Impossible: Appellate Reweighing of Harm and Mitigation in Capital Cases After* Williams v. Taylor, *with a Special Focus on Texas*, 80 TEX. L. REV. 193 (2001); Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (2000); TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 77–100 (2000); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Anthony Lewis et al., Panel Discussion, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105 (1994); Patrick Higginbotham & Mark Curriden, *Capital Defendants Deserve a Competent Judicial System*, DALLAS MORNING NEWS, Jan. 23, 2005; Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, July 15, 2000, at A1; Interview with Robert C. Owen, Clinical Prof., Univ. of Tex. (Oct. 19, 2010), *available at* http://www.texastribune.org/texas-dept-criminal-justice/hank-skinner/an-interview-with-ut-death-penalty-lawyer-rob-owen/ ("There are real problems with equality of defense representation in Texas. I think that it is not uniformly high quality.").

[239] Although not entirely independent from the state judiciary, the Capital Defense Review Committee of Maricopa County, Arizona, provides a useful localized model for evaluating the qualifications of capital defense counsel. *See* MARICOPA CNTY. SUPERIOR CT., ADMINISTRATIVE ORDER NO. 2012-008: IN THE MATTER OF ADOPTING A PLAN FOR REVIEW OF APPOINTED DEFENSE COUNSEL 3 (adopted Jan. 11, 2012) (providing that the nine-member Committee shall include, as members drawn from the judiciary, only "[t]he Presiding Criminal Judge [of Maricopa County Superior Court] or a Maricopa County Superior Court Judge designated by the Presiding Criminal Judge"). For an example of a statewide entity, see La. Pub. Defender Bd., *Capital Defense Guidelines* § 905(C)(2) (requiring that the duties for ensuring high-quality legal representation to indigent defendants be "assigned, contracted or delegated" to the state public defender or other independent defender organization).

attorney competence that may be tolerable in non-capital cases can be fatally inadequate in capital ones," thus "[t]he standards of performance . . . should accordingly insure that all aspects of the representation conform to the special standard of practice applicable to capital cases."[240] To this end, Texas must

- Adopt performance standards for capital counsel analogous to Guideline 10.1 through Guideline 10.15.2 of the *ABA Guidelines*.[241] In particular, these standards should require certain training prior to appointment—training in conformance with Guideline 8.1—and also set limits on acceptable attorney workloads;[242]
- Implement mechanisms for a responsible to monitor the performance of list-qualified appointed counsel, as specified in Guideline 7.1 of the *ABA Guidelines*.[243] These mechanisms should include

    - Periodic and ad hoc review of the list-qualified counsel to ensure that they remain capable of providing high-quality legal representation;[244]
    - A requirement that list-qualified counsel undergo a performance review following any capital-case representation;[245]
    - Regular and public procedures for investigating and resolving complaints by judges, clients, attorneys, and others, which complaints allege that defense counsel failed to provide high-quality legal representation in a capital case; and
    - Removal of any attorney from the list of qualified counsel whenever s/he has failed to represent a client consistent with the *ABA Guidelines*, subject to the attorney's right to object to and appeal this removal decision.[246]

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[240] *See* ABA, *supra* note 82, at 991 (commentary to Guideline 10.1).

[241] *See id.* at 989–1090.

[242] *See, e.g.*, La. Pub. Defender Bd., *Capital Defense Guidelines* § 919; Ohio Rules of Superintendence 20(III)(B). *See also* ABA, *supra* note 82, at 965–69.

[243] *See* ABA, *supra* note 82, at 970–75.

[244] *See, e.g.*, MARICOPA CNTY. SUPERIOR CT., ADMINISTRATIVE ORDER NO. 2012-008: IN THE MATTER OF ADOPTING A PLAN FOR REVIEW OF APPOINTED DEFENSE COUNSEL 7 (adopted Jan. 11, 2012) (requiring the Capital Defense Review Committee to "periodically re-evaluate attorneys at intervals of not more than three years," and permitting the Committee to "re-evaluate an attorney at any time . . . when there is reason to believe that the attorney has not met or may not continue to meet the applicable" qualification and performance standards).

[245] *See, e.g.*, La. Pub. Defender Bd., *Capital Defense Guidelines* § 921(C)(1)–(2) (requiring that counsel brief the appointing authority "[w]henever a capital case has been closed at trial, appellate, state post-conviction, federal post-conviction, or clemency level," and requiring the appointing authority to convene a case review committee "in every case in which a death sentence is imposed or affirmed, post-conviction relief is denied or a defendant is executed").

[246] *See, e.g.*, N.C. Rules of the Comm. on Indigent Defense Servs, Part 2, App. 2A.2(e) (providing that if an attorney is removed from the appointment roster, the attorney may request review of the removal decision).

D. Recommendation #4

Compensation for Defense Team (Guideline 9.1 of the *ABA Guidelines*):

a. The jurisdiction should ensure funding for the full cost of high-quality legal representation, as defined by Guideline 9.1 of the *ABA Guidelines*, by the defense team and outside experts selected by counsel.[247]

According to the *ABA Guidelines*, "[i]t is critically important . . . that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence."[248]

Trial and Direct Appeal Counsel

For the most part, Texas's indigent capital defense system is funded on a county-by-county basis. As explained in the factual discussion,[249] the Texas Code of Criminal Procedure states that "[a]ll payments [to list-qualified appointed counsel] . . . shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held and may be included as costs of court."[250] Similarly, the public defender offices that presently handle capital cases primarily receive their funding from the counties they serve: El Paso County in the case of the El Paso Public Defender's Office[251] and, in the case of RPDO, the counties that have agreed to have RPDO provide defense services to capitally-charged indigent defendants in their jurisdiction.[252]

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[247] In order for a state to ensure funding for the "full cost of high quality legal representation," it must be "responsible for paying not just the direct compensation of members of the defense team, but also the costs involved in meeting the requirements of [the ABA] Guidelines for high quality representation (e.g., Guideline 4.1, Guideline 8.1)." ABA, *supra* note 82, at 984–85. Guideline 4.1 is reflected in Recommendation #1, *supra*, and Guideline 8.1 is reflected in Recommendation #5, *infra*.

[248] *Id.* at 955 (commentary to Guideline 4.1).

[249] *See supra* notes 11–12 and 23 and accompanying text.

[250] TEX. CODE CRIM. PROC. ANN. art. 26.05(f) (2013); *see also* TEX. CODE CRIM. PROC. ANN. art. 26.052(l) (2013) ("An attorney appointed under this article to represent a [capital] defendant at trial or on direct appeal is compensated as provided by Article 26.05 from county funds.").

[251] EL PASO CNTY., TEX., FY 2012 ADOPTED BUDGET 563 (2011) (for fiscal years 2010 and 2011, listing general fund appropriations of $4,783,767 and $5,040,389, respectively). For fiscal year 2012, the El Paso County Public Defender received no budget increase, whereas the El Paso District Attorney received a modest budget increase of $109,037—a 0.8% increase over fiscal year 2011. *Id.* at 568.

[252] *See Sample Interlocal Agreement*, REG'L PUB. DEFENDER FOR CAPITAL CASES 1–2 (2013), *available at* http://rpdo.org/forms/interlocal%20agreement.pdf.

County funding for capital indigent defense services is augmented by the Texas Legislature through appropriations to the Texas Indigent Defense Commission (Commission), which in turn awards grants to counties under its various grant programs.[253] In particular, counties may use Commission grants for

> (1) Attorney fees for indigent defendants accused of crimes or juvenile offenses;
> (2) Expenses for licensed investigators, experts, forensic specialists, or mental health experts related to the criminal defense of indigent defendants;
> (3) Other direct litigation costs related to the criminal defense of indigent defendants; and
> (4) Other approved expenses allowed by the Commission or necessary for the operation of a funded program.[254]

The Commission also uses its grant funding authority to offset counties' required contributions to RPDO's operating budget.[255] The Commission's contribution will decrease during the first five years of a county's participation in the RPDO program. For example, given the Commission's current cost-sharing arrangement with RPDO, counties in the First and Eighth Administrative Judicial Regions joining the RPDO program in late 2012 will account for 0%, 30%, 40%, 60%, and 80% of their calculated obligations in the first, second, third, fourth, and fifth year of participation, respectively.[256] The El Paso County Public Defender's Office also receives annual grant funding from the Commission.[257]

The Commission issues these grants from the Fair Defense Account.[258] For the 2012 and 2013 fiscal years, appropriations to this account totaled $29,774,951 and $32,512,893, respectively.[259] Legislation that would have increased the funds available for issuing grants to counties by $2,350,894 in 2012 and $5,088,837 in 2013 did not pass.[260]

In his 2013 State of the Judiciary address, the Chief Justice of the Texas Supreme Court encouraged members of the Texas Legislature to increase funding to the Commission and "provid[e] relief to the counties by sharing costs of indigent defense equally with county government".[261]

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[253] TEX. GOV'T CODE ANN. § 79.037 (2013) (empowering the Commission to issue grants from the Fair Defense Account); 1 TEX. ADMIN. CODE § 173.101 *et seq.* (2013) (detailing the Commission's various grant programs).

[254] 1 TEX. ADMIN. CODE § 173.202 (2013).

[255] *Sample Interlocal Agreement*, REG'L PUB. DEFENDER FOR CAPITAL CASES 1–2 (2012), *available at* http://rpdo.org/forms/interlocal%20agreement.pdf.

[256] *See Estimated Allocations for the First and Eighth Administrative Judicial Regions*, REG'L PUB. DEFENDER FOR CAPITAL CASES (2012), *available at* http://rpdo.org/forms/1%20and%208%20allocations.pdf.

[257] *See* Powell Survey I, *supra* note 92, at 2.

[258] *See* TEX. GOV'T CODE ANN. §§ 79.031 (establishing the Fair Defense Account), 79.037 (empowering the Commission to issue grants from the Fair Defense Account) (2013).

[259] EIGHTY-SECOND TEX. LEGIS., GENERAL APPROPRIATIONS ACT FOR THE 2012–13 BIENNIUM, at IV-23 (2011).

[260] *Id.* at IV-40 to -41, IV-40 n.1.

[261] Cohen, *supra* note 89.

State Habeas Counsel

At the state habeas level, the Office of Capital Writs (OCW) receives funding "(1) as specified in the General Appropriations Act; and (2) from the fair defense account . . . , in an amount sufficient to cover personnel costs and expenses not covered by appropriations . . . ."[262] For fiscal years 2012 and 2013, funding for OCW amounted to $922,135 and $862,136, respectively, all of which came from the Fair Defense Account.[263]

If OCW "does not accept or is prohibited from accepting an appointment," Texas law requires that other competent counsel be appointed.[264] This list-qualified counsel will be "reasonably" compensated as provided by the Texas Code of Criminal Procedure.[265] Specifically, the Code requires the state to "reimburse a county for compensation of [private, locally-appointed post-conviction] counsel . . . and for payment of expenses under Section 3, *regardless of whether counsel is employed by the office of capital writs*."[266] This state-funded reimbursement to the county is capped at $25,000, and "[c]ompensation and expenses in excess of the $25,000 reimbursement provided by the state are the obligation of the county."[267] The cap on state reimbursement was introduced in 1999 when the Texas Legislature shifted the burden for compensating state habeas counsel from the Texas Court of Criminal Appeals (using state funds) to the convicting court (using county funds).[268]

The State of Texas does not guarantee, nor does it provide funding for, defense services during federal habeas and state clemency proceedings. As a consequence, indigent death-sentenced inmates rely on federal habeas counsel, compensated at the rate set by federal law,[269] or non-profit organizations—for example, the Texas Defender Service or the Capital Punishment Center at the University of Texas School of Law—for defense services in federal court or before the Texas Board of Pardons and Paroles.[270] If an inmate is represented by counsel pursuant to

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[262] TEX. GOV'T CODE ANN. § 78.052(b) (2013).

[263] EIGHTY-SECOND TEX. LEGIS., GENERAL APPROPRIATIONS ACT FOR THE 2012–13 BIENNIUM, at IV-28 (2011).

[264] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(c) (2013).

[265] *Id.* at § 2(f).

[266] *Id.* at § 2A(a) (emphasis added).

[267] *Id.* The Code makes clear, however, that

> [t]he limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement,

and that "a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement." *Id.* at § 2A(c).

[268] *Compare* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(h) (1995), *with* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2A(a) (1999).

[269] *See* 18 U.S.C. § 3599(g)(1) (2013); U.S. COURTS, *Federal Death Penalty and Capital Habeas Corpus Representations*, *in* GUIDELINES FOR ADMINISTERING THE CJA AND RELATED STATUTES, *available at* http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter6.aspx#630. The hourly rate was raised from $125 per hour to $178 per hour on January 1, 2010. *Id.*

[270] *See* 18 U.S.C. § 3599(e) (2013); Harbison v. Bell, 556 U.S. 180, 194 (2009) (stating that the petitioner's "case underscores why it is 'entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells'" (quoting Hain v. Mullin, 436 F.3d 1168, 1175 (10th Cir. 2006) (en banc))); Kase Survey, *supra* note 104, at 2.

federal law, the inmate is entitled to funds for "investigative, expert, or other services" deemed "reasonably necessary for the representation of the defendant."[271]

In view of this, the State of Texas only partially complies with this part of Recommendation #4.

> **a. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high-quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.**
>
> **i. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**
>
> **ii. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**

<u>List-qualified Appointed Counsel</u>

Since 1976, more than 50% of all death sentences have originated in Harris, Dallas, Bexar, and Tarrant Counties—the four most active counties in terms of death sentences.[272] In these counties, no public defender office presently handles capital cases.[273] Accordingly, a significant proportion of Texas's indigent capital defendant population receives list-qualified appointed counsel, whose compensation is determined by individual county policy.[274] While several counties appoint private counsel to represent indigent capital defendants at trial, the analysis under this part of Recommendation #4 will confine its focus to the list-qualified appointed counsel fee schedules in Harris, Dallas, Bexar, and Tarrant Counties, as these jurisdictions have historically sentenced the most defendants to death in Texas.

A comparison of these counties' fee schedules is provided in Table 1, below. The table also includes data from the fee schedules in Nueces and Jefferson Counties as those counties (like Harris, Dallas, Bexar, and Tarrant) have sentenced to death a number of capital defendants but do not task a public defender office with providing counsel to indigent capital defendants.

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[271] 18 U.S.C. § 3599(f) (2013).

[272] *Total Number of Offenders Sentenced to Death from Each County*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_number_sentenced_death_county.html (last visited Apr. 3, 2013).

[273] Although the Dallas County Public Defender's Office once handled capital cases, the office last served as lead trial counsel in the case of Jedidiah Isaac Murphy, who was tried in 2001. Email from Paul J. Blocker, Jr., First Assistant Public Defender, Dallas Cnty. Pub. Defender, to Ryan Kent (July 26, 2012).

[274] *See* TEX. CODE CRIM. PROC. ANN. arts. 26.05(b), 26.052(l) (2013). *But see* STANDARDS AND RULES FOR QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES PURSUANT TO ARTICLE 26.052, TEXAS CODE OF CRIMINAL PROCEDURE, FIFTH ADMIN. JUD. REGION OF TEX., at 5 (eff. Nov. 17, 2011) (establishing capital counsel compensation rates across the Fifth Administrative Judicial Region). In fact, given that Nueces and Jefferson Counties also make significant use of capital punishment yet do not task a public defender office with providing counsel to indigent capital defendants, the proportion of indigent death-sentenced inmates who were provided counsel through the list-qualified appointment system exceeds fifty percent. *Total Number of Offenders Sentenced to Death from Each County*, TEX. DEP'T CRIM. JUSTICE, www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited Sept. 1, 2013).

Table 1
Fee Schedule Comparison: Harris, Dallas, Bexar, Tarrant, Nueces, and Jefferson Counties[275]

	Harris	Dallas	Bexar	Tarrant [h]	Nueces	Jefferson
Trial						
In-court	$800/day [a]	$1,500/day	$150/hour	$500–$1,200 per day	$500–$750 per day	$1,500/day
– Voir Dire	$600/day [a]	$1,000/day	$100/hour	*Not specified*		
Out-of-court	$100/hour [a, b]	$150/hour	$80/hour [e]	$50–$125 per hour	$30–$50 per hour	$50/hour
Direct Appeal						
Oral Argument	$100/hour [c]	$125/hour	$200/hour [f]	$50–$125 per hour [i]	$50–$75 per hour [j]	$10,000 flat fee
Out-of-court	$100/hour	$125/hour	$150/hour [f]	$50–$125 per hour [i]	$50–$75 per hour [j]	
State Habeas						
Hearing with Testimony	$350/day [d]	$125/hour	$200/hour [g]	$50–$125 per hour [i]	$50–$75 per hour [k]	*Not specified*
Out-of-court	$100/hour [d]	$125/hour	$150/hour [g]	$50–$125 per hour [i]	$50–$75 per hour [k]	

[a] A $35,000 flat fee applies once "testimony begins in the guilt/innocence phase of trial."
[b] Subject to a presumptive maximum of $12,000.
[c] Subject to a presumptive maximum of $1,500.
[d] Total state habeas costs are subject to a presumptive maximum of $25,000.
[e] Subject to a presumptive maximum of $8,000.
[f] Total direct appeal costs are subject to a presumptive maximum of $15,000.
[g] Total costs for filing a petition for discretionary review are subject to a presumptive maximum of $15,000.
[h] Tarrant County's fee schedule lists ranges for the services of counsel without specifying the type of case. The fee voucher then permits the attorney to indicate the rate at which s/he expects to be compensated for each service performed.
[i] The fee schedule lists "$50–125/hour" as the rate for "appellate time," which includes both direct appeal and state habeas services.
[j] Total direct appeal costs are capped at $10,000.
[k] Total costs for filing a petition for discretionary review are capped at $10,000.

* * *

Trial Counsel

With regard to trial counsel fees, the fee schedules for Harris, Dallas, Bexar, and Tarrant Counties vary in their rates of compensation and level of specificity. As an example of this rate variance, defense counsel are compensated for representing capital defendants at trial at $80 per hour (Bexar County), $100 per hour (Harris County), $150 per hour (Dallas County), or from $50 to $125 per hour (Tarrant County).[276] With respect to flat fees and caps on compensation,

[275] *See Harris Cnty. Dist. Cts.*, *Attorney Fee Schedule*, at 2–4 (eff. July 1, 2010); *Dallas Cnty. Dist. Cts.*, *Dallas County Procedures for Appointment of Counsel in Death Penalty Cases*, at 2 (amend. May 3, 2007); Joint Order Adopting Fee Schedule, No. 64592, at 3 (Bexar Cnty. Dist. Ct. Oct. 28, 2011); *Tarrant Cnty. Dist. Cts.*, *Tarrant County District Courts Felony Court-appointment Plan*, at 10–11 (amend. Oct. 17, 2011); *Tarrant Cnty. Dist. Cts.*, *Defense Claim for Fee Payment/Expenses*, at 1 (eff. Dec. 14, 2001); *Nueces Cnty. Dist. Cts.*, *Attorney Fee Voucher*, at 1 (2007); *Jefferson Cnty. Crim. Dist. Cts.*, *Attorney Fee Schedule*, at 1 (eff. Jan. 1, 2013).

[276] Joint Order Adopting Fee Schedule, No. 64592, at 3 (Bexar Cnty. Dist. Ct. Oct. 28, 2011); *Harris Cnty. Dist. Cts.*, *Attorney Fee Schedule*, at 2 (eff. July 1, 2010); *Dallas Cnty. Dist. Cts.*, *Dallas County Procedures for Appointment of Counsel in Death Penalty Cases*, at 2 (amend. May 3, 2007); *Tarrant Cnty. Dist. Cts.*, *Tarrant County District Courts Felony Court-appointment Plan*, at 10–11 (amend. Oct. 17, 2011). All fee schedules

list-qualified defense counsel in Harris County receive a $35,000 flat rate for cases in which "testimony begins in the guilt/innocence phase of trial" and a $12,000 "presumptive maximum" for all out-of-court work.[277] The fee schedules for Dallas, Bexar, and Tarrant Counties do not mention flat fees or explicitly impose caps on compensation, but Bexar County requires list-qualified appointed counsel to "notify the court when they have reached 100 hours [of out-of-court time] and provide the court with an up-to-date itemization form for the time already spent."[278]

Each jurisdiction also distinguishes between in-court and out-of-court services and offers greater compensation for time spent in-court despite the fact that competent representation requires counsel to invest substantial time and resources in his/her out-of-court efforts on behalf of the client.[279] For example, counsel's out-of-court preparation in a capital case often involves an extensive pretrial investigation, during which charging documents must be reviewed, potential witnesses must be interviewed, and discovery from the prosecution and law enforcement must be sought.[280] This out-of-court work further includes establishing a constructive relationship with the client and investigating and procuring appropriate expert assistance regarding the client's mental state.[281] In capital cases especially, counsel are duty-bound to investigate and present mitigating evidence, which requires a thorough investigation into the client's medical, family, and social history, as well as securing and reviewing information pertaining to the client's education, employment, and prior criminal history.[282]

Direct Appeal and State Habeas Counsel

As at the trial level, the compensation for list-qualified appointed counsel providing direct-appeal services varies between Harris, Dallas, Bexar, and Tarrant Counties. Harris County, for example, pays $100 per hour for brief preparation and oral arguments, with various presumptive maximums imposed for the appellate defense services listed in the fee schedule (e.g., the

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reference out-of-court of work for 1st chair capital counsel; in-court work subject to maximums set out in Table 1, above.

[277] *Harris Cnty. Dist. Cts.*, *Attorney Fee Schedule*, at 2 (eff. July 1, 2010). The flat rate "[i]ncludes all fees except investigation costs, expert witness fees, and witness travel costs." *Id.*

[278] Joint Order Adopting Fee Schedule, No. 64592, at 5 (Bexar Cnty. Dist. Ct. Oct. 28, 2011).

[279] *See* Joint Order Adopting Fee Schedule, No. 64592, at 3 (Bexar Cnty. Dist. Ct. Oct. 28, 2011) (for lead counsel, listing $150 per hour for trial work, $125 per hour for evidentiary hearing work, and $100 per hour for jury selection work, but listing $80 per hour for out-of-court work); *Dallas Cnty. Dist. Cts.*, *Dallas County Procedures for Appointment of Counsel in Death Penalty Cases*, at 2 (amend. May 3, 2007) (listing $1,500 per day for trial work and $1,000 per day for jury selection work, but listing $150 per hour for out-of-court work); *Harris Cnty. Dist. Cts.*, *Attorney Fee Schedule*, at 2 (eff. July 1, 2010) (for lead counsel, listing $800 per day for trial work and $600 per day for jury selection work, but listing $100 per hour for out-of-court work); *Tarrant Cnty. Dist. Cts.*, *Tarrant County District Courts Felony Court-appointment Plan*, at 10–11 (amend. Oct. 17, 2011) (without distinguishing between felony case types, listing range of $500 to $1,200 per day for trial and evidentiary hearing work, but listing range of $50 to $125 per hour for out-of-court work).

[280] ABA, *supra* note 82, at 1017–20.

[281] *Id.* at 1005–06, 1023.

[282] *Id.* at 1022–23. *See also* McFarland v. Scott, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting from denial of certiorari) ("[A] properly conducted capital trial can involve hundreds of hours of investigation, preparation, and lengthy trial proceedings . . . ."); Darden v. Wainwright, 477 U.S. 168, 184–85 (1986) (denying petitioner's ineffective-assistance-of-counsel claim by citing the "great deal of time and effort [that] went into the defense of [petitioner's capital] case").

presumptive maximum for preparing a new-trial motion is $18,000).[283] In Dallas County, "[w]ork on capital appeals and capital writs [are] compensated at a rate of $125.00 per hour for all reasonable and necessary documented legal activity."[284] Bexar County distinguishes between "in court" appellate work and "out of court" appellate work and imposes a cap of $15,000 on all appellate work.[285] Tarrant County specifies a range for "appellate time" from $50 to $125 per hour.[286]

Dallas, Bexar, and Tarrant Counties have adopted fee schedules for state habeas counsel identical to those for direct appeal counsel.[287] Harris County, by contrast, establishes a $25,000 "presumptive maximum for all fees incurred" during state habeas representation.[288]

Conclusion

With respect to list-qualified appointed counsel, all four of the counties reviewed make distinctions between in-court and out-of-court work; furthermore, Harris and Bexar Counties impose caps on compensation. These policies are not consistent with the provision of high-quality defense services in capital cases, may deter qualified counsel from undertaking capital representation, and do not accord with the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*.

First, caps on compensation—the policy of both Harris and Bexar Counties—are improper as they may amount to too little in the way of compensation, particularly as preparing thoroughly for a capital case may consume hundreds or thousands of hours of out-of-court work.[289] As a consequence, qualified counsel may opt not to represent capital defendants in Harris and Bexar Counties out of concerns that their considerable efforts will not be fairly compensated.

Second, Harris County's $35,000 flat fee for cases in which "testimony begins in the guilt/innocence phase of trial" poses "an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee."[290] In addition, flat fees may induce counsel to bring a case to trial, as opposed to negotiating a plea agreement that, while perhaps in the best interests of the capital defendant, would not compel the

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[283] *Harris Cnty. Dist. Cts., Attorney Fee Schedule*, at 3 (eff. July 1, 2010).

[284] *Dallas Cnty. Dist. Cts., Dallas County Procedures for Appointment of Counsel in Death Penalty Cases*, at 2 (amend. May 3, 2007).

[285] Joint Order Adopting Fee Schedule, No. 64592, at 3 (Bexar Cnty. Dist. Ct. Oct. 28, 2011).

[286] *Tarrant Cnty. Dist. Cts., Tarrant County District Courts Felony Court-appointment Plan*, at 10–11 (amend. Oct. 17, 2011).

[287] *See* Joint Order Adopting Fee Schedule, No. 64592, at 3 (Bexar Cnty. Dist. Ct. Oct. 28, 2011); *Dallas Cnty. Dist. Cts., Dallas County Procedures for Appointment of Counsel in Death Penalty Cases*, at 2 (amend. May 3, 2007); *Tarrant Cnty. Dist. Cts., Tarrant County District Courts Felony Court-appointment Plan*, at 10–11 (amend. Oct. 17, 2011).

[288] *Harris Cnty. Dist. Cts., Attorney Fee Schedule*, at 4 (eff. July 1, 2010).

[289] Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 374–75 (1995) ("A direct appeal of a death sentence can be nearly as time-consuming as preparing and presenting a defense at trial. A number of estimates have placed the average attorney hours required to properly pursue such an appeal at around 700–1000.").

[290] ABA, *supra* note 82, at 987–88.

county to pay the flat fee. Flat fees also may discourage qualified counsel from undertaking capital-case representation in much the same way as do caps on compensation.[291]
Third, disparities between in-court and out-of-court compensation may discourage counsel from providing his/her capital client with the most effective representation. As the commentary to the *ABA Guidelines* observes,

> [c]omprehensive pretrial investigation is a necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence, to persuade the prosecution to forego seeking a death sentence at trial, or to uncover facts that will make the client legally ineligible for the death penalty.[292]

A fee schedule that more generously compensates in-court work disincentivizes counsel from providing those out-of-court services critical to obtaining a fair and just outcome for a capital defendant. Accordingly, the fee schedules in Harris, Dallas, Bexar, and Tarrant Counties (and elsewhere) must be adjusted to achieve parity between in-court and out-of-court rates.[293]
Finally, it is worth noting that the hourly compensation rates in Harris, Dallas, Bexar, and Tarrant Counties fall below the hourly compensation rate for attorneys appointed to represent indigent death-sentenced inmates pursuant to federal law, which at $178 per hour already may be too low to induce qualified counsel to undertake capital-case representation.[294]

iii. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

Public-defender Appointed Counsel

The public defender offices that presently handle capital cases are the El Paso Public Defender's Office and RPDO. However, RPDO only represents capital defendants at the trial level. In addition, the Office of Capital Writs (OCW) represents indigent death-sentenced inmates in state habeas proceedings.

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[291] *See supra* note 289 and accompanying text.
[292] ABA, *supra* note 82, at 925 (commentary to Guideline 1.1).
[293] *See, e.g.*, 18 U.S.C. § 3599(g)(1) (2012); U.S. COURTS, *Federal Death Penalty and Capital Habeas Representations*, *in* GUIDE TO JUDICIARY POLICY (2012), *available at* http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter6.aspx (establishing a rate of $178 per hour for all in-court and out-of-court services); OHIO PUB. DEFENDER, STATE MAXIMUM FEE SCHEDULE FOR APPOINTED COUNSEL REIMBURSEMENT 13–15 (rev. June 24, 2003) (for state reimbursements to counties funding indigent defense services, establishing a maximum reimbursement rate of $95 per hour for all cases "involving a death penalty specification," regardless of whether those services were performed in court or out of court).
[294] *See* 18 U.S.C. § 3599(g)(1) (2013); U.S. COURTS, *Federal Death Penalty and Capital Habeas Corpus Representations*, *in* GUIDE TO JUDICIARY POLICY (2012), *available at* http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol07A-Ch06.pdf; Letter from Wm. T. (Bill) Robinson, III, ABA President, to Samuel W. Phelps, Circuit Exec., U.S. Ct. of Appeals for the Fourth Circuit, on Proposed Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases (Jan. 30, 2012) (on file with author) ("The Association's 25 years of experience recruiting and training defense counsel for death penalty cases has demonstrated the already very difficult task of recruiting skilled and experienced counsel to accept capital cases at the CJA rate of $178/hour. That is because the authorized rate is usually much less than what counsel can charge other clients in other kinds of cases.").

Trial Counsel

At the El Paso County Public Defender's Office, the salary range for senior trial attorneys qualified to serve as first-chair trial counsel in capital cases ranges from $67,000 to $128,000 per year.[295] The three deputy public defenders currently qualified to serve in this capacity earn salaries ranging from $108,000 to $122,000 per year and are "commensurate with the [El Paso County] District Attorney's Office."[296]

At RPDO, attorneys earn $95,000 per year, regardless of seniority or years of practice.[297] This salary is comparable to the average annual salary for assistant district attorneys in Harris County.[298] RPDO attorneys also earn a greater annual salary than the average for assistant district attorneys in Dallas County, which is approximately $82,000 per year.[299] However, two Harris County assistant district attorneys who prosecute capital cases actually earn an average salary of $135,000 per year;[300] likewise, two attorneys at the Dallas County District Attorney's Office who prosecute capital cases actually earn an average salary of $129,000 per year.[301]

Direct Appeal and State Habeas Counsel

El Paso County deputy public defenders qualified to serve as first-chair trial counsel in capital cases also represent capital clients on direct appeal.[302] Again, their salaries range from $108,000

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[295] Powell Survey I, *supra* note 92, at 4.

[296] *Id.*

[297] Wischkaemper Survey I, *supra* note 93, at 3.

[298] *Government Employee Salaries*, TEX. TRIB., http://www.texastribune.org/library/data/government-employee-salaries (last visited Sept. 28, 2012) (Sept. 2012 data on file with author). Of the 252 employees whose job title is "Assistant District Attorney," the average salary is approximately $94,000. *Id.* An assistant district attorney whose salary is listed as $3,570 is an outlier and, therefore, has been omitted from this calculation.

[299] *Government Employee Salaries*, TEX. TRIB., http://www.texastribune.org/library/data/government-employee-salaries (last visited Sept. 28, 2012) (Sept. 2012 data on file with author). The average is calculated from the 224 employees whose job title is "Attorney," including those attorney employees parenthetically listed as "Managing Attorney" or "Legal Division Director." *Id.*

[300] *Government Employee Salaries*, TEX. TRIB., http://www.texastribune.org/library/data/government-employee-salaries (last visited Sept. 28, 2012) (salary information for Mr. Anshu V. Mitchell and Ms. Roe Meredith Wilson) (Sept. 2012 data on file with author).

[301] *Government Employee Salaries*, TEX. TRIB., http://www.texastribune.org/library/data/government-employee-salaries (last visited Sept. 28, 2012) (salary information for Messrs. Theodore A. Beach and Heath G. Harris). A division chief and a prosecutor at the Bexar County District Attorney's Office who are known to prosecute capital cases also earn an average salary of $110,000 per year. *Government Employee Salaries*, TEX. TRIB., http://www.texastribune.org/library/data/government-employee-salaries (last visited Sept. 28, 2012) (salary information for Ms. Catherine Babbitt and Mr. David Lunan) (Sept. 2012 data on file with author).

[302] For the El Paso Public Defender's Office to represent an indigent death-sentenced inmate during state habeas review, two conditions must be satisfied: (1) OCW has not been appointed to represent the inmate; and (2) the public-defender appointed counsel "is on the list of competent [state habeas] counsel." TEX. CODE CRIM. PROC. ANN. art. 26.044(n) (2013). *See also* TEX. GOV'T CODE ANN. § 78.056(a) (2013) (requiring that "[t]he presiding judges of the administrative judicial regions [] maintain a statewide list of competent counsel available for appointment [during state habeas review]"). A comparison of the El Paso Public Defender's salary roster and the most recently published list of competent state habeas counsel suggests that the second condition is not presently satisfied. *Compare Government Employee Salaries*, TEX. TRIB., http://www.texastribune.org/library/data/government-employee-salaries (last visited Sept. 28, 2012), *with Approved Attorneys for 11.071 Appointment*, TEX. INDIGENT DEFENSE COMM'N (Aug. 22, 2012), *available at* http://www.courts.state.tx.us/courts/pdf/AttyList.pdf.

per year to $122,000 per year and are "commensurate with the [El Paso County] District Attorney's Office."[303]

Whereas the El Paso Public Defender's Office represents capital defendants at trial and on direct appeal, RPDO only provides defense services at trial.[304] By contrast, OCW only provides defense services during state habeas proceedings, and its attorney employees currently earn salaries ranging from $52,000 to $62,000 per year.[305] OCW attorneys' prosecutorial counterparts—that is, the assistant district and county attorneys of Texas's 254 counties[306]—tend to earn much higher annual salaries: for example, $94,000 in Harris County, $78,000 in Dallas County, and $76,000 in Bexar County.[307] It is, however, OCW policy to compensate "more senior attorney[s]" at a rate more commensurate with these averages, although the experience levels of OCW's current attorney employees do not yet warrant this greater compensation.[308]

Conclusion

Both respect to list-qualified and public-defender appointed counsel compensation, the State of Texas only partially complies with this part of Recommendation #4.

b. Non-attorney members of the defense team should be fully-compensated at a rate that is commensurate with the provision of high-quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.

i. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

ii. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.

iii. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for

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[303] Powell Survey I, *supra* note 92, at 4.

[304] Wischkaemper Survey II, *supra* note 91, at 2.

[305] Survey from Brad D. Levenson, Dir., Office of Capital Writs, at 3 (Sept. 19, 2012) (on file with author) [hereinafter Levenson Survey].

[306] The Texas Code of Criminal Procedure specifies the duties of district and county attorneys. Specifically, the Code broadly assigns to district attorneys the responsibility of "represent[ing] the State in all criminal cases in the district courts of [their] district and in appeals therefrom." TEX. CODE CRIM. PROC. ANN. art. 2.01 (2013). Likewise, county attorneys "shall represent the State in all criminal cases under examination or prosecution in [their] county[,] and in the absence of the district attorney [they] shall represent the State alone." *Id.* at art. 2.02. County attorneys also must "aid the district attorney in the prosecution of any case in behalf of the State in the district court" upon request of the district attorney. *Id.* Petitions for Article 11.071 writs fall within the ambit of these district and county attorneys' authority.

[307] *See Government Employee Salaries*, TEX. TRIB., http://www.texastribune.org/library/data/government-employee-salaries (last visited Sept. 28, 2012) (Sept. 2012 data on file with author). The average annual salary for Bexar County prosecutors includes employees with the Criminal District Attorney's Office whose titles are "Attorney" or "Prosecutor."

[308] Levenson Survey, *supra* note 305, at 3.

services performed in or out of court. Periodic billing and payment should be available.

Investigators employed by the El Paso Public Defender's Office earn $46,000 per year at entry-level, $52,000 per year after five years of service, and $66,000 per year after fifteen years of service.[309] Salaries for RPDO investigators range from $42,000 to $45,000 per year.[310] As for OCW, its two post-conviction investigators each earn $58,000 per year.[311]

By comparison, investigators at the Harris County District Attorney's Office earn from $61,000 to $99,000 per year, and all nine of the office's lieutenant investigators receive annual salaries in excess of $96,000.[312] In Dallas County, the annual investigator salaries range from $51,000 to $77,000; the deputy chief investigator and chief investigator earn, respectively, $79,000 and $87,000 per year.[313]

These figures suggest that investigators employed by public defender organizations earn less than their counterparts at prosecutor's offices. It is worth noting, however, that investigators employed by the El Paso District Attorney's Office actually earn slightly *less* than those employed by the El Paso Public Defender's Office.[314]

With respect to mitigation specialists, those employed by the El Paso Public Defender's Office earn $55,000 per year at entry-level, $62,000 per year after five years of service, and $80,000 per year after fifteen years of service.[315] Salaries for RPDO mitigation specialists range from $52,000 to $55,000 per year.[316] OCW's staff does not include dedicated mitigation specialists; instead, the functions of these specialists are provided by OCW's two post-conviction investigators.[317]

RPDO reports that the salaries paid to its mitigation specialists are comparable to the compensation earned by mitigation specialists working in the private sectors, particularly "[w]hen benefits are factored in."[318]

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[309] Powell Survey I, *supra* note 92, at 4.
[310] Wischkaemper Survey I, *supra* note 93, at 4.
[311] Levenson Survey, *supra* note 305, at 4.
[312] *Government Employee Salaries*, TEX. TRIB., http://www.texastribune.org/library/data/government-employee-salaries (last visited Sept. 28, 2012) (Sept. 2012 data on file with author). Salary data from the *Texas Tribune* lists one investigator, hired on June 14, 2010, as earning $61,098 and another investigator, hired on March 1, 1984, as earning $99,224. *Id.*
[313] *Id.*
[314] *Id.* Seventeen of the eighteen investigators listed in the *Texas Tribune*'s database earn $45,000 per year, and fourteen of these investigators have five or more years of service. *Id.*
[315] Powell Survey I, *supra* note 92, at 5.
[316] Wischkaemper Survey I, *supra* note 93, at 4.
[317] *Staff Directory*, OFFICE OF CAPITAL WRITS, http://www.ocw.texas.gov/staff-directory.aspx (last visited Sept. 1, 2013); Levenson Survey, *supra* note 305, at 4.
[318] Wischkaemper Survey I, *supra* note 93, at 4.

The Assessment Team is unable to determine the prevailing rates of compensation for members of the defense team who assist list-qualified appointed counsel in their representation of indigent capital defendants and death-sentenced inmates.

c. Additional compensation should be provided in unusually protracted or extraordinary cases.

Public defenders employed by the El Paso Public Defender's Office, RPDO, and OCW are salaried and, therefore, would not receive additional compensation in unusually protracted or extraordinary cases.[319] The El Paso Public Defender's Office has, however, "located [additional resources] in the past for non-routine needs,"[320] while RPDO maintains a "reserve fund . . . for additional extraordinary cases."[321] OCW reports that the office currently "offer[s] high-quality legal representation with [its] current budget" and that, were it unable to do so, the office would "stop taking cases pursuant to statute."[322]

List-qualified appointed counsel are compensated pursuant to the provisions of the Texas Code of Criminal Procedure.[323] The Code establishes that such counsel "shall be paid a reasonable attorney's fee for performing [specified] services, based on the time and labor required, *the complexity of the case*, and the experience and ability of the appointed counsel[.]"[324] In fact, counties that impose caps on compensation tend to refer to these caps as "presumptive" maximums—that is, subject to judicial override in unusually protracted or extraordinary cases.[325] Supplementary funds also are available at the discretion of the Texas Indigent Defense Commission, which offers "[e]xtraordinary disbursements" to counties "for actual extraordinary expenses [incurred by] providing indigent defense services in a case or series of cases."[326]

While the Assessment Team is encouraged by the allowance for and availability of additional funding in extraordinary cases, the Assessment Team remains concerned by the fact that

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[319] Powell Survey I, *supra* note 92, at 4; Wischkaemper Survey I, *supra* note 93, at 3.

[320] Powell Survey I, *supra* note 92, at 3.

[321] Wischkaemper Survey I, *supra* note 93, at 3.

[322] Levenson Survey, *supra* note 305, at 3; *see also* TEX. GOV'T CODE ANN. § 78.054(a)(2) (2013) (empowering OCW to refuse appointment if "the office has insufficient resources to provide adequate representation for the defendant").

[323] *See generally* TEX. CODE CRIM. PROC. ANN. art. 26.05 (2013); *see also id.* at art. 26.052(*l*) ("An attorney appointed under this article to represent a defendant at trial or on direct appeal is compensated as provided by Article 26.05 from county funds.").

[324] TEX. CODE CRIM. PROC. ANN. art. 26.05(a) (2013) (emphasis added). The specified services are:

(1) time spent in court making an appearance on behalf of the defendant as evidenced by a docket entry, time spent in trial, and time spent in a proceeding in which sworn oral testimony is elicited;
(2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires;
(3) preparation of an appellate brief and preparation and presentation of oral argument to a court of appeals or the [Texas] Court of Criminal Appeals; and
(4) preparation of a motion for rehearing.

Id.

[325] *See, e.g.*, *Harris Cnty. Dist. Cts., Attorney Fee Schedule*, at 2 (eff. July 1, 2010).

[326] 1 TEX. ADMIN. CODE § 173.102(8) (2012). In 2012, these extraordinary disbursements totaled $300,000 which was used to offset capital trial expenses. Email from Wesley Shackelford, Deputy Dir. and Special Counsel, Tex. Indigent Defense Comm. to Sarah Turberville (April 22, 2013) (on file with author).

compensation for counsel and ancillary services must be approved by the court in ordinary and extraordinary cases alike.[327] Such an arrangement may induce counsel to provide less-than-zealous representation for fear of antagonizing the presiding judge on whom their livelihood depends,[328] a suspicion supported by a 1999 survey of 1,376 attorneys "who practiced criminal defense law as all or part of their law practice" which found that 32% of requests for support services had been denied.[329]

Finally, it is important to recognize that inexperienced attorneys simply may refrain from requesting additional resources—again, in ordinary and extraordinary cases alike—on the false assumption that those requests are sure to be denied. This problem underscores the importance of requiring all capitally-qualified counsel to complete a comprehensive training program that includes pleading and motion practice, as contemplated by the *ABA Guidelines* and discussed under Recommendation #5.

d. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

Pursuant to the Texas Code of Criminal Procedure, "[a]ppointed counsel may file with the trial court a pretrial ex parte confidential request for advance payment of expenses to investigate potential defenses."[330] The Code compels the court to grant these requests "in whole or in part if the request is reasonable."[331] If the court denies any part of a request for payment, it must "state the reasons for the denial in writing," amongst other requirements.[332] Expenses need not be incurred with prior approval of the court, however, for the Code also compels the court to "order reimbursement of counsel for [] expenses [incurred without prior approval of the court], if the expenses are reasonably necessary and reasonably incurred."[333]

With respect to public-defender appointed counsel, all three public defender offices currently providing capital-case defense services report that their budgets cover all incidental expenses (e.g., travel costs, document preparation) necessary for capital-case representation.[334]

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[327] TEX. CODE CRIM. PROC. ANN. art. 26.052(g)–(h) (2013). *See also infra* notes 104 and 115 and accompanying text.

[328] *See also* THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 152 (1993) ("[M]ore and more experienced private criminal attorneys are refusing to accept court appointments in capital cases because of the time involved, the substantial infringement on their private practices, the lack of compensation for counsel feels and experts/expenses and the enormous pressure they feel in handling these cases.").

[329] ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERV. TO THE POOR IN CRIMINAL MATTERS, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 5, 18 (2000), *available at* http://www.uta.edu/pols/moore/indigent/last.pdf.

[330] TEX. CODE CRIM. PROC. ANN. art. 26.052(f) (2013). Such a request "must state: (1) the type of investigation to be conducted; (2) specific facts that suggest the investigation will result in admissible evidence; and (3) an itemized list of anticipated expenses for each investigation." *Id.*

[331] *Id.* at art. 26.052(g).

[332] *Id.* In addition to stating the reasons for the denial in writing, the court must "attach the denial to the confidential request; and [] submit the request and denial as a sealed exhibit to the record." *Id.*

[333] *Id.* at art. 26.052(h).

[334] Powell Survey I, *supra* note 92, at 3; Wischkaemper Survey I, *supra* note 93, at 2; Levenson Survey, *supra* note 305, at 4.

Conclusion

The State of Texas only partially complies with Recommendation #4. Because the quality of representation often suffers when compensation is inadequate, Texas is commended for improving its provision of defense services—including improvements to compensation—in many regions of the State. In particular, Texas now provides state and local funding to support RPDO, which currently provides capital trial defense services in more than 190 of Texas's 254 counties. In addition, the Texas Legislature should be applauded for establishing OCW to provide much-needed representation to death-sentenced inmates during state habeas proceedings. The State of Texas does not, however, ensure funding in every instance for the full cost of high-quality legal representation, as defined by the *ABA Guidelines*. As mentioned, a majority of capital defendants are tried in counties that rely on list-qualified appointed counsel to represent indigents facing the death penalty and the compensation schemes in these counties are subject to caps, differentiation between in-court and out-of-court work, and trial court approval.

These funding schemes create a disincentive to counsel to advocate in the best interest of their clients, as such advocacy often involves substantial out-of-court preparation and may, in fact, mean pursuing a plea offer in lieu of going to trial. List-qualified appointed counsel must also balance the demands of their non-capital law practices with the extraordinary demands of capital-case representation. These challenges, coupled with insufficient funding overall, will continue to complicate Texas's efforts to recruit and retain experienced attorneys with the necessary knowledge and skills to effectively represent indigent capital defendants and death-sentenced inmates alike.

Recommendations

The *ABA Guidelines* advise that "jurisdictions that wish to have a death penalty must bear the full costs of providing such a defense."[335] The *Guidelines* accordingly call on governments, which bear a constitutional duty to provide capital defendants with effective defense representation, to establish systemic structures to ensure the necessary resources are available in each capital case.[336]

To ensure a sufficient pool of qualified attorneys is available and willing to be appointed to represent indigent capital defendants and death-sentenced inmates, and to ensure that all counsel are able to provide high-quality legal representation to those who may face or are facing the death penalty, the Assessment Team recommends that jurisdictions within the State of Texas

- Remove the distinction in compensation rates between in-court and out-of-court services. Flat fees should be prohibited and counsel should be compensated for actual time and services performed;
- Ensure that compensation provided to counsel is reasonable, including providing comparable compensation for defense services at trial, on direct appeal, and during state habeas and clemency proceedings;

[335] Eric M. Freedman, *Add Resources and Apply Them Systematically: Governments' Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1102 (2003).
[336] *Id*. at 1099–1103.

- Compensate counsel for representing a death-sentenced inmate during clemency proceedings; and
- Compensate investigative, expert, and other ancillary services so that high-quality representation is provided at every stage of the legal proceedings, including the stages of state habeas and clemency.

E. Recommendation #5

Training (Guideline 8.1 of the *ABA Guidelines*):

a. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

Funding to train members of the defense team—i.e., counsel, investigators, and mitigation specialists—is not assured under Texas law. Nevertheless, resource-dependent programs have been established to facilitate the training of some members of the defense team.

Specifically, the Texas Court of Criminal Appeals is required under Texas law to "grant legal funds to . . . criminal defense attorneys who regularly represent indigent defendants in criminal matters."[337] "The association's or entity's purposes must include providing continuing legal education, technical assistance, and other support programs."[338] In accordance with these statutory provisions, the Court of Criminal Appeals has provided funding to the Texas Criminal Defense Lawyers Association and the Center for American and International Law that, in turn, has been used to support training for attorney employees at the El Paso Public Defender's Office and RPDO, as well as list-qualified appointed counsel.[339]

The Court of Criminal Appeals also established the Texas Criminal Justice Integrity Unit (TCJIU) in June 2008 to, among other endeavors, sponsor trainings for all participants in the death penalty system including defense attorneys.[340] In conjunction with entities such as the National Academy of Sciences and the Texas Department of Public Safety, TCJIU has held forensic training on fingerprints, ballistics and other topics which provided 12.5 hours of continuing legal education for over 400 individuals.[341] With the Texas Criminal Defense Lawyers Association, the TCJIU held the Capital Case Litigators Initiative which provided 23.75

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[337] TEX. GOV'T CODE ANN. § 56.003(f) (2013). As provided under Texas law, "[t]he judicial and court personnel training fund is an account in the general revenue fund." *Id.* at § 56.001(a). *See also id.* at § 56.004(b) (requiring the Texas legislature to "appropriate funds from the judicial and court personnel training fund to the [Texas] court of criminal appeals to provide for [] continuing legal education, technical assistance, and other support programs for . . . criminal defense attorneys who regularly represent indigent defendants in criminal matters"). In addition, the Court of Criminal Appeals has received federal funding to "support capital-case training for both criminal defense attorneys who represent indigent defendants and prosecutors." *Texas Court of Criminal Appeals Receives a Capital Case Litigation Grant from the Department of Justice*, TEX. CT. CRIM. APPEALS, Sept. 9, 2011, *available at* http://www.cca.courts.state.tx.us/pdf/CapitalCasePressRelease.pdf.

[338] TEX. GOV'T CODE ANN. § 56.003(f) (2013).

[339] Powell Survey II, *supra* note 91, at 5 ("The major source of funding for our training comes from the Texas Indigent Defense Commission through CAIL and TCDLA . . ."); Wischkaemper Survey II, *supra* note 91, at 5.

[340] Texas Criminal Justice Integrity Unit Survey Response provided by Hon. Barbara Hervey, Judge, Tex. Ct. of Crim. Appeals to Sarah Turberville (Feb. 15, 2013) (on file with author) [hereinafter TCJIU Survey Response]

[341] *Id.*

hours of continuing legal education to defense counsel covering a variety of topics including mental health issues, race, mitigation, and preserving error for appeal.[342]

Since 2002, the Texas Legislature "has directed the [Texas Indigent Defense] Commission to provide technical support and grants to assist counties in improving their indigent defense systems and to promote compliance by counties with the requirements of state law relating to indigent defense."[343] The Commission operates two grant programs: "One program provides formula-based grants to a wide range of counties throughout Texas. . . . The other program offers counties an opportunity to apply for a competitive-based discretionary grant."[344]

The Commission's program for disbursing discretionary-based grants does not specifically address training, professional development, or continuing education for members of capital defense teams. Nevertheless, the program indirectly provides financial support to capital defense teams through, for example, its offset of participating counties' contributions to RPDO's operating budget.[345] Indeed, RPDO states that it "receive[s] adequate resources to train [its] attorneys," citing the inexpensiveness of capital-litigator training and RPDO's receipt of "travel stipends from [the Texas Criminal Defense Lawyers Association and the Center for American and International Law] that come from the [Texas] Court of Criminal Appeals."[346] RPDO attorneys may, however, be denied relevant training if funds are unavailable."[347]

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[342] *Capital Case Litigators Initiative: Table of Contents*, TEX. CRIM. DEF. LAWYERS ASS'N, Oct. 4–6, 2012.

[343] TEX. INDIGENT DEFENSE COMM'N, FY11 ANNUAL AND EXPENDITURE REPORT 17 (2012); *Texas Indigent Defense Commission Awards over $2.2 Million in Grants to Texas Counties*, TEX. INDIGENT DEFENSE COMM'N, Aug. 20, 2012. Although the Commission only has existed since 2011, its predecessor, the Task Force on Indigent Defense, also was empowered by the legislature to disburse grants. *See* TEX. GOV'T CODE ANN. § 71.062 (2002) (empowering the Task Force to issue grants from the Fair Defense Account) (repealed 2011).

[344] TEX. INDIGENT DEFENSE COMM'N, FY11 ANNUAL AND EXPENDITURE REPORT 17 (2012).

[345] *Sample Interlocal Agreement*, REG'L PUB. DEFENDER FOR CAPITAL CASES 1–2 (2012), *available at* http://rpdo.org/forms/interlocal%20agreement.pdf. *See also* part (a) of Recommendation #4, *supra*.

[346] Wischkaemper Survey II, *supra* note 91, at 5.

[347] *Id.* at 4.

b. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:

i. Relevant state, federal, and international law;
ii. Pleading and motion practice;
iii. Pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
iv. Jury selection;
v. Trial preparation and presentation, including the use of experts;
vi. Ethical considerations particular to capital defense representation;
vii. Preservation of the record and of issues for post-conviction review;
viii. Counsel's relationship with the client and his/her family;
ix. Post-conviction litigation in state and federal courts; and
x. The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.

Generally, all licensed attorneys in Texas, including those who represent capital defendants and death-sentenced inmates, are required to complete fifteen hours of continuing legal education.[348] Apart from the requirement that three of these fifteen hours must be devoted to legal ethics or professional responsibility subjects, the rule is unspecific as to the substantive content of this continuing legal education.[349]

List-qualified Appointed Counsel

Whereas list-qualified lead trial counsel must "have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases,"[350] list-qualified lead appellate counsel must "have participated in continuing legal education courses or other training relating to criminal defense in *appealing* death penalty cases."[351] In four administrative judicial regions, this training must meet or exceed an average of ten hours per year.[352] Another region requires an average of six hours per year,[353] while two others require five hours per year.[354] The

[348] TEX. STATE BAR R. art. XII, § 6 (2012).
[349] TEX. STATE BAR R. art. XII, § 6 (2012).
[350] TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(2)(G) (2013).
[351] TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(3)(G)(2013) (emphasis added).
[352] APPLICATION FOR APPROVAL AS QUALIFIED APPELLATE COUNSEL IN DEATH PENALTY CASES, SECOND ADMIN. JUD. REGION OF TEX., at 1 (2012); 2011 PLAN: STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE, SIXTH ADMIN. JUD. REGION OF TEX., at 2–5 (2011); EIGHTH ADMIN. REGION STANDARDS, *supra* note 56, at 1–4; 2011 PLAN: STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE, NINTH ADMIN. JUD. REGION OF TEX., at 1–5 (2011) (all on file with author).
[353] STANDARDS FOR APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES PROMULGATED PURSUANT TO ART. 26.052 C.C.P., FIRST ADMIN. JUD. REGION OF TEX., at 1–2 (rev. Nov. 13, 2009) (on file with author).
[354] STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT IN THE FOURTH ADMINISTRATIVE JUDICIAL REGION,

standards for appointment promulgated by the remaining regions—that is, the Third and Seventh Administrative Judicial Regions—do not specify the number of hours needed to satisfy the Code's training component.[355]

Moreover, none of these standards specify the contents of the required "continuing legal education courses or other training relating to criminal defense in death penalty cases."[356] Thus, while training programs may be comprehensive in that they address the ten areas listed above, there is no guarantee that locally-appointed counsel will have covered all areas mentioned in this part of Recommendation #5.

Public-defender Appointed Counsel

As for public-defender appointed counsel—a category that includes attorney employees of the El Paso Public Defender's Office, RPDO, and OCW—neither Texas law nor internal agency policy require these public defenders to complete a comprehensive training program as described in this part of Recommendation #5.[357]

Nevertheless, the El Paso Public Defender's Office indicates that it "provide[s] at least 15 hours of yearly participatory training—including subjects relevant to capital defense—to all of [the office's] attorneys," and that it "send[s] the capital attorney and his assistant to more intensive out of town training every year."[358] The subject matter addressed at these trainings collectively covers the ten topics listed in this part of Recommendation #5. Providers of this external training include the Center for American and International Law, the Texas Criminal Defense Lawyers Association, the National Association of Criminal Defense Lawyers, and the California Attorneys for Criminal Justice, as well as "[l]ocal attorneys" and "[q]ualified experts [who] may be called to present their topics [of expertise]."[359]

RPDO attorney employees are required to attend the Center for American and International Law's "Capital Trial Voir Dire" program,[360] which trains participants on "the Constitutional Method of capital voir dire" and provides opportunities for participants "to practice these skills

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FOURTH ADMIN. JUD. REGION OF TEX., at 1–2 (2011); STANDARDS AND RULES FOR QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES PURSUANT TO ARTICLE 26.052, TEXAS CODE OF CRIMINAL PROCEDURE, FIFTH ADMIN. JUD. REGION OF TEX., at 1–4 (eff. Nov. 17, 2011) (all on file with author).

[355] *See* STANDARDS FOR THE QUALIFICATIONS OF LEAD TRIAL COUNSEL FOR APPOINTMENT IN DEATH PENALTY CASES, THIRD ADMIN. JUD. REGION OF TEX., at 1 (2011); STANDARDS FOR QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES PURSUANT TO ARTICLE 26.052, TEXAS CODE OF CRIMINAL PROCEDURE, SEVENTH ADMIN. JUD. REGION OF TEX., at 1–3 (eff. Oct. 1, 2011) (all on file with author).

[356] *See, e.g.*, *Programs*, TEX. DEFENDER SERV., http://www.texasdefender.org/index.php?option=com_content&view=section&layout=blog&id=10&Itemid=63 (last visited Sept. 1, 2013) (listing the subject matter of trainings and seminars hosted by the Texas Defender Service).

[357] *But see* TEX. CODE CRIM. PROC. ANN. art. 26.044(c-1) (2013) (requiring public defender offices to submit to a commissioners court "[a] written plan . . . or a proposal . . . [that] include[s] . . . provisions for personnel training").

[358] Powell Survey II, *supra* note 91, at 3. The El Paso County Public Defender's Office acknowledges, however, that, "[a]t this point, [it] do[es] not have written policies regarding training." *Id.*

[359] Powell Survey II, *supra* note 91, at 4–5.

[360] Wischkaemper Survey II, *supra* note 91, at 3–4.

in break-out sessions."[361] Voluntary training also may be available through external entities—for example, the Texas Criminal Defense Lawyers Association, the National Criminal Defense Lawyers, the NAACP Legal Defense Fund, the National Legal Aid and Defender Association, and the National Institute for Trial Advocacy—but staff participation depends upon the availability of funds.[362]

Finally, with respect to OCW attorney employees, staff development guidelines only state that "[n]ew employees starting employment with the OCW *may* be required or encouraged to attend relevant trainings prior to or immediately after starting work with the OCW."[363]

Accordingly, the State of Texas only partially complies with this part of Recommendation #5.

c. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.

As discussed under Recommendation #3, there is no independent appointing authority in Texas that promulgates, monitors, and enforces qualification requirements—including training standards—with respect to counsel who may be appointed in a capital case. However, the requirements for remaining on an appointment roster do include continuing legal education specific to capital-case representation: each local selection committee must "annually review the list of attorneys . . . to ensure that each listed attorney satisfies the [qualification] requirements,"[364] and those requirements include "participat[ion] in continuing legal education courses or other training relating to criminal defense in death penalty cases."[365] The Texas Code of Criminal Procedure further requires that list-qualified appointed counsel regularly "present proof to the [local selection] committee that the attorney has successfully completed the minimum continuing legal education requirements of the State Bar of Texas, including a course

[361] *Capital Trial Voir Dire: A Program for the Defense*, CTR. FOR AM. & INT'L LAW, http://www.cailaw.org/Criminal-Justice/Events/2013/capital-trial-voir-dire.html (last visited Sept. 1, 2013).

[362] Wischkaemper Survey II, *supra* note 91, at 4. Many of the areas mentioned in this part of Recommendation #5 are, indeed, addressed at these training programs. *See, e.g.*, *Airlie Conference Agenda*, NAACP LEGAL DEFENSE & EDUC. FUND (July 12–15, 2012) (on file with author) (listing, as conference sessions, ""Critical Issues in Early Childhood: How to Understand, Investigate and Develop the Crucial First Years of Clients' Lives," "The Future of Psychiatric Diagnosis: Looking Ahead to the DSM-V," "Investigating Intellectual Disability When the Client Speaks Another Language," and "Seeking Cooperation: Negotiating with Prosecutors and Correction Officials"); *Hearing Training for Habeas Attorneys Conference Agenda*, TEX. DEFENDER SERV. (May 10–11, 2012) (on file with author) (listing, as conference lectures, "Direct Examination: Expert Witness Preparation" and "How to Introduce Physical Evidence and Use Demonstrative Evidence").

[363] Email from Brad D. Levenson, Dir., Office of Capital Writs, to Ryan Kent, Staff Att'y (July 20, 2012) (on file with author) (quoting OCW's internal guidelines).

[364] TEX. CODE CRIM. PROC. ANN. art. 26.052(m) (2013).

[365] *Id.* at art. 26.052(d)(2)(G). *See also id.* at art. 26.052(d)(3)(G) (for lead appellate counsel representing an indigent defendant "in the direct appeal of a capital case," requiring "participat[ion] in continuing legal education courses or other training relating to criminal defense in *appealing* death penalty cases" (emphasis added)).

or other form of training relating to criminal defense in death penalty cases or in appealing death penalty cases, as applicable."[366]

These requirements notwithstanding, the quality of the training provided, as well as the extent to which local selection committees scrutinize list-qualified appointed counsel's assertions pertaining to their training, remains unclear. Accordingly, the State of Texas only partially complies with this part of Recommendation #5.

d. The jurisdiction should ensure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

There is no requirement under Texas law that mitigation specialists, investigators, and other non-attorneys participating in a capital case on behalf of the defense receive continuing professional education appropriate to their areas of expertise. Public defender agencies in the State of Texas have, in the past, facilitated this education of non-attorney members of capital defense teams,[367] but future funding for these professionals is not guaranteed. Thus, the State of Texas does not comply with this part of Recommendation #5.

Conclusion

The State of Texas only partially complies with Recommendation #5.

The Assessment Team is encouraged by the fact that training for capital counsel is facilitated by the State of Texas through the Court of Criminal Appeals. Nevertheless, the subject matter of this training may fall well short of Guideline 8.1 of the *ABA Guidelines* and Guideline 7.1 of the State Bar of Texas's *Guidelines and Standards for Texas Capital Counsel*. Moreover, there is no guarantee that capital defense counsel ultimately would attend and complete a comprehensive training program were one offered in the state.

Recommendations

Under current law, the Texas Indigent Defense Commission is empowered to adopt "qualification standards under which attorneys may qualify for appointment to represent indigent defendants, including [] qualifications commensurate with the seriousness of the nature of the proceeding; . . . successful completion of relevant continuing legal education programs approved by the council; and testing and certification standards."[368] The Commission has already

[366] *Id.* at art. 26.052(d)(5). As already mentioned, however, the precise continuing legal education requirements vary from administrative judicial region to administrative judicial region. *See* notes 350–355, *supra*, and accompanying text.

[367] Email from Philip Wischkaemper, Deputy Dir., Reg'l Pub. Defender for Capital Cases, to Ryan Kent (July 19, 2012) (on file with author) ("[A] number of [RPDO's] mitigation specialists have attended programs funded by another federally funded program called Habeas Assistance [and] Training."); Powell Survey II, *supra* note 91, at 9 ("We usually send mitigation specialists to training with capital attorneys, or to an out of town seminar when they are available. While it has always been our policy to do this, we do not list this as mandatory."). *But see* Powell Survey II, *supra* note 91, at 8 (indicating that investigators employed by the El Paso County Public Defender "are required to get 10 hours of general training each year as part of their employment").

[368] TEX. GOV'T CODE ANN. § 79.034(a) (2013).

exercised this authority with regard to the minimum continuing legal education required of all counsel who provide indigent defense services in criminal cases, whether those cases are capital or otherwise.[369] The Assessment Team urges the Commission to promulgate additional rules to require capital defense counsel to complete, at regular intervals, a comprehensive training program covering at least the topics set out in the *ABA Guidelines* and the State Bar of Texas's *Guidelines and Standards for Texas Capital Counsel*.

Furthermore, Texas must also provide funding to ensure that all capital counsel meet *ABA Guideline* 8.1's training requirements and that non-attorneys who wish to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise. Specifically, Texas must ensure that mitigation specialists are properly trained and qualified in accordance with the *ABA Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*.[370]

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[369] 1 TEX. ADMIN. CODE § 174.1 (2013).

[370] *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008).

CHAPTER SEVEN

THE DIRECT APPEAL PROCESS AND PROPORTIONALITY REVIEW

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The U.S. Supreme Court has found that arbitrariness in death sentencing, in which some death sentences are "wantonly" or "freakishly" imposed, violates the Eighth Amendment prohibition on cruel and unusual punishment.[1] Proportionality review is meant to serve as a check on the institutional and individual factors that may lead to arbitrary sentences in capital cases.[2] It is the process through which a death sentence is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate.[3]

Meaningful comparative proportionality review helps to ensure that the death penalty is being administered in a rational and non-arbitrary manner; to provide a check on broad prosecutorial discretion; and to prevent discrimination from playing a role in the capital decision-making process—the key concerns underlying the Court's death penalty jurisprudence. For that reason, the majority of states with the death penalty engage in some form of proportionality review in capital cases.[4]

In most capital cases, juries determine the sentence, yet they do not have the information necessary to evaluate the propriety of that sentence in light of sentences in similar cases.[5] In the relatively small number of cases in which the trial judge determines the sentence, proportionality review is still important, as the judge may be unaware of statewide sentencing practices or be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review.

Beyond simply stating that a particular death sentence is proportional, or citing previous decisions, a court conducting proportionality review ought to analyze the similarities and differences between those past decisions and the case before it. By weighing the appropriateness of a death sentence from a statewide perspective, a reviewing court achieves the important ends of proportionality review while properly leaving to local prosecutors and juries the decisions, in the first instance, of whether the death penalty ought to be sought or imposed.

Moreover, for proportionality review to be truly effective in ensuring the rational, non-arbitrary application of the death penalty, it must include not only cases in which a death sentence was

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1 Furman v. Georgia, 408 U.S. 238, 310 (1972) (J. Stewart, concurring).

2 Gregg v. Georgia, 428 U.S. 153, 206 (1976) (joint opinion of Stewart, Powell & Stevens, JJ.) (finding that proportionality review "serves as a check against the random or arbitrary imposition of the death penalty"); *see also* Pulley v. Harris, 465 U.S. 37, 71 (1984) (Brennan, J., dissenting) (noting that, in 1984, over thirty states required, either by statute or case law, some form of comparative proportionality review).

3 *Gregg*, 428 U.S. at 206 (joint opinion of Stewart, Powell & Stevens, JJ.).

4 *See infra* note 45 and accompanying text.

5 *Id.*

imposed but also cases in which the death penalty was sought but not imposed and cases in which the death penalty could have been but was not sought.[6]

Because of the role that meaningful comparative proportionality review can play in ensuring that death sentences are not arbitrary or excessive, states that do not engage in the review, or that do so only superficially, may increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

[6] *See, e.g.*, Walker v. Georgia, 129 S. Ct. 453, 454–55 (2008) (Stevens, J., on the denial of certiorari) (noting that Georgia's approach to proportionality review, in which Georgia asserted that the state supreme court compared "'not only similar cases in which death was imposed, but similar cases in which death was not imposed' . . . seemed judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court" (quoting Zant v. Stephens, 462 U.S. 862, 880 n.19 (1983))).

I. FACTUAL DISCUSSION

A. Direct Appeal Procedures

A defendant sentenced to death in Texas is entitled to a direct appeal of his/her conviction and sentence to the Texas Court of Criminal Appeals, the highest criminal court in the state.[7] A death-sentenced defendant is not required to file notice of appeal, but the clerk of the trial court must file a notice of conviction in the Court of Criminal Appeals within thirty days of sentencing.[8]

Texas law provides that "[a]s soon as practicable after a death sentence is imposed in a capital felony case, the presiding judge of the convicting court shall appoint counsel to represent an indigent defendant on appeal."[9] The same attorney who represented the defendant at trial may not be appointed to represent the defendant on appeal unless "(1) the defendant and the attorney request the appointment on the record; and (2) the court finds good cause to make the appointment."[10]

"The appellate record consists of the clerk's record and, if necessary to the appeal, the reporter's record."[11] In criminal cases, the clerk's record must include the several items specified under Texas Rule of Appellate Procedure 34.5—for example, the court's docket sheet, the court's charge and the jury's verdict, and the notice of appeal.[12] The reporter's record, which the appellant must request in writing, principally includes the stenographic or electronic recording of the proceedings.[13] If the appellant in a criminal case requests a partial reporter's record but argues on appeal that the evidence is insufficient to support a finding of guilt, "the record must include all the evidence admitted at the trial on the issue of guilt or innocence and punishment."[14] A fee for the preparation of the clerk's record is set by state statute,[15] whereas a

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[7] TEX. CONST. art. V, § 5(b) ("The appeal of all cases in which the death penalty has been assessed shall be to the Court of Criminal Appeals."); TEX. R. APP. PROC. 71.1 (same); TEX. CODE CRIM. PROC. ANN. art. 44.02 (2012) ("A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed . . ."); TEX. R. APP. PROC. 25.2(a)(2) ("A defendant in a criminal case has the right of appeal . . ."). Fourteen Courts of Appeals retain intermediate appellate jurisdiction in civil and non-capital criminal cases. *See Courts of Appeals*, TEX. CTS. ONLINE, http://www.courts.state.tx.us/courts/coa.asp (last visited July 18, 2012).

[8] TEX. R. APP. PROC. 25.2(b).

[9] TEX. CODE CRIM. PROC. ANN. art. 26.052(j) (2012). The procedures for determining whether a defendant is indigent and for appointing counsel are specified under the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 26.04 (2012); *see also* Whitehead v. State, 130 S.W.3d 866 (Tex. Crim. App. 2004) (regarding an appeal from a trial court's order denying appellant indigent status).

[10] TEX. CODE CRIM. PROC. ANN. art. 26.052(k) (2012).

[11] TEX. R. APP. PROC. 34.1.

[12] TEX. R. APP. PROC. 34.5. The rule also provides an avenue for the parties to request additional materials to be included in the clerk's record. *See* TEX. R. APP. PROC. 34.5(b).

[13] TEX. R. APP. PROC. 34.6. Also, "[b]y written stipulation filed with the trial court clerk, the parties may agree on the contents of the appellate record." TEX. R. APP. PROC. 34.2. The agreed record "will be presumed to contain all evidence and filings relevant to the appeal." *Id.* The procedure for requesting materials to be included in the agreed record are specified under Texas Rules of Appellate Procedure 34.5 and 34.6. *Id.*; TEX. R. APP. PROC. 34.5, 34.6.

[14] TEX. R. APP. PROC. 34.6(c)(5).

[15] *See generally* TEX. GOV'T CODE ANN. §§ 51.317 (regarding fees due at filing), 51.318 (regarding fees due when service is performed or requested), 51.319 (regarding other fees, including a catchall clause authorizing collection of

fee for the preparation of the reporter's record may be set by the Texas Court of Criminal Appeals.[16]

The trial court clerk and the official or deputy reporter are "responsible for preparing, certifying, and timely filing" the clerk's record and the reporter's record.[17] In capital cases, the appellate record must be filed with the Court of Criminal Appeals within sixty or 120 days, depending on whether a motion for a new trial has been filed and whether that motion has been granted or denied.[18] The parties may file supplemental briefs after the record is filed in the Court of Criminal Appeals.[19] The appropriate form for those briefs, as well as the time for filing them, is provided for under Rule 38 of the Texas Rules of Appellate Procedure.[20] Likewise, the details regarding oral argument before the Court of Criminal Appeals are provided for under Rule 39.[21] In all cases before the Court, "at least two counsel for the defendant shall be permitted oral argument if desired by the appellant."[22]

B. Review in the Texas Court of Criminal Appeals

A death-sentenced defendant is not required to file notice of appeal as every case in which a defendant is sentenced to death is "subject to automatic review by the [Texas] Court of Criminal Appeals."[23] If a complaint for appellate review conforms to the Texas Rules of Appellate Procedure, then the Court will consider those errors properly preserved under the appropriate standard of review.[24] Common standards of appellate review include automatic reversible error, de novo review, clearly erroneous review, and abuse of discretion.[25] The appropriate standard of review varies depending on the point of error asserted.[26]

"a reasonable fee" for "performing any other service prescribed or authorized by law for which no fee is set") (2012).

[16] TEX. R. APP. PROC. 34.6(i).

[17] TEX. R. APP. PROC. 35.3.

[18] TEX. R. APP. PROC. 35.2.

[19] TEX. CODE CRIM. PROC. ANN. art. 44.33 (2012).

[20] *See* TEX. R. APP. PROC. 38.

[21] *See* TEX. R. APP. PROC. 39. An appellant's right to oral argument is not absolute. TEX. R. APP. PROC. 39.1 (allowing that the Court of Criminal Appeals may "decide[] that oral argument is unnecessary" if "(a) the appeal is frivolous; (b) the dispositive issue or issues have been authoritatively decided; (c) the facts and legal arguments are adequately presented in the briefs or record; or (d) the decisional process would not be significantly aided by oral argument").

[22] TEX. CODE CRIM. PROC. ANN. art. 44.33 (2012).

[23] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(h) (2012). This "automatic review" occurs regardless of whether the defendant desires to waive the right to appeal and regardless of whether any briefs are submitted by the appellant. *See* Mullis v. State, No. AP-76525, 2012 WL 1438685, at *1 (Tex.Crim.App., Apr. 25, 2012); TEX. R. APP. P. 38.8(b)(4). The Court of Criminal Appeals may not dismiss a case for failure to submit briefs but must instead review the record for unassigned fundamental errors. TEX.CODE CRIM. PROC. ANN. art. 44.33(b) (2012); TEX. R. APP. PROC. 38.8(b)(4).

[24] *See* TEX. R. APP. PROC. 33.1(a). An error is properly preserved if the record shows that "(1) the complaint was made to the trial court by a timely request, objection, or motion . . . [and] (2) the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal." *Id. See generally* Charles F. Baird, *Standards of Appellate Review in Criminal Cases*, 42 S. TEX. L. REV. 707 (2001).

[25] *See* Baird, *supra* note 24, at 722–25 (listing, defining, and describing common standards of appellate review).

[26] For example, a violation of the State's "affirmative duty to disclose evidence favorable and material to a defendant's guilt or punishment under the Due Process Clause of the Fourteenth Amendment," Brady v. Maryland,

In its appellate review, the Texas Court of Criminal Appeals is not required to limit its review to those errors properly preserved. In *Carter v. State*, the Court explicitly rejected the State's argument that an appellate court "has no jurisdiction to entertain unassigned error regardless of the fundamental nature of the error in question," finding that, "[o]nce jurisdiction of an appellate court is invoked, exercise of its reviewing functions is limited only by its own discretion or a valid restrictive statute."[27] It is, however, rare for an appellant to obtain relief for so-called "unassigned fundamental errors,"[28] and a defendant's failure to preserve an issue at trial or failure to brief issues for the court typically precludes relief.[29]

Upon completing its review, the Texas Court of Criminal Appeals may affirm or reverse the conviction, the sentence, or both.[30] The Texas Code of Criminal Procedure calls upon the Court to "reform a sentence of death to a sentence of confinement . . . for life without parole if the court finds that there is legally insufficient evidence to support an affirmative answer to [the future dangerousness or anti-parties special issues]."[31] A death sentence also must be reduced to life without parole if the court finds "reversible error that affects the punishment stage of the trial other than a finding of insufficient evidence" and the prosecuting attorney timely files a motion requesting that the sentence be reduced.[32]

If the Court of Criminal Appeals finds error affecting the penalty stage only, and if the prosecuting attorney does not request that the sentence be reduced, then the defendant will receive a new sentencing phase hearing.[33]

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373 U.S. 83, 87-88 (1963), requires reversal. Thomas v. State, 841 S.W.2d 399, 407 (Tex. Crim. App. 1992). By contrast, a trial court's ruling on the admission of expert testimony and scientific evidence is reviewed under an abuse-of-discretion standard. Kelly v. State, 824 S.W.2d 568, 574 (Tex. Crim. App. 1992). Texas appellate courts also may review claims as to the factual sufficiency of the evidence adduced at trial. *See* TEX. CODE CRIM. PROC. ANN. arts. 44.25 ("[T]he Court of Criminal Appeals may reverse the judgment in a criminal action, as well upon the law as upon the facts."), 44.251(a) (2012); Watson v. State, 204 S.W.3d 404, 414 (Tex. Crim. App. 2006) ("[T]he law as it stands today in Texas is that . . . this Court, in the direct appeal of capital murder cases[,] [has] the statutory and constitutional authority to entertain a claim of factual insufficiency and to reverse the conviction and remand the cause for a new trial in the event [it] find[s] the evidence to be, indeed, factually insufficient.").

[27] Carter v. State, 656 S.W.2d 468, 468–69 (Tex. Crim. App. 1983) (internal quotations and emphasis omitted).

[28] *See, e.g.*, Carter v. State, 639 S.W.2d 13, 15 (Tex. App. 1982).

[29] *See, e.g.*, Perry v. State, 703 S.W.2d 668, 670 (Tex. Crim. App. 1986) (finding defendant's "failure to complain or object in the trial court" regarding a suggestive pretrial identification constituted waiver and reversing the court of appeals' grant of relief on the basis of "unassigned error").

[30] *See generally* TEX. CODE CRIM. PROC. ANN. art. 44.251 (2012).

[31] TEX. CODE CRIM. PROC. ANN. art. 44.251(a) (2012). The "future dangerousness" special issue asks "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," and the "anti-parties" special issue asks—in cases in which the defendant has been convicted as a party to a capital-eligible offense or, instead, has been held criminally responsible for a capital-eligible offense committed by another person—"whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (2012).

[32] TEX. CODE CRIM. PROC. ANN. art. 44.251(b) (2012). The Code also states that a death sentence shall be reduced to life without parole if the United States Supreme Court (1) finds that the imposition of the death penalty . . . violates the United States Constitution; and (2) issues an order that is not inconsistent with [Article 44.251]. TEX. CODE CRIM. PROC. ANN. art. 44.251(d)(2012).

[33] TEX. CODE CRIM. PROC. ANN. art. 44.251(c) (2012).

The Court of Criminal Appeals does not undertake review of whether imposition of a death sentence is proportional to sentences imposed in similar capital cases.[34]

C. Discretionary Review by the United States Supreme Court

If the Texas Court of Criminal Appeals affirms the conviction and sentence of death on direct appeal, the appellant has ninety days after the decision is entered to file a petition for a writ of certiorari with the U.S. Supreme Court.[35] The decision to grant the writ is entirely within the discretion of the Court,[36] and its review is limited to federal questions—that is, whether a state court committed federal constitutional error or misapplied federal law in adjudicating an appellant's case.[37] Ultimately, the Court

> may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and [it] may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[38]

If the conviction and sentence are affirmed, and if the appellant wishes to continue challenging his/her conviction or sentence, s/he may initiate post-conviction relief state habeas corpus proceedings.[39]

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[34] *See, e.g.*, MO. REV. STAT. § 565.035.3 (2012) (calling for the Supreme Court of Missouri to consider whether the death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant."); KY. REV. STAT. ANN. § 532.075(2)–(3) (2012) (requiring that upon mandatory review of the death sentence, the Kentucky Supreme Court must consider "the punishment as well as any errors enumerated by way of appeal" and, with regard to the sentence, determine whether (1) "[T]he sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," (2) "[T]he evidence supports the jury's or judge's finding of statutory aggravating circumstances," and (3) "[T]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.").

[35] 28 U.S.C. § 2101(c) (2012).

[36] 28 U.S.C. § 1257 (2012); SUP. CT. R. 10.

[37] *See* 28 U.S.C. § 1257 (2012); Chandler v. Florida, 449 U.S. 560, 570 (1981) ("[I]n reviewing a state-court judgment, we are confined to evaluating it in relation to the Federal Constitution.").

[38] 28 U.S.C. § 2106 (2012).

[39] *See generally* TEX. CODE CRIM. PROC. ANN. art. 11.071 (2012); *see also* Chapter Eight on State Post-conviction Proceedings, *infra*.

II. ANALYSIS

A. Recommendation #1

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought.

A fundamental principle of capital jurisprudence in the United States is the need for procedural protections against "random or arbitrary imposition of the death penalty."[40] Arbitrary death sentences may result from both structural and individual sources. Arbitrariness can result from unfettered prosecutorial discretion in seeking the death penalty, deficient legal representation of capital defendants, and juror confusion in the sentencing process. In addition, due to the decentralized nature of the criminal justice system—in which local jurisdictions are responsible for criminal law enforcement—disparity may be inevitable. In Texas, for example, there is significant geographic disparity among the number and rate at which Texas counties impose death sentences. Statistics compiled by the Texas Department of Criminal Justice indicate that 1,062 individuals have been given death sentences in the state since 1976 through 2013 and that these sentences are dispersed across 120 counties.[41] However, as set out in Table 1 below, just twenty of Texas' 254 counties account for over 76% of the 1,062 individuals sentenced to death.[42]

Table 1

Rank	County	Individuals Sentenced to Death
1	Harris	284
2	Dallas	103
3	Bexar	73
4	Tarrant	71
T-5	Nueces	24
T-5	Jefferson	24
7	Smith	23
T-8	Cameron	19
T-8	El Paso	19
T-8	Lubbock	19
T-8	Travis	19
12	Montgomery	18
13	Potter	17
T-14	Brazos	16
T-14	Hidalgo	16

[40] Gregg v. Georgia, 428 U.S. 153, 206 (1976); see also Mills v. Maryland, 486 U.S. 367, 383-84 (1988) ("The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.").

[41] *See Total Number of Offenders Sentenced to Death from Each County*, TEX. DEP'T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited July 22, 2013).

[42] *Id.*

Table 1 (Cont'd)

Rank	County	Individuals Sentenced to Death
T-14	McLennan	16
17	Bowie	15
18	Collin	14
19	Fort Bend	11
20	Navarro	10
		811

A court conducting proportionality review determines whether a death sentence is unacceptable in a particular case "because [it] is disproportionate to the punishment imposed on others convicted of the same crime."[43] A meaningful proportionality review necessarily compares the case at bar—in which a death sentence has been imposed and is reviewed on appeal—to (1) cases in which a death sentence was imposed, (2) cases in which the death penalty was sought but not imposed, and (3) cases in which the death penalty could have been, but was not, sought. After conducting proportionality review, a reviewing court will reverse a death sentence found to be aberrant.[44]

While at least eighteen of the thirty-three states with the death penalty conduct proportionality review in cases in which a death sentence was imposed,[45] Texas does not.[46] While every case in

[43] Pulley v. Harris, 465 U.S. 37, 44 (1984). *See e.g.*, State v. Papasavvas, 790 A.2d 798, 800 (N.J. 2002) (stating that "[u]nlike direct review, proportionality review does not question whether an individual death sentence is justified by the facts and circumstances of the case or whether, in the abstract, the sentence imposed on a defendant is deserved on a moral level. On the contrary, its role is to place the sentence imposed for one terrible murder on a continuum of sentences imposed for other terrible murders to ensure that the defendant 'has not been singled out unfairly for capital punishment.'") (internal citations omitted).

[44] For example, between 1989 and 2003, the Florida Supreme Court reversed thirty-seven death sentences on proportionality grounds. Phillip L. Durham, *Review in Name Alone: the Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Florida Supreme Court*, 17 ST. THOMAS L. REV. 299, 311 (2004).

[45] The states are: Alabama, ALA. CODE § 13A-5-53(b)(3) (2012); Delaware, DEL. CODE. ANN. tit. 11, § 4209(g)(2)(a) (2012); Florida, *see* Anderson v. State, 863 So. 2d 169, 187-88 (Fla. 2003) (stating that "this Court considers the totality of the circumstances in a case as compared to other cases in which the death penalty has been imposed"); Urbin v. State, 714 So. 2d 411, 417 (Fla. 1998); Georgia, GA. CODE ANN. § 17-10-35(c)(3) (2012); Kentucky, KY. REV. STAT. ANN. § 532.075(3)(c) (2012); Louisiana, LA. CODE. CRIM. PROC. ANN. art. 905.9.1(1)(c) (1997); Mississippi, MISS. CODE ANN. § 99-19-105(3)(c) (2012); Missouri, MO. REV. STAT. § 565.035(3)(3) (2012); Montana, MONT. CODE ANN. § 46-18-310(l)(c) (2012); Nebraska, NEB. REV. STAT. § 29-2521.03 (2012); New Hampshire. N.H. REV. STAT. ANN. § 630:5(XI)(c) (2012); New York, N.Y. CRIM. PROC. LAW § 470.30(3)(b) (2012); North Carolina, N.C. GEN. STAT. § 15A-2000(d)(2) (2012); Ohio, OHIO REV. CODE ANN § 2929.05(A) (2012); South Carolina, S.C. CODE ANN. § 16-3-25(C)(3) (2012); South Dakota, S.D. CODIFIED LAWS § 23A-27A-12(3) (2012); Tennessee, TENN. CODE ANN. § 39-13-206(c)(1)(D) (2012); Virginia, VA. CODE ANN. § 17.1-313(C)(2) (2012); and Washington, WASH. REV. CODE § 10.95.130(2)(b) (2012).

[46] Pondexter v. State, 942 S.W.2d 577, 588 (Tex. Crim. App. 1996) (en banc) (rejecting appellant's point of error "that the Due Process Clause of the Fourteenth Amendment requires [the Texas Court of Criminal Appeals] to engage in proportionality review in death penalty cases"). Of their own accord, the highest courts in Florida and Arkansas incorporate proportionality review into their death sentence reviews but are not required to do so by statute. Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775, 792 (2004). As a matter of federal constitutional law, proportionality review in capital cases is not required. Pulley v. Harris, 465 U.S. 37, 44 (1984); *see also id.* at 48–50 (noting that *Jurek v. Texas*, 428 U.S. 262 (1976), upheld Texas's capital sentencing process even though it lacked proportionality review, concluding: "In view of *Jurek*, we are quite sure that . . . the Court [in 1976] had not mandated comparative proportionality review whenever a death sentence was imposed").

which a defendant is sentenced to death is "subject to automatic review by the [Texas] Court of Criminal Appeals,"[47] this review does not encompass a comparison of the case at bar to previous capital cases to ensure that the sentence imposed was both proportionate to the offense and offender. Thus, Texas does not comply with this Recommendation.

Notably, a form of proportionality review has been undertaken by the Texas Court of Criminal Appeals in at least one capital case. The Texas Code of Criminal Procedure calls upon the Court of Criminal Appeals to "reform a sentence of death to a sentence of confinement . . . for life without parole if the court finds that there is legally insufficient evidence to support an affirmative answer to [the future dangerousness or anti-parties special issues]."[48] Acknowledging its responsibility "to make certain that the death sentence is not 'wantonly or freakishly' imposed,"[49] the Court in *Ellason v. State* agreed with former Presiding Judge John F. Onion, Jr., that "'any reversal in a capital murder case based on the insufficiency of the evidence to support any [penalty-phase] special issue . . . is a precedent to be carefully considered as a guideline in future cases.'"[50] The Court then reviewed the facts of nine cases in which it found the evidence insufficient to support the jury's affirmative answer to the future dangerousness special issue and, thereafter, concluded that "[i]n the case at bar . . . the facts of the offense alone are insufficient to sustain an affirmative response to the second special issue."[51]

In the twenty-one years following the Court's decision in *Ellason*, however, comparative analysis to determine the legal sufficiency of the evidence has fallen out of favor. In the 2010 case of *Estrada v. State*, the Court commented that "each case must be resolved on its own facts."[52] Upon listing the evidence unfavorable to the defendant, the Court summarily concluded that the evidence was "sufficient to support the jury's affirmative answer to the future-dangerousness special issue."[53]

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[47] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(h) (2012); *see also* TEX. CONST. art. V, § 5 ("The appeal of all cases in which the death penalty has been assessed shall be to the Court of Criminal Appeals."); TEX. R. APP. PROC. 71.1 (2012) (same). Because appellate review is automatic, a capital appellant need not file a notice of appeal in order to perfect his/her appeal. TEX. R. APP. PROC. 25.2(b) (2012).

[48] TEX. CODE CRIM. PROC. ANN. art. 44.251(a) (2012). *See supra* note 31 and accompanying text.

[49] Ellason v. State, 815 S.W.2d 656, 660 (Tex. Crim. App. 1991) (citing Horne v. State, 607 S.W.2d 556 (Tex. Crim. App. 1980); Keeton v. State, 724 S.W.2d 58 (Tex. Crim. App. 1987)).

[50] *Ellason*, 815 S.W.2d at 660 (quoting Wallace v. State, 618 S.W.2d 67, 71 (Tex. Crim. App. 1981) (Onion, P.J., concurring)).

[51] *Ellason*, 815 S.W.2d at 660–62 (discussing Smith v. State, 779 S.W.2d 417 (Tex. Crim. App. 1989); Huffman v. State, 746 S.W.2d 212 (Tex. Crim. App. 1988); Warren v. State, 741 S.W.2d 395 (Tex. Crim. App. 1987); Beltran v. State, 728 S.W.2d 382 (Tex. Crim. App. 1987); Keeton v. State, 724 S.W.2d 58 (Tex. Crim. App. 1987); Roney v. State, 632 S.W.2d 598 (Tex. Crim. App. 1982); Garcia v. State, 626 S.W.2d 46 (Tex. Crim. App. 1982); Brasfield v. State, 600 S.W.2d 288 (Tex. Crim. App. 1980)).

[52] Estrada v. State, 313 S.W.3d 274, 284 (Tex. Crim. App. 2010) (citing Dinkins v. State, 894 S.W.2d 330, 357–61 (Tex. Crim. App. 1995)).

[53] *Estrada*, 313 S.W.3d at 284–85. In reaching its holding, the *Estrada* Court did cite four cases in which the evidence was deemed sufficient for a finding of future dangerousness. *See* Trevino v. State, 991 S.W.2d 849 (Tex. Crim. App. 1999); *Ex parte* Tennard, 960 S.W.2d 57 (Tex. Crim. App. 1997); Dinkins v. State, 894 S.W.2d 330 (Tex. Crim. App. 1995); Hawkins v. State, 660 S.W.2d 65 (Tex. Crim. App. 1983). However, in responding to the defendant's claim that he "'easily poses an equally low (if not lower) threat of future danger than the defendants in [ten] cases [in which the evidence was deemed insufficient for a finding of future dangerousness],'" the Court merely dismissed those examples as "older cases." *Estrada*, 313 S.W.3d at 284.

The proportionality analysis suggested by Recommendation #1 is somewhat different than the comparative analysis undertaken by the Texas Court of Criminal Appeals in *Ellason*. In *Ellason*, the Court only focused on whether there was sufficient evidence to support a finding of future dangerousness, whereas proportionality review also encompasses review of the facts and circumstances surrounding the crime and the life of the defendant in both the case at bar and in past cases. Nevertheless, the two inquiries are similar in that both analyses call upon judges to evaluate whether a death sentence is warranted in one case by comparing its facts to those in other cases. *Ellason* and other earlier cases demonstrate that it is feasible for the Court of Criminal Appeals to compare the facts in one case with those in other cases "to make certain that the death sentence is not 'wantonly or freakishly' imposed."[54]

Finally, the importance of proportionality review in Texas may be gleaned from a comparison of Texas cases in which the death penalty has been imposed to those in which a defendant received a lesser sentence—for example, life imprisonment or life imprisonment without possibility of parole. Consider the facts and outcomes from the following five capital cases:

1. Calvin Burdine was convicted and sentenced to death for the murder of a victim in the course of a robbery.[55] Texas did not prosecute the co-defendant for capital murder, "despite evidence indicating that the co-defendant was the primary actor . . . . Pursuant to a plea agreement, [the co-defendant] served an eight year prison sentence and was subsequently paroled."[56] Burdine's conviction and death sentence were later reversed during federal habeas corpus proceedings due to ineffective assistance of counsel because trial counsel slept during portions of Burdine's capital trial.[57]
2. Roberto Rojas Aguirre shot and killed his three children—all under age nine—and also shot his mother-in-law.[58] He was convicted of capital murder and sentenced by a jury to life without parole.[59]
3. Kimberly Saenz was a nurse who killed five of her kidney dialysis patients by injecting them with bleach.[60] She was convicted of five counts of capital murder and sentenced to life in prison in by a jury.[61]
4. John Wesley Nero was permitted to plead guilty to capital murder and avoid the death penalty for the killing of a police officer.[62] Nero had fled police in his vehicle after

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[54] *Ellason*, 815 S.W.2d at 660 (citing Horne v. State, 607 S.W.2d 556 (Tex. Crim. App. 1980); Keeton v. State, 724 S.W.2d 58 (Tex. Crim. App. 1987)).

[55] Burdine v. Johnson, 66 F.Supp.2d 854, 855 (S.D. Tex. 1999).

[56] *Id.* at n.1.

[57] Burdine v. Johnson, 262 F.3d 336, 338 (5th Cir. 2001) (finding that when "defense counsel repeatedly slept as evidence was being introduced against a defendant, that defendant has been denied counsel at a critical stage of his trial. In such circumstances, the Supreme Court's Sixth Amendment jurisprudence compels the presumption that counsel's unconsciousness prejudiced the defendant.").

[58] Jared Taylor, *Rojas Guilty on All Counts in Capital Murder Case*, MONITOR (McAllen, TX), Aug. 19, 2011.

[59] Amber Dixon, *Alton Man Gets Life in Prison for Family's Murder*, VALLEYCENTRAL.COM, Aug. 26, 2011, *available at* http://www.valleycentral.com/news/story.aspx?id=656344#.UZkGjLXVCSo.

[60] *Life in Prison for Ex-Nurse in 5 Bleach Deaths*, USA TODAY, Apr. 2, 2012, *available at* http://usatoday30.usatoday.com/news/nation/story/2012-04-02/nurse-bleach-injection-dialysis/53952548/1.

[61] *Id.*

[62] Sarah Moore, *Suspect in Beaumont Cop Death Takes Plea Deal*, BEAUMONT ENTERPRISE, Mar. 14, 2013.

allegedly assaulting family members, and then deliberately ran down a police officer who was attempting to lay down road spikes in Nero's vehicle's path.[63]

5. Levi King "walked into a farm house in the middle of the night with an AK-47 and murdered a family he'd never met."[64] He was convicted of capital murder and sentenced to life imprisonment.[65]

Of these individuals, only one received a death sentence. While his offense of robbery in the course of a murder is a serious one, it is difficult to conclude that either Burdine or this offense is the worst among the aforementioned defendants and offenses. A meaningful proportionality review that takes into consideration comparable cases would better ensure the rational, non-discriminatory application of Texas's death penalty.

Recommendation

Texas is in the minority of jurisdictions that do not undertake proportionality review of death sentences. As described above, significant geographic disparity pervades the imposition of the death penalty in Texas. Indeed, just four of Texas's 254 counties account for over 50% of death sentences imposed in the state since 1976.[66] As demonstrated by the Court's efforts in *Ellason v. State*, however, the Court of Criminal Appeals recognizes the importance of ferreting out arbitrariness in capital sentencing; and its analysis contained in *Ellason* demonstrates the feasibility of undertaking the kind of review needed to ensure that the death penalty is being administered in a rational, non-arbitrary manner.

Therefore, the Assessment Team recommends that the Texas Court of Criminal Appeals, as the highest criminal court in the state, undertake a searching and thorough proportionality review of every death sentence imposed. This review should include a comparison to similar cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought, but was not. The review should also encompass a meaningful comparison to co-defendants' or co-participants' cases, including those cases that resulted in a sentence less than death.

Furthermore, as the Texas Department of Criminal Justice's website indicates, data already has been collected with respect to the factual circumstances in those cases in which a death sentence was imposed.[67] Although no Texas agency currently compiles all of the information needed on capital charging and sentencing for use by the Court in proportionality review, the experience of

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[63] *Id.*

[64] Kristen Guilfoos, *Levi King: Inside the Mind of a Murderer*, KCBD NEWSCHANNEL 10 (Lubbock, TX), Nov. 24, 2010, *available at* http://www.kcbd.com/story/13560667/levi-king-inside-the-mind-of-a-murderer.

[65] *Id.*

[66] *See Total Number of Offenders Sentenced to Death from Each County*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited July 22, 2013).

[67] *See* TEX. DEP'T CRIM. JUSTICE, *Offenders on Death Row*, http://www.tdcj.state.tx.us/stat/dr_offenders_on_dr.html (last visited July 22, 2013) (under "Offender Information," providing summaries of the incidents that led to the inmate's receiving a capital sentence).

other states—states in which a proportionality review is conducted in capital cases—could prove instructive should Texas institute a proportionality review of its own.[68]

[68] The Assessment Team, in urging the State of Texas to adopt meaningful proportionality review in capital cases, is mindful of the data collection and demanding analysis such an effort will require. But the Team also is mindful of Justice Frankfurter's observations over a half-century ago:

> As to impossibility, all I can say is that nothing is more true of (the legal) profession than that the most eminent among them, for 100 years, have testified with complete confidence that something is impossible which, once it is introduced, is found to be very easy of administration. The history of legal procedure is the history of rejection of reasonable and civilised standards in the administration of law by most eminent judges and leading practitioners. . . . Every effort to effect improving changes is resisted on the assumption that man's ultimate wisdom is to be found in the legal system as at the date at which you try to make a change.

FELIX FRANKFURTER, *The Problem of Capital Punishment*, OF LAW AND MEN 77, 86 (1956).

CHAPTER EIGHT

STATE HABEAS CORPUS PROCEEDINGS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The availability of state post-conviction, referred to as "state habeas" in some jurisdictions, and federal habeas corpus relief through collateral review of state court judgments is an integral part of the capital punishment review process. Significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of a finding of ineffective assistance of counsel, the discovery of crucial new evidence, prosecutorial misconduct, unconstitutional racial discrimination in jury selection, and other meritorious constitutional bases.[1]

Collateral review is critically important to the fair administration of justice in capital cases. Because some capital defendants receive inadequate counsel at trial and on direct appeal, and because it is often impossible to uncover evidence that was unconstitutionally suppressed or undisclosed until after direct appeal, state post-conviction proceedings often provide the first opportunity to establish meritorious constitutional claims. Moreover, exhaustion and procedural default rules require an inmate to present such claims in state court before they may be considered in federal habeas corpus proceedings.

Securing relief on meritorious constitutional claims of error in state 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. In addition, decisions by the U.S. Supreme Court and passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) have greatly limited the ability of a death row inmate to return to federal court a second time.[2] AEDPA's restrictions include a one-year statute of limitations on federal habeas claims and, in some circumstances, a requirement that federal courts must give deference to state court rulings that the Constitution has not been violated, even if the federal court concludes that the state court's ruling was erroneous.[3] The one-year statute of limitations may be waived if the inmate, using newly discovered evidence, proves actual innocence to the district court such that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt."[4]

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[1] JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman.

[2] AEDPA was enacted into law following the 1995 Oklahoma City bombing. Charles V. Zehren, *Compromise Time / GOP Leaders OK Anti-terror Bill; Clinton on Board*, NEWSDAY, Apr. 16, 1996, at A7. While the law included measures to identify and thwart potential terrorists, it also imposed new, stricter rules on inmates seeking federal habeas relief, irrespective of whether the inmate was involved in a terror plot. *See id.*; 28 U.S.C. §§ 2244, 2254 (2013).

[3] *See* 28 U.S.C. §§ 2244, 2254 (2013).

[4] McQuiggin v. Perkins, 569 U.S. ___, 133 S.Ct. 1924, 1928 (2013) (citing Schlup v. Delo, 513 U.S. 298, 329 (1995)). Moreover, unjustifiable delay by the inmate in filing the habeas petition is "not as an absolute barrier to relief, but . . . a factor in determining whether actual innocence has been reliably shown." *Id.*

AEDPA also places, absent a convincing claim of innocence, restrictions on evidentiary hearings with respect to facts not presented in state court—no matter the justification for the omission.[5] Federal courts are prohibited from reviewing second or successive habeas applications unless (1) the claim is based on a new law made retroactive by the U.S. Supreme Court, or (2) the factual basis of a claim clearly establishing the inmate's innocence "could not have been discovered previously through the exercise of due diligence."[6] Thus, a constitutional claim that was previously overlooked due to an attorney's oversight cannot be reviewed in federal court.

These limitations on post-conviction relief, as well as the federal government's defunding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage frivolous claims in federal courts. These changes, however, also have resulted in an inability of some death row inmates to have valid claims heard or reviewed on the merits in federal court.

The frequent invocation of the harmless error doctrine also has limited grants of federal habeas corpus relief. The harmless error doctrine dictates that, even if the court finds an error in the inmate's case, it must uphold the conviction and sentence unless it determines that the error had a "substantial and injurious effect" on the outcome of the case.[7] Because of the procedural limitations on federal habeas relief, it is especially important for state courts to fully consider all of a death row inmate's claims in state post-conviction proceedings.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier for state courts to review valid claims of constitutional error on the merits. Under current collateral review procedures, a "full and fair judicial review" often does not include reviewing the merits of the inmate's constitutional claims.

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5 *See* 28 U.S.C. §§ 2244, 2254 (2013).
6 *See* 28 U.S.C. § 2244(b)(2) (2013).
7 *See* Brecht v. Abrahamson, 507 U.S. 619, 622–23 (1993).

I. FACTUAL DISCUSSION: TEXAS OVERVIEW

Texas law permits a death row inmate to challenge his/her conviction and death sentence in a post-conviction procedure known as a writ of habeas corpus, or "state habeas."[8] Although the Texas Constitution grants the Texas Court of Criminal Appeals original jurisdiction over habeas cases, Texas statutory law requires the inmate's claim to first be reviewed by the district court in which s/he was convicted.[9]

A. State Habeas Procedure

1. Initial Habeas Application

Texas's capital state habeas process begins after the inmate is convicted and sentenced to death.[10] "Immediately after judgment is entered" at trial, the district court must "determine if the [inmate] is indigent and, if so, whether the [inmate] desires appointment of counsel for the purpose of a writ of habeas corpus."[11] If the inmate requests an attorney, the court must appoint counsel within thirty days of making a finding of indigency.[12] The Texas Office of Capital Writs (OCW) will be appointed to represent the inmate unless OCW declines or is prohibited from accepting appointment, in which case an attorney from an approved list "maintained by the presiding judges of the administrative judicial regions" will be appointed.[13]

The inmate must then file the habeas application "not later than the 180th day after the date the [trial] court appoints counsel . . . or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later."[14] Upon a finding of good cause the court may, at the inmate's request, grant a single ninety-day extension.[15] If the inmate files an untimely application for habeas relief, the court must dismiss the application or, upon a finding of good cause for the late filing, either (1) appoint new counsel and set a new filing deadline, or (2) allow counsel to continue representation and set a new filing deadline.[16]

The prosecution must file an answer to the application "not later than the 120th day after the date [it] receives notice" that the habeas application was filed.[17] The trial court may grant a single sixty-day extension if the prosecution can show "particularized justifying circumstances" for additional time.[18]

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[8] *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 (2013).
[9] TEX. CONST. art. V, § 5(c); TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a) (2013).
[10] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(b) (2013).
[11] *Id.*
[12] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(b), (c) (2013). Although the court is required to determine if the inmate is indigent, it appears that an inmate need not be indigent to receive appointed counsel. *Id.*
[13] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(c), (f) (2013). In addition, OCW will not be appointed if the inmate elects to proceed pro se or hire retained counsel. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(c) (2013).
[14] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a) (2013).
[15] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(b) (2013).
[16] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(e), 4A(a), (b) (2013).
[17] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 7(a) (2013).
[18] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 7(a) (2013). *See also* TEX. CODE CRIM. PROC. ANN. art. 11.071, §§ 8(b), 9(e) (2013) (instructing the parties to file with the Court proposed findings of fact and conclusions of law).

No later than twenty days after the prosecution files its answer, the district court must determine "whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist."[19] If the court determines that no unresolved issues exist, no additional evidence will be submitted to the court.[20] If the court finds that unresolved factual issues do exist in the case, "the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection" to resolve the issues.[21] Irrespective of whether the court determines that unresolved issues exist, both parties must then file proposed findings of fact and conclusions of law.[22] The district court will then issue its findings of fact and conclusions of law with respect to the issues raised in the application.[23]

Following review by the district court, the Court of Criminal Appeals must "expeditiously review" the application and "enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify."[24] However, no specific deadlines are imposed.[25] Because the Court of Criminal Appeals has original jurisdiction over the case, it is not bound by the district court's findings.[26]

2. Subsequent Habeas Applications

A habeas application that is filed after an initial application is known as a subsequent habeas application.[27] The trial court must send any subsequent habeas applications it receives to the Texas Court of Criminal Appeals.[28] The Court of Criminal Appeals will dismiss the application as an "abuse of the writ" unless it determines that "the application contains sufficient specific facts establishing that:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special [capital sentencing] issues that were submitted to the jury in the applicant's trial . . . .[29]

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19 *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(a) (2013).
20 *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8 (2013).
21 TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9(a) (2013).
22 TEX. CODE CRIM. PROC. ANN. art. 11.071, §§ 8(b), 9(e) (2013).
23 TEX. CODE CRIM. PROC. ANN. art. 11.071, §§ 8(c), 9(e) (2013).
24 TEX. CODE CRIM. PROC. ANN. art. 11.071, § 11 (2013).
25 *See id.*
26 *See* TEX. CONST. art. V, § 5(c).
27 *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a) (2013).
28 TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(b) (2013).
29 TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a), (c) (2013).

The district court will not appoint counsel to represent an inmate in subsequent habeas proceedings until it receives notice from the Court of Criminal Appeals that one of these three exceptions has been met.[30] If one of these exceptions is established, the trial court will then consider the habeas application on the merits and follow the same procedures as for the initial habeas application.[31]

B. Types of Claims Reviewable in State Habeas

The Texas Court of Criminal Appeals has held that "the writ of habeas corpus is an extraordinary remedy that is available only when there is no other adequate remedy at law," and that habeas "should not be used to litigate matters which should have been raised on appeal or at trial."[32] As such, claims arising from the trial record generally cannot be reviewed in state habeas proceedings.[33] Instead, habeas is typically reserved for claims of constitutional error based on evidence outside the trial record, such as ineffective assistance of counsel[34] and prosecutorial misconduct.[35]

In 2013, the Texas Legislature also adopted legislation that permits, under very limited circumstances, an inmate to seek a writ of habeas corpus if

> …relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and [] the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and [] the court . . . also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.[36]

This law became effective on September 1, 2013.[37]

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30 TEX. CODE CRIM. PROC. ANN. art. 11.071, §§ 5(a), 6(b-1) (2013).
31 *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, §§ 5, 6(b) (2013).
32 *Ex parte* Jimenez, 364 S.W.3d 866, 880 (Tex. Crim. App. 2012) (internal quotation marks omitted).
33 *Id.*
34 *See, e.g.*, *Ex parte* Medina, 361 S.W.3d 633 (Tex. Crim. App. 2011).
35 *See, e.g.*, *Ex parte* Fierro, 934 S.W.2d 370 (Tex. Crim. App. 1996).
36 TEX. CODE CRIM. PROC. ANN. art. 11.073(b)(2) (2013) (effective Sept. 1, 2013).
37 *Id.*

II. ANALYSIS

In this Chapter, the Texas Assessment Team makes several recommendations for the reform of Texas's capital habeas procedure. While these recommendations address discrete areas of Texas law, the Team emphasizes that, in general, Texas should amend its capital habeas procedures to ensure that all death row inmates have an opportunity to have their claims thoroughly reviewed on the merits, with findings of fact and conclusions of law made publicly available in each case.

The Texas criminal justice system has a legitimate interest in the finality of judgments, and the Assessment Team acknowledges that there are valid reasons for curtailing successive habeas petitions and imposing filing deadlines. This interest, however, must be balanced with the duty to ensure that a death row inmate's claims are fully and fairly considered. Without a thorough capital habeas review, there is a risk that an inmate will be wrongly executed. There is a strong need for a robust state post-conviction review of death sentences in Texas, particularly given the history of inadequate counsel in capital cases and other documented trial-level problems affecting the fairness and accuracy of capital case outcomes.[38]

Moreover, state habeas proceedings are often the petitioner's only opportunity to have his/her claims of constitutional error reviewed on the merits as federal laws and U.S. Supreme Court decisions have curtailed the ability of federal courts to review claims that were not presented in state court. For instance, a federal court is required to defer to a state court's factual findings and legal conclusions unless those determinations were "unreasonable," even if the federal court would have otherwise ruled differently.[39] Because of these restrictive federal laws, a death row inmate's initial state habeas application establishes the outer boundaries of his/her claims in all later proceedings, absent extraordinary circumstances. Thus, it is imperative that Texas courts conduct a complete and thorough review of a petitioner's case before it reaches federal court. As discussed throughout this Chapter, however, Texas limits capital habeas review in a variety of ways: petitioners must comply with strict filing deadlines, courts often do not conduct evidentiary hearings, discovery is rarely granted, and a variety of procedural rules limit the ability of courts to consider a claim on the merits.

The Assessment Team further notes that, as described in more detail throughout this Chapter, many of the orders issued by Texas courts in capital habeas cases are not published, and in those orders that are published, the analysis is often limited. This problem pervades the habeas review process. Trial courts rarely permit evidentiary hearings in capital habeas cases and typically do not author an order setting out the court's independent findings of fact and conclusions of law. Furthermore, when reviewing the district court's findings, the Court of Criminal Appeals often declines to publish an opinion explaining the reasons for denying the habeas application. Instead, the court issues a summary order which states that it is adopting the findings of the trial court, with little or no analysis of the facts or law presented in the case.[40]

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[38] Several chapters in this Report describe the host of problems affecting the investigation, prosecution, and defense of death penalty cases in Texas.

[39] 28 U.S.C. § 2254(d),(e) (2013).

[40] *See, e.g.*, *Ex parte* Ruiz, Nos. WR-78,129-01 & WR-78,129-02 (Tex. Crim. App. Sept. 26, 2012), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=23115; *Ex parte* Norman, Nos. WR-74,743-01 & 74,743-02 (Tex. Crim. App. Aug. 22, 2012), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=22905; *Ex parte* Storey, No. WR-75,828-01

Due to the lack of openness in the capital habeas review process, the Assessment Team was unable to discern the basis for decisions in a large number of Texas capital habeas cases. The unavailability of information has caused the Assessment Team's analysis to be incomplete in some areas. This opacity is equally problematic for death row petitioners and habeas lawyers in Texas, as there is little case law developed on capital habeas proceedings despite the frequency of death sentences imposed and executions carried out.

The Team has, however, considered several other sources in its assessment of Texas's capital habeas procedures, including available case law, Texas statutes, and interviews with relevant Texas stakeholders. It has also independently reviewed studies of habeas proceedings by non-governmental entities. Moreover, as discussed throughout the Chapter, Texas's opaque process, and at times superficial review of habeas claims, have themselves had a profound effect on the fairness of capital habeas review in Texas.

A. Recommendation #1

> **All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.**

As described in the Factual Discussion, Texas statutory law dictates the means by which a Texas death row inmate may seek post-conviction review of his/her conviction and death sentence, in a procedure known as state habeas corpus.[41] While the Texas Constitution grants the Texas Court of Criminal Appeals original jurisdiction over state habeas proceedings,[42] habeas petitioners must first file an application for a writ of habeas corpus with the district court in which they were convicted.[43] The district court is empowered to hold an evidentiary hearing and issue findings of fact and conclusions of law before the application is reviewed by the Court of Criminal Appeals.[44] As discussed below, however, Texas's habeas procedures at the district court-level do not provide for adequate development and consideration of all claims.

<u>Insufficient Time to Adequately Prepare State Habeas Claims</u>

Under Texas's capital habeas statute, a death row inmate must file his/her habeas application within 180 days of the appointment of counsel or within forty-five days of the date the

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(Tex. Crim. App. June 15, 2011), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=21184; *Ex parte* Sorto, Nos. WR-71,381-01 & WR-71,381-02 (Tex. Crim. App. Feb. 25, 2009), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=18035.

[41] TEX. CODE CRIM. PROC. ANN. art. 11.071 (2013).

[42] TEX. CONST. art. V, § 5(c). *See also Ex parte* Cvengros, 384 S.W.2d 881, 882 (Tex. Crim. App. 1965) ("This Court has general original jurisdiction to issue writs of habeas corpus.").

[43] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a) (2013).

[44] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(a)-(c) (2013).

prosecution files its direct appeal brief, whichever is later.[45] The district court may grant a single ninety-day extension upon a showing of good cause.[46] An untimely application "constitutes a complete waiver of all grounds for relief" unless the Court of Criminal Appeals, upon reviewing the reasons for the late application, finds "good cause" for the untimely filing.[47] Generally, the Court of Criminal Appeals has found good cause only when the late filing was caused by an error in calculation of the filing date. In *Ex Parte Ramos*, for instance, the Court of Criminal Appeals excused a late filing because the district court's order erroneously stated that the application must be filed by a date two days later than the actual deadline.[48] In another case, late filing was permitted because defense counsel computed the filing deadline based on what the court deemed "a mistaken, but not totally implausible, interpretation of the law."[49] The Assessment Team has found no records of cases in which a late filing was excused because of counsel's need to further investigate a claim.

Post-conviction claims in capital cases often include factual and research-intensive issues, such as claims of ineffective assistance of counsel and prosecutorial misconduct, which are not readily apparent from a review of the trial record and take significant time to prepare.[50] Many other capital jurisdictions, including several states previously assessed by the ABA, provide death row inmates with a significantly longer period, or do not impose a specific deadline at all, for filing a claim of post-conviction relief in a death penalty case.[51] Furthermore, Texas does not impose filing deadlines on habeas applications in non-capital cases.[52] Thus, Texas affords the least amount of preparation time to those inmates who face the most serious punishment and imposes demanding obligations on counsel to thoroughly reinvestigate the case to "ensure that the client

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[45] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a) (2013).

[46] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(b) (2013).

[47] TEX. CODE CRIM. PROC. ANN. art. 11.071, §§ 4(b),(e) (2013); 4A(b)(1) (2013). If the court finds good cause, it may either permit counsel to continue representation and grant the inmate an extension of up to 180 days or appoint new counsel and grant the inmate an extension of up to 270 days. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4A(b)(2), (3) (2013).

[48] *Ex parte* Ramos, 977 S.W.2d 616, 616–17 (Tex. Crim. App. 1998).

[49] *Ex parte* Reynoso, 257 S.W.3d 715, 723 (Tex. Crim. App. 2008).

[50] Indeed, in cases of ineffective assistance of trial counsel, "[t]he very ineffectiveness claimed may prevent the record from containing the information necessary to substantiate such a claim." *Ex parte* Torres, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997).

[51] ALA. R. CRIM. P. 32.2(c) (providing that an Alabama death row inmate must file his/her post-conviction petition within one year after the Court of Criminal Appeals issues the certificate of judgment affirming his/her conviction); FLA. R. CRIM. P. 3.851(d)(1) (stating that a death row inmate must file for post-conviction relief within one year of the disposition of his/her petition for writ of certiorari to the U.S. Supreme Court); GA. CODE § 9-14-42(c) (2013) (providing no set time limit for Georgia death row inmates to file for post-conviction relief); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(a) (stating that Indiana inmates may file for post-conviction relief "at any time."); KY. R. CRIM. P. 11.42(10) (providing Kentucky death row inmates three years from the date the judgment becomes final to file for post-conviction relief); PA. R. CRIM. P. 901(A) (stating that Pennsylvania death row inmates must file their post-conviction motions within one year of final judgment on direct appeal); TENN. CODE ANN. § 40-30-102(a) (2013) (providing a death row inmate with one year following the disposition of his/her direct appeal to file for post-conviction relief). Federal law also grants petitioners one year to file a federal habeas petition from the date the direct appeal is final which will be tolled while the state habeas petition is pending. 28 U.S.C. 2244(d)(1)–(2) (2013).

[52] TEX. CODE CRIM. PROC. ANN. art. 11.07 (2013).

was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law."[53]

In addition, unlike most jurisdictions, where the capital post-conviction process does not begin until after the inmate's direct appeal is exhausted, Texas death row inmates are required to file the habeas application while their direct appeal is still pending.[54] Texas's capital habeas statute directs the district court to determine whether an inmate is indigent and desires appointed counsel "immediately" after s/he is sentenced to death at trial and a judgment is entered.[55] Counsel must then be appointed within thirty days.[56] The habeas application must be filed within 180 days of the appointment of counsel or within forty-five days of the date the prosecution files its direct appeal brief.[57]

Regardless of which deadline applies, the habeas application typically must be filed before the Texas Court of Criminal Appeals publishes its direct appeal opinion. Thus, habeas counsel do not have the benefit of a complete appellate record and court opinion to assist in development of cognizable claims.

Significantly, under this scheme, it is also almost impossible to present an ineffective assistance of appellate counsel claim in state habeas. The U.S. Supreme Court has held that defendants are constitutionally entitled to effective appointed counsel in direct appeal proceedings.[58] To prevail on such a claim, the inmate must demonstrate "that the outcome of his appeal would be

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[53] *See* ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 933 (2003).

[54] Only one of the eleven other states previously assessed by the ABA requires the inmate's capital habeas petition to be filed before direct appeal proceedings have concluded. ALA. R. CRIM. P. 32.2(c) (providing that an Alabama death row inmate must file his/her post-conviction petition within one year after the Court of Criminal Appeals affirms his/her conviction on direct appeal); ARIZ. REV. STAT. § 13-4234(D) (2013) (providing that Arizona capital post-conviction proceedings do not commence until the defendant's conviction and sentence are affirmed on direct appeal); FLA. R. CRIM. P. 3.851(d)(1) (stating that a death row inmate must file for post-conviction relief within one year of the disposition of his/her petition for writ of certiorari to the U.S. Supreme Court on direct appeal); GA. CODE § 9-14-42(c) (2013) (providing that post-conviction proceedings do not commence until after direct review is completed); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(a) (stating that Indiana inmates may file for post-conviction relief "at any time."); KY. R. CRIM. P. 11.42(10) (providing Kentucky death row inmates three years from the date the judgment becomes final on direct appeal to file for post-conviction relief); MO. SUP. CT. R. 24.035(b), 29.15(b) (stating that a Missouri death-row inmate must file his/her post-conviction petition within ninety days of the affirmance of his/her conviction and sentence on direct appeal); PA. R. CRIM. P. 901(A) (stating that Pennsylvania death row inmates must file their post-conviction motions within one year of final judgment on direct appeal); TENN. CODE ANN. § 40-30-102(a) (2013) (providing a death row inmate with one year following the disposition of his/her direct appeal to file for post-conviction relief); VA. CODE § 19.2-163.7 (2013) (providing that state habeas proceedings do not commence until after the Supreme Court of Virginia affirms a death row inmate's conviction and death sentence on direct appeal). An Ohio death-row petitioner must file his/her initial post-conviction petition, with limited exceptions, no later than 180 days after the date on which the trial transcript is filed in the Ohio Supreme Court in the direct appeal of the judgment of conviction and sentence. OHIO REV. CODE § 2953.21(A)(2), (F) (2013).

[55] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(b) (2013).

[56] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(c) (2013).

[57] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(a) (2013).

[58] Evitts v. Lucey, 469 U.S. 387 (1985); Smith v. Robbins, 528 U.S. 259 (2000).

different" had appellate counsel's performance not been deficient.[59] Without a direct appeal opinion, however, habeas counsel have no way to determine the outcome of the direct appeal claims. Instead, habeas counsel must assess the performance of direct appeal counsel while direct appeal proceedings are ongoing.

Lack of Evidentiary Hearings

Texas's capital habeas statute provides that if there are no "controverted, previously unresolved factual issues material to" the inmate's case, the district court must make findings of fact and conclusions of law without holding an evidentiary hearing.[60] Even if "controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist," the district court is not required to hold an evidentiary hearing.[61] Instead, "[t]o resolve the issues, the court *may* require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection."[62] The district court is never required to conduct an evidentiary hearing to resolve a factual dispute. This rule stands in contrast to the capital post-conviction procedures in many states, which require the trial court hold an evidentiary hearing when there is a legitimate factual dispute on a cognizable claim.[63]

While some Texas district courts may, in their discretion, elect to conduct an evidentiary hearing, the practice of using affidavits and other documents to resolve disputes of fact in capital habeas cases--sometimes referred to as a "paper hearing"—appears to be common in Texas, and have been used in lieu of live evidentiary hearings in many recent cases.[64]

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[59] *Ex parte* Owenby, 749 S.W.2d 880, 881 (Tex. Crim. App. 1988) (citing Strickland v. Washington, 466 U.S. 668 (1984).

[60] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(a)–(c) (2013).

[61] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9(a) (2013).

[62] *Id.* (emphasis added).

[63] *E.g.*, *Ex parte* Land, 775 So.2d 847, 852 (Ala. Crim. App. 2000) (requiring Alabama trial courts to hold an evidentiary hearing when the petition "contains matters and allegations (such as ineffective assistance of counsel) which, if true, entitle the petitioner to relief"), *overruled on other grounds by* State v. Martin, 69 So.3d 94 (Ala. 2011); ARIZ. R. CRIM. P. 32.8(a) (stating that Arizona petitioners are entitled to an evidentiary hearing "to determine issues of material fact"); GA. UNIF. SUPER. CT. R. 44.9 (granting Georgia petitioners a right to an evidentiary hearing); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 4(g) (granting Indiana petitioners a right to a hearing "[i]f an issue of material fact is raised"); OHIO REV. CODE § 2953.21(C) (West 2007) (providing Ohio petitioners with a right to a hearing when "there are substantive grounds for relief"); PA. R. CRIM. P. 908(A)(2) (providing Pennsylvania petitioners with a right to a hearing if the petition or the prosecution's answer "raises material issues of fact"); TENN. SUP. CT. R. 28 § 6(B)(6) (providing Tennessee petitioners with a right to a hearing on "colorable claims").

[64] *E.g.*, *Ex parte* Bible, No. WR-76,122-01 (Tex Crim. App. Jan. 25, 2012), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=22029 (adopting the prosecution's proposed findings of fact and conclusions of law without holding an evidentiary hearing); *Ex parte* Storey, No. WR-75,828-01 (Tex. Crim. App. June 15, 2011), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=21184 (adopting the prosecution's proposed findings of fact and conclusions of law without holding an evidentiary hearing); *Ex parte* Ochoa, Nos. WR-67,495-01 & WR-67,495-02 (Tex. Crim. App. Aug. 19, 2009), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=18598 (adopting the prosecution's proposed findings of fact and conclusions of law without holding an evidentiary hearing); *Ex parte* Murphy, No. WR-63,549-01 (Tex. Crim. App. July 1, 2009), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=18578 (declining to hold an evidentiary hearing); *Ex parte* Sorto, Nos. WR-71,381-01 & WR-71,381-02 (Tex. Crim. App. Feb. 25, 2009), *available at*

As previously discussed, habeas claims in death penalty cases often involve complex factual considerations, such as claims of ineffective assistance of counsel and prosecutorial misconduct, that require significant time and investigation to develop. Claims such as these often benefit from an evidentiary hearing, in which the court can assess the credibility of witnesses during live testimony and cross-examination. When affidavits and other documents replace live testimony, relevant facts may be overlooked or undeveloped, including facts supporting a claim of innocence.

Ricardo Guerra, for example, was convicted and sentenced to death for killing a police officer in Houston during a traffic stop.[65] Guerra and the car's other occupant, Roberto Carrasco Flores, were stopped by the officer approximately two hours before midnight.[66] Moments later, the officer and a nearby witness were both shot and killed with a nine-millimeter handgun.[67] Later that night, Carrasco was shot and killed during a gunfight with police; a nine-millimeter handgun and the murdered officer's service revolver were found under his body.[68] "Although the physical evidence pointed to Carrasco" as the officer's killer, Guerra, who was found hiding near where Carrasco was killed with "a .45 caliber pistol [] within [] reach," was arrested for the murder.[69] Guerra's conviction was based largely on eyewitness testimony.[70]

In state habeas proceedings, the district court did not hold an evidentiary hearing and recommended a denial of relief, and the Court of Criminal Appeals accepted the district court's recommendation.[71] However, subsequent federal habeas proceedings, during which the court "conducted an extensive evidentiary hearing," revealed "numerous instances of police and prosecutorial misconduct, including but not limited to the failure to disclose material, exculpatory evidence to the defense."[72] The prosecution had failed to disclose eyewitness statements made to police which, in contrast with their trial testimony, indicated that Guerra was not the shooter.[73] Two of the eyewitnesses testified at the evidentiary hearing that they later agreed to testify against Guerra because the police had threatened them.[74]

Based on this information, which was revealed during an evidentiary hearing, the federal district court granted Guerra a new trial, and the U.S. Court of Appeals for the Fifth Circuit affirmed.[75]

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http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=18035 (adopting the prosecution's proposed findings of fact and conclusions of law without holding an evidentiary hearing). *But see, e.g.*, *Ex parte* Garza, No. WR-70,257-01 (Tex. Crim. App. Sept. 10, 2008), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=17329 (denying relief after holding an evidentiary hearing). In 79% of the capital habeas cases between 1995 and 2000 reviewed by the Texas Defender Service, the district court never held an evidentiary hearing on the inmate's claims, and instead relied on a paper hearing. TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, Exec. Summary (unnumbered page) (2001).

[65] Guerra v. Johnson, 90 F.3d 1075, 1076 (5th Cir. 1996).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Guerra v. Johnson, 90 F.3d 1075, 1076 (5th Cir. 1996).

[72] *Id.* at 1075–76.

[73] *Id.* at 1079 –80.

[74] *Id.*

[75] *Id.* at 1076, 1080.

Prosecutors chose not to retry Guerra, and he was released, having spent fifteen years in prison.[76] Had the state district court held an evidentiary hearing during state habeas proceedings, this misconduct might have been discovered earlier, and the appropriate relief in Guerra's case would have come much sooner.

Bars to Review in Federal Court

Guerra's case is an anomaly, however, in that the federal courts were not barred from correcting the errors made at the state court level. Current federal habeas law, as enacted under AEDPA, states that "a determination of a factual issue made by a State court shall be presumed to be correct."[77] Thus, a federal court must treat a Texas state court's factual findings as accurate, even if those findings were made without the benefit of an evidentiary hearing. Guerra escaped this presumption only because "the state habeas court did not make findings of fact."[78] Texas's current habeas statute requires the district court to make findings of fact, so more recent petitioners are unlikely to receive the comprehensive review in federal court like that conducted in Guerra's case.[79] As such, it is especially important for Texas courts to conduct an evidentiary hearing to help ensure that all evidence is fully explored as inmates' claims are unlikely to be examined in federal court.

Adoption of Prosecution's Proposed Findings

Texas trial courts also regularly adopt the prosecution's proposed findings of fact and conclusions of law in capital habeas cases. Regardless of whether the district court holds an evidentiary hearing, Texas statutory law requires the defense and prosecution to submit proposed findings to the trial court.[80] The trial court must then submit its own findings to the Court of Criminal Appeals.[81]

In practice, however, the findings submitted by the trial court are often identical or nearly identical to those proposed by the prosecution.[82] Texas district courts have adopted the findings of the prosecution in several recent cases.[83] This practice calls into question whether Texas trial

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[76] Stephen Johnson & Steve Brewer, *Man released from death row dies in accident/Aldape Guerra is killed in car wreck in Mexico*, HOUS. CHRON., Aug. 22, 1997. Shortly after he was released, Guerra was killed in a car accident. *Id*.

[77] 28 U.S.C. § 2254(e)(1) (2013).

[78] Guerra v. Johnson, 90 F.3d 1075, 1078 (5th Cir. 1996). The federal court considered Guerra's habeas claim under an older version of the federal habeas statute that also required the federal court to defer to the state court's factual findings. *Id.*

[79] *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 9 (2013).

[80] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8(b), § 9(e) (2013).

[81] TEX. CODE CRIM. PROC. ANN. art. 11.071, §§ 8(d)(1)(E), 9(f)(1)(F) (2013).

[82] In 83.7% of the capital habeas cases reviewed cases arising between 1995 and 2000 examined by Texas Defender Service, the district court's factual findings were "identical or virtually identical" to the proposed findings drafted by the prosecutor. TEX. DEFENDER SERV., *supra* note 64, at 127.

[83] *E.g.*, *Ex parte* Bible, No. WR-76,122-01 (Tex Crim. App. Jan. 25, 2012), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=22029 (adopting the prosecution's proposed findings of fact and conclusions of law); *Ex parte* Storey, No. WR-75,828-01 (Tex. Crim. App. June 15, 2011), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=21184 (adopting the prosecution's proposed findings of fact and conclusions of law); *Ex parte* Ochoa, Nos. WR-67,495-01 & WR-67,495-02 (Tex. Crim. App. Aug. 19, 2009), *available at*

courts are exercising independent judgment in capital habeas cases. Even in those habeas cases in which the prosecution should ultimately prevail, it strains credulity to reason that every factual finding proposed by a single party is accurate.

Moreover, because factual findings made at the trial court level are treated with great deference in subsequent proceedings, the findings proposed by the prosecution and adopted by the Texas district court are generally not subject to challenge in other courts. It is common practice, for example, for the Texas Court of Criminal Appeals to adopt the findings of the district court in a summary order.[84] In federal habeas proceedings, the state court's findings are "presumed to be correct."[85] Thus, the findings drafted by the prosecutor, an interested party, can ultimately become the accepted findings at all levels of review. This undermines the ability of all courts to fairly and accurately consider a death row inmate's claims of constitutional error, as well as the public's confidence in the independence and integrity of the justice system.

Conclusion

While Texas provides death row inmates with a right to seek post-conviction review in state habeas proceedings, Texas's procedures do not permit adequate development and judicial consideration of all claims. Texas expedites the capital habeas review process by imposing strict filing deadlines on inmates—deadlines which are not imposed in non-capital cases. Inmates must also file their habeas petition before the direct appeal proceedings have concluded, making it virtually impossible to present an ineffective assistance of appellate counsel claim.

Moreover, Texas district courts routinely decline to hold evidentiary hearings, even when issues of fact are in dispute. Texas courts also frequently adopt the factual findings proposed by the prosecution in state habeas cases, often verbatim. When a court's orders do not reflect an independent assessment of the factual claims of the parties, the judicial system's reputation as a neutral arbiter is compromised.

These practices seriously undermine the credibility of the district court's findings in the most serious cases in Texas's justice system.

Accordingly, Texas is not in compliance with Recommendation #1.

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http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=18598 (adopting the prosecution's proposed findings of fact and conclusions of law); *Ex parte* Sorto, Nos. WR-71,381-01 & WR-71,381-02 (Tex. Crim. App. Feb. 25, 2009), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=18035 (adopting the prosecution's proposed findings of fact and conclusions of law).

[84] *E.g.*, *Ex parte* Ruiz, Nos. WR-78,129-01 & WR-78,129-02 (Tex. Crim. App. Sept. 26, 2012), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=23115; *Ex parte* Norman, Nos. WR-74,743-01 & 74,743-02 (Tex. Crim. App. Aug. 22, 2012), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=22905; *Ex parte* Storey, No. WR-75,828-01 (Tex. Crim. App. June 15, 2011), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=21184; *Ex parte* Sorto, Nos. WR-71,381-01 & WR-71,381-02 (Tex. Crim. App. Feb. 25, 2009), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=18035. Similarly, among the cases it reviewed between 1995 and 2000, the Texas Defender Service found that the Texas Court of Criminal Appeals adopted the findings of the district court in 92.7% of cases. TEX. DEFENDER SERV., *supra* note 64, at 128.

[85] 28 U.S.C. § 2254(e)(1) (2013).

Recommendation

Section 11.071 of the Texas Code of Criminal Procedure, which governs state habeas proceedings in death penalty cases, was enacted in 1995.[86] The special death penalty statute was enacted to decrease the time between sentencing and execution and to eliminate the "endless appeals" that some officials and commentators stated followed a death sentence.[87]

While the Assessment Team acknowledges that Texas has a legitimate interest in protecting the finality of judgments and preventing duplicative appeals, the current statutory framework does not adequately balance these interests with the need to ensure that a death row inmate's claims are fully and fairly evaluated. Moreover, given the substantial number of persons who have been exonerated from Texas's death row in recent years, statutory procedures that reduce the time between conviction and execution increase the risk that an innocent person will be put to death. The current nature of state habeas review is also particularly problematic given that post-conviction review is often the only avenue available for relief to remedy errors and misconduct that occurred during trial, undermining the fairness and reliability of the proceeding. The effects of Texas's capital habeas statute are made worse by prevailing practices in which habeas petitions are dismissed without an evidentiary hearing or independent findings of fact.

Accordingly, the Assessment Team believes it is time to revisit Texas's capital habeas framework to ensure that the interest in finality is adequately balanced with fairness. Specifically, the Team recommends that Texas reform its habeas review process to

1. Extend the filing deadline for an inmate's petition;
2. Provide that habeas proceedings should not commence until direct appeal proceedings, including review by the U.S. Supreme Court, have concluded;
3. Require the district court to conduct a live evidentiary hearing on any claims for which there is a dispute of material fact; and
4. Require the district court to draft independent findings of fact and conclusions of law in each case.

The Assessment Team acknowledges that the dockets of district court judges in Texas are often filled with many complicated cases. While judges may endeavor to provide capital habeas petitioners with a complete review of their claims of constitutional error, they may not have the time and resources, under the current system, to provide each inmate with an evidentiary hearing and to draft independent findings and conclusions.
Thus, in order to successfully implement these reforms, Texas should establish a dedicated capital law clerk office to assist Texas district court judges in capital cases. This kind of institutionalized approach would equip district court judges with a professional staff of specially-trained attorneys to assist in the production of independent, detailed capital habeas orders, much

[86] Act of May 24, 1995, S.B. 440, s 1, 74th Leg., Reg. Sess. (to be codified at TEX. CODE CRIM. PROC. ANN. art. 11.071). Prior to 1995, Texas courts applied a its general habeas statute to both capital and non-capital felony cases. TEX. CODE CRIM. PROC. ANN. art. 11.07 (1994).
[87] Clay Robison, *The 74th Legislature/Bush Backs Limits on Death Appeals*, HOUS. CHRON., Jan. 20, 1995, at A21.

like the orders that are issued by federal district courts. Such an office could also provide young Texas lawyers who are interested in capital litigation with valuable training.

As twenty counties in Texas are responsible for over 75% of death sentences imposed in the State, the office's resources would not be required in each district court in Texas.[88] The federal pro se law clerk offices, established by many federal judicial districts, could serve as a model for this system.[89] These specialized clerks assist federal judges with reviewing the large number of pro se civil suits that are filed by prison inmates, thereby saving the court significant time in a cost-effective manner.

While a professional staff of lawyers to assist Texas district court judges in capital habeas cases is preferred, in the absence of legislative creation of a capital law clerk office, district court judges should be granted the resources to hire temporary law clerks to assist with capital habeas cases.

Finally, the Assessment Team recommends that the Court of Criminal Appeals issue detailed, public opinions in capital habeas cases. For those past cases in which the Court of Criminal Appeals has adopted the findings of the district court in a summary order, the district court's findings should be made public.

B. Recommendation #2

The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.

Recommendation #3

Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.

In order for death row inmates to fully develop their habeas claims, they must be granted full discovery of files, interviews, and other materials from the trial and direct appeal proceedings, including the prosecutor's file. Habeas proceedings are the inmate's first opportunity to present claims based on information that appears outside the trial record, such as a claim that the prosecutor withheld favorable evidence under *Brady v. Maryland*.[90] Without full discovery, the petitioner may be unable to discover evidence that undermined the reliability of the trial or sentencing phase, and the claim will go unlitigated.

There are no statutes or rules governing the use of discovery in capital habeas cases in Texas, and the Texas Court of Criminal Appeals has not issued any opinions requiring discovery of any

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[88] *See Total Number of Offenders Sentenced to Death from Each County*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited June 19, 2013).

[89] *Pro Se Law Clerks: A Valuable Resource*, U.S. COURTS, http://www.uscourts.gov/News/TheThirdBranch/11-04-01/Pro_Se_Law_Clerks_A_Valuable_Resource.aspx (last visited June 19, 2013).

[90] Brady v. Maryland, 373 U.S. 83 (1963).

kind in such cases.[91] Thus, a Texas death row inmate has no right to access the trial prosecutor's file, prior defense counsel files, and law enforcement files that are necessary to develop habeas claims.

Additional Texas rules and laws limit defense counsel's ability discover relevant materials by other means. The Texas Public Information Act, which requires the state to disclose certain government documents upon request, does not apply to "information relating to litigation of a . . . criminal nature," including pending state habeas proceedings.[92] While Texas's new criminal discovery rule, which goes in to effect on January 1, 2014, requires discsloure of witness statements and police reports to the defense prior to trial, this rule does not require such disclosures during habeas corpus proceedings.[93] Further, under the new law, "the work product of counsel for the state in the case and their investigators and their notes or reports" remain exempt from any disclosure requirements.[94] Texas statutory law also prohibits the disclosure of juror questionnaires and other information collected from jurors during the jury selection process, making it more difficult to discover juror or other misconduct during jury selection.[95] While there is an exception permitting disclosure for "good cause," Texas courts have held that a petitioner must present specific evidence of misconduct for the exception to apply.[96] Given that a juror questionnaire itself may be the only source of specific evidence that could compel disclosure of the juror questionnaire, it would be extremely difficult for defense counsel to comply with this requirement.

The lack of discovery procedures in Texas capital habeas cases greatly increases the risk that evidence of a wrongful conviction or death sentence will not be discovered, especially if that evidence is in the possession of the prosecution or a law enforcement agency. Delma Banks, for instance, was sentenced to death in 1980 for a murder near Nash, Texas.[97] Banks's conviction was based, in part, on the testimony of two witnesses.[98] One witness, Charles Cook, testified that Banks had confessed to the murder in his presence.[99] The other witness, Robert Farr, testified that he was with Banks when he retrieved the gun used in the murder.[100]

During state habeas proceedings in 1992, Banks alleged that the prosecution had withheld exculpatory information related to the testimony of Cook and Farr in violation of *Brady v. Maryland*.[101] Having no discovery obligation, the prosecution denied the allegations, and Banks's state habeas petition was dismissed.[102]

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91 *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 11.071 (2013) (failing to include any rules regarding discovery).
92 TEX. GOV. CODE ANN. § 552.103(a), (b) (2013).
93 S.B. 1611, 83rd Leg., Reg. Sess. (Tex. 2013), *available at* http://www.legis.state.tx.us/tlodocs/83R/billtext/pdf/SB01611F.pdf#navpanes=0.
94 *Id.*
95 TEX. CODE CRIM. PROC. ANN. art. 35.29 (2013).
96 Esparza v. State, 31 S.W.3d 338, 340 (Tex. App. 2000) (applying this rule in direct appeal proceedings).
97 Banks v. Dretke, 540 U.S. 668, 677 (2004).
98 *Id.* at 677–78.
99 *Id.* at 677.
100 *Id.* at 678.
101 *Id.* at 682 (citing Brady v. Maryland, 373 U.S. 83 (1963)).
102 *Id.* at 683.

Several years later, however, in federal habeas proceedings, Banks was able to receive limited discovery of the prosecutor's files.[103] The files revealed that law enforcement officers "had closely rehearsed Cook's testimony" and told him "how to reconcile his testimony with affidavits" he had previously signed.[104] A subsequent evidentiary hearing also revealed that Farr had received money from police in exchange for his testimony.[105] As a result of this evidence, Banks's death sentence was overturned, and he was resentenced to life in prison as part of a plea agreement in 2012.[106]

Other cases also demonstrate the need for discovery in state habeas proceedings. Evidence that was undisclosed at trial in the Ricardo Guerra case, discussed in Recommendation #1, which led to a reversal of Guerra's conviction in federal court, might have been revealed during state habeas if discovery had been permitted.[107] In another case, Thomas Miller-El was granted federal habeas relief due to racial bias during jury selection.[108] The prosecutors' notes, which would not be discoverable at any stage under current Texas law, revealed that they "took their cues from a 20-year-old manual of tips on jury selection, as shown by their notes of the race of each potential juror. By the time a jury was chosen, the [prosecution] had peremptorily challenged 12% of qualified nonblack panel members, but eliminated 91% of the black ones."[109]

Conclusion

Texas rules and laws do not appear to permit discovery in capital state habeas cases. Moreover, other Texas laws prevent discovery of evidence through other means, and in some instances provide specific exemptions from disclosure of materials that have, as revealed in subsequent federal court review, contained evidence of misconduct. Because habeas claims are often fact-intensive and rely on information that is in the possession of other parties, the ability of Texas death row inmates to effectively investigate and litigate claims is seriously limited. As such, evidence of constitutional error, including evidence of innocence, may go undiscovered. Thus, Texas is not in compliance with Recommendation #2 or #3.

Recommendation

The Assessment Team recommends that Texas adopt a law permitting automatic, comprehensive discovery in capital state habeas cases. At minimum, habeas defense counsel must have access to complete files of trial and appellate defense counsel, the prosecutor's complete file, all law enforcement and crime laboratory files and documents, and juror questionnaires. The law should, however, allow redaction of certain identifying information for the protection of witnesses. The discovery should be made available to the inmate within a reasonable time prior to the filing of his/her state habeas petition. States that have already enacted comprehensive

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[103] Banks v. Dretke, 540 U.S. 668, 684–85 (2004).
[104] *Id.* at 685.
[105] *Id.*
[106] Brandi Grissom, *Death Row Inmate's Sentence Reduced to Life*, TEX. TRIB., Aug. 2, 2012.
[107] *See supra* notes 65–79 and accompanying text.
[108] *See* Miller-El v. Dretke, 545 U.S. 231 (2005).
[109] *Id.* at 266.

capital habeas discovery procedures could serve as a model for this legislation.[110] Such comprehensive discovery procedures would help courts to make detailed, accurate findings and effectively remedy any constitutional errors that may have occurred during the guilt or sentencing phases of a death penalty trial.

C. Recommendation #4

When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.

Texas statutory law provides little guidance to the Texas Court of Criminal Appeals for reviewing the district court's findings of fact and conclusions of law in capital state habeas cases.[111] The court is required to "expeditiously review" the habeas petition, but there are no standards governing what this review must entail. The court may also "set the cause for oral argument and [] request further briefing."[112] Thus, the court has significant discretion regarding the extent of its review in capital state habeas proceedings.

In practice, the Court of Criminal Appeals' review of capital habeas petitions appears to be limited. While the court occasionally publishes a detailed opinion that explains the factual and legal bases for its decision, these cases appear to be rare.[113] More frequently, the court issues an unpublished, one to three-page summary order that does not review the facts of the case or explain the legal reasoning behind its decision.[114] In 2011 and 2012, for example, the Court of Criminal Appeals issued a summary order in 87% of the twenty-three initial capital habeas

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[110] *See, e.g.*, IND. R. TRIAL P. 26(B)(1) (allowing Indiana capital habeas petitioners to obtain discovery regarding any matter, not privileged, which is relevant to the subject-matter of the post-conviction proceeding, including the "existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter"); N.C. GEN. STAT. § 15A-1415(f) (2013) (providing for open-file discovery in North Carolina capital habeas cases).
Id.

[111] As noted in Recommendation #1, the Texas Constitution grants the Texas Court of Criminal Appeals original jurisdiction over state habeas proceedings. TEX. CONST. art. V, § 5(c). Thus, the Court of Criminal Appeals is not technically an appellate court with respect to capital habeas claims. However, Texas's capital habeas statute requires district court to recommend findings of fact and conclusions of law, which are then reviewed by the Court of Criminal Appeals. TEX. CODE CRIM. PROC. ANN. art. 11.071, § 11 (2013). Thus, the Court of Criminal Appeals is treated as an appellate court for the purposes of this Recommendation.

[112] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 11 (2013).

[113] *See, e.g.*, *Ex parte* Fierro, 934 S.W.2d 370 (Tex. Crim. App. 1996) (providing a detailed explanation of the court's reasons for denying the inmate's habeas application).

[114] *See, e.g.*, *Ex parte* Ruiz, Nos. WR-78,129-01 & WR-78,129-02 (Tex. Crim. App. Sept. 26, 2012), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=23115; *Ex parte* Norman, Nos. WR-74,743-01 & 74,743-02 (Tex. Crim. App. Aug. 22, 2012), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=22905; *Ex parte* Storey, No. WR-75,828-01 (Tex. Crim. App. June 15, 2011), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=21184; *Ex parte* Sorto, Nos. WR-71,381-01 & WR-71,381-02 (Tex. Crim. App. Feb. 25, 2009), *available at* http://www.cca.courts.state.tx.us/opinions/pdfOpinion.asp?OpinionID=18035. A Texas Defender Service study of capital habeas cases arising between 1995 and 2000 found that the Court of Criminal Appeals had adopted the findings of the district court in a summary order in 92.7% of the cases it reviewed. TEX. DEFENDER SERV., *supra* note 64, at 128.

petitions in which it denied relief.[115] With respect to subsequent writs in which relief was denied, the court issued a summary order in almost 95% of capital cases.[116] This practice is contrary to many other capital jurisdictions, where appellate courts issue detailed orders in capital post-conviction cases.[117]

Court of Criminal Appeals' Failure to Seriously Review Cognizable Claims

The Court of Criminal Appeals' practice of issuing summary orders that adopt the district court's findings of fact and conclusions of law calls into question whether the court is seriously reviewing petitioners' claims. This practice is especially troubling because the district court, as described in Recommendation #1, often adopts wholesale the prosecution's proposed findings of fact and conclusions of law in its own proposed findings.[118] This practice calls into question whether some Texas capital habeas cases ever receive a completely impartial review. Moreover, in some cases in which the Court of Criminal Appeals has issued a summary order denying relief, the decision was reversed in subsequent federal proceedings, indicating that the court did not conduct a thorough review. The cases below illustrate the lack of meaningful review and the ramifications of this limited review on both individual cases and the Texas death penalty system at-large.

Ernest Willis

In the case of Ernest Willis, the Court of Criminal Appeals denied relief despite the fact that the district court conducted an extensive evidentiary hearing and recommended relief.[119] Willis was convicted and sentenced to death for murder by arson in 1987.[120] In state habeas proceedings, the Texas district court, "following five days of hearing, . . . issued detailed findings of fact and conclusions of law and recommended granting relief to Willis."[121]

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[115] A review of all capital habeas orders issued by the Texas Court of Criminal Appeals in 2011 and 2012 yielded twenty-three initial habeas petitions in which the court denied all relief. Twenty of these cases were disposed of in a summary order that was no more than three pages in length. Habeas petitions that were summarily denied due to the death of the petitioner or a prior plea agreement were not included in the total. Cases provided via e-mail by Jared Tyler, Tyler Law Firm to Sarah Turberville, Exec. Dir., ABA Death Penalty Due Process Rev. Project (Jan. 15, 2013) (on file with author).

[116] This total excludes cases in which the inmate died before disposition and cases which were denied due to a pending federal habeas case. *See id.*

[117] *See, e.g.*, THE KENTUCKY DEATH PENALTY ASSESSMENT TEAM, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE KENTUCKY DEATH PENALTY ASSESSMENT REPORT 258 (2011) (finding that "[r]ecent opinions issued by the Kentucky Supreme Court in capital post-conviction cases have addressed issues of fact and law raised by the claims and the Court has issued opinions fully explaining its disposition of those claims"); THE INDIANA DEATH PENALTY ASSESSMENT TEAM, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE INDIANA DEATH PENALTY ASSESSMENT REPORT 192 (2007) (finding that the Indiana Supreme Court issues detailed opinions in capital post-conviction cases); THE MISSOURI DEATH PENALTY ASSESSMENT TEAM, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE MISSOURI DEATH PENALTY ASSESSMENT REPORT 254–55 (2012) (finding that the Supreme Court of Missouri issues detailed opinions in capital post-conviction cases).

[118] *See supra* notes 80–84 and accompanying text.

[119] Willis v. Cockrell, No. P-01-CA-20, 2004 WL 1812698, at *2 (W.D. Tex. Aug. 9, 2004).

[120] *Id.* at *1–2.

[121] *Id.* at *2.

In its thirty-three page recommendation to the Court of Criminal Appeals, the district court outlined several reasons why Willis should be granted a new trial.[122] Willis, the court noted, had been involuntarily medicated with psychotic drugs by the state during his trial, causing him to appear "indifferen[t] to the proceedings."[123] During closing arguments, the prosecution argued that Willis's demeanor was evidence of his guilt and future dangerousness.[124] The district court also found that Willis's attorneys were ineffective during both phases of his capital trial.[125] His attorneys "took no steps to determine the cause of [his] appearance or demeanor" during the trial, failed to object when the prosecutor described Willis as a "pit bull," "animal," and "rat" during voir dire and closing arguments, and did not conduct a mitigation investigation or present mitigating evidence.[126] Finally, the court found that the prosecution had failed to turn over favorable evidence in violation of *Brady v. Maryland*.[127] In a report prepared for the prosecution, a mental health expert stated that he "'didn't think this was a good death penalty case,' as he found no evidence to support a conclusion of future dangerousness for the purposes of the Texas capital sentencing statute."[128] The report was never disclosed to the defense before trial.[129]

Despite multiple instances of constitutional error identified by the district court, the Court of Criminal Appeals denied relief to Willis in a six-page order.[130] The Court of Criminal Appeals, for instance, "overruled the [district] court's recommended relief on th[e] [medication] claim in one paragraph."[131] The court responded to the finding of ineffective assistance of counsel by reciting the qualifications of Willis's attorneys as proof that, irrespective of their performance in the case, they could not have been ineffective.[132] With respect to the *Brady* claim, the court held that the medical expert's report was not favorable to Willis because the report's conclusions were "hypotheticals," but the court cited no authority to support this proposition.[133]

In later federal habeas proceedings, however, the federal district court granted relief, agreeing with the Texas district court's conclusions on most issues.[134] The federal court also noted that the Court of Criminal Appeals made "numerous errors" when assessing Willis's *Brady* claim.[135] Furthermore, the federal court repeatedly found that the Court of Criminal Appeals' determinations to be "contrary to and an unreasonable application of clearly established federal law," the federal standard for reversing a state court's determinations.[136]

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122 Michael Hall, *Death Isn't Fair*, TEX. MONTHLY, Dec. 1, 2002, at 122.
123 *Willis*, 2004 WL 1812698, at *4.
124 *Id.* at *4.
125 Willis v. Cockrell, No. P-01-CA-20, 2004 WL 1812698, at *5 (W.D. Tex. Aug. 9, 2004).
126 *Id.* at *5–6.
127 *Id.* at *7 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)).
128 *Id.*
129 *Id.*
130 Michael Hall, *Death Isn't Fair*, TEX. MONTHLY, Dec. 1, 2002, at 116.
131 Willis v. Cockrell, No. P-01-CA-20, 2004 WL 1812698, at *14 (W.D. Tex. Aug. 9, 2004).
132 *Id.* at *23.
133 *Id.* at *19.
134 *See id.* at *35.
135 *Id.* at *22.
136 *Id.* at *22, 25, 31, 33 (citing 28 U.S.C. § 2254(d)).

Evidence presented in federal proceedings also indicated that Willis was likely innocent of the murder.[137] Another death row inmate, who was later executed for a different crime, had offered a detailed confession to the murder while on death row.[138] Moreover, expert testimony contradicted several aspects of the prosecution's arson theory.[139] The expert, a fire investigator, testified that, contrary to the prosecution's theory, there was no evidence that an accelerant such as gasoline had been used to start the fire.[140] Forensic testing also had revealed no evidence of an accelerant on Willis's clothes or in the house where the fire occurred.[141] Additionally, Willis had no known motive for starting the fire.[142]

While the federal district court was procedurally barred from granting relief on Willis's actual innocence claim, Willis' conviction and death sentence were overturned by the federal courts for the other reasons described above.[143] However, based on the evidence of his innocence, the prosecution elected not to retry Willis, stating that it did not believe Willis was responsible for the fire.[144] In 2004, Willis was released from prison after seventeen years on death row.[145]

Nanon Williams

The Court of Criminal Appeals also summarily dismissed a district court's recommendation for relief in the case of Nanon Williams.[146] Williams had been convicted and sentenced to death for a murder committed during a drug deal.[147] The evidence against Williams consisted of ballistics analysis and the testimony of two eyewitnesses, Vaal Guevara and Ammade Rasul, who also were parties to the drug deal.[148] During state habeas proceedings, the district court ordered the release of existing ballistics evidence, as well as a handgun carried by Guevara at the time of the murder for additional testing.[149] Analysis and a subsequent evidentiary hearing revealed that a bullet found in the victim had been fired from Guevara's gun, contrary to the ballistic expert's trial testimony.[150]

Because there was also evidence that the victim had been hit by a shotgun possessed by Williams, the district court denied Williams's claim for relief.[151] However, the district court found that Williams's trial counsel was ineffective for failing to hire a ballistics expert to examine Guevara's gun.[152] This, the court found, "would have changed the type and strength of cross-examination of Guevara, the jury's ultimate assessment of Guevara's credibility, and much

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137 *See id.* at *9–12.
138 *Id.* at *9–10.
139 Willis v. Cockrell, No. P-01-CA-20, 2004 WL 1812698, at *10 (W.D. Tex. Aug. 9, 2004).
140 *Id.*
141 *Id.*
142 *Id.* at *12.
143 *Id.*
144 Michael Gracyzk, *Death-row Inmate Freed after 17 Years*, PHILA. INQUIRER, Oct. 7, 2004, at A19.
145 *Id.*
146 Williams v. Quarterman, 551 F.3d 352, 357 (5th Cir. 2008)
147 *Id.* at 353–54.
148 *Id.* at 354–55.
149 *Id.* at 355.
150 *Id.*
151 *Id.* at 355–57.
152 Williams v. Quarterman, 551 F.3d 352, 357 (5th Cir. 2008).

of the prosecution's closing argument."[153] Based on these findings, the district court recommended that Williams's death sentence be reversed.[154]

Despite these extensive findings, the Court of Criminal Appeals denied relief in a two-page order that "offered no explanation or analysis to support its decision."[155] The court's order stated only that "we do not believe, based on our review of the record presented, that some of the crucial fact findings and the recommendation based, at least in part, on them, are supported by the evidence presented at the evidentiary hearing."[156]

Williams was under the age of eighteen when he allegedly committed the murder.[157] Thus, before the Court of Criminal Appeals' decision could be fully litigated in federal court, his death sentence was commuted to life in prison based on the 2005 U.S. Supreme Court decision barring the application of the death penalty to juvenile offenders.[158]

Lack of Capital Habeas Case Law

The Texas Court of Criminal Appeals practice of issuing summary orders in capital habeas cases also creates an additional problem for petitioners and their attorneys: without the benefit of published opinions that fully explain the court's reasoning, there is little precedent established by case law. In recent years, the Court of Criminal Appeals has posted its summary orders on its website, but these are of limited use, because they do not set out any rules or legal standards that could be applied to other cases.[159] Even if the court's order is more detailed, the Texas Rules of Appellate Procedure state that "[u]npublished opinions have no precedential value and must not be cited as authority by counsel or by a court."[160] An opinion is not considered "published" unless it is printed in a law reporter. Of the nearly 100 capital habeas orders issued by the Court of Criminal Appeals in 2011 and 2012, only nine were designated for publication.[161]

Conclusion

While the Texas Court of Criminal Appeals sometimes publishes a detailed opinion that fully explains the rationale for its decision, it often issues a summary order that does not address the issues of fact and law raised by the petitioners' claims. This review is, at best, perfunctory, as it involves little more than signing off on the district court's findings in a two or three-page order. As a result, the court has failed to address claims that later led to relief in federal proceedings.

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[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] Williams v. Quarterman, 551 F.3d 352, 354 n.1 (5th Cir. 2008) (citing Roper v. Simmons, 543 U.S. 551 (2005)).
[158] *Id.*
[159] *See supra* note 114. In cases as recent as 2005, however, the order is not available online. In the case of death row inmate Linda Carty, for instance, the Court of Criminal Appeals website notes that a habeas petition was received and disposed of, but the court's order is not available for review. *Case Search Results on Case # WR-61,055-01*, TEX. CT. CRIM. APPEALS, http://www.cca.courts.state.tx.us/opinions/Case.asp?FilingID=231890 (last visited June 19, 2013).
[160] TEX. R. APP. PROC. 77.3
[161] *See supra* note 115.

The lack of detailed opinion also leaves habeas petitioners with little case law to assist them in determining whether a claim is cognizable. This practice is also markedly out-of-step with the practice in many other capital jurisdictions, where appellate courts routinely issue detailed opinions in capital post-conviction appeals.

Accordingly, Texas is in partial compliance with Recommendation #4.

Recommendation

Similar to the issues raised under Recommendation #1, the Assessment Team is concerned about the lack of detailed, published opinions in Texas capital habeas cases. The Assessment Team recommends that, in all non-subsequent capital habeas cases, the Texas Court of Criminal Appeals publish an opinion that fully explains the bases for its disposition.

D. Recommendation #5

> **On the initial state post-conviction application, state post-conviction courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not preserved properly at trial or on appeal**.

While Texas's capital habeas statute requires the district court to make findings of fact and conclusions of law before the petition is submitted to Texas Court of Criminal Appeals for review, the Texas Constitution grants the Court of Criminal Appeals original jurisdiction over all habeas cases.[162] Accordingly, the Court of Criminal Appeals is not required to grant any deference to the district court's findings.[163]

For this reason, Texas's standard for reviewing claims not properly preserved at trial or on appeal is discussed in Recommendation #6, below. Recommendation #5 is not applicable to Texas.

E. Recommendation #6

> **When deciding post-conviction claims on appeal, state appellate courts should apply a "knowing, understanding and voluntary" standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.**

Given the irrevocability of execution, persons facing the death penalty should not be deemed to have waived serious constitutional errors due to their lawyer's failure to properly preserve the issue for review. This is especially true in Texas, where, historically, poor performance by capital defense counsel at all levels of review has been well-documented.[164] While the recent creation of the Regional Public Defender for Capital Cases (RPDO) has improved the quality of counsel afforded to capital defendants in Texas, many populous regions of the State—as discussed in Chapter Six on Defense Services—are not served by trial counsel at RPDO. Those

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[162] TEX. CONST. art. V, § 5(c); TEX. CODE CRIM. PROC. ANN. art. 11.071, § 8, 9, 11 (2013).
[163] *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 11 (2013).
[164] *See* Recommendation #8, *infra*.

facing a death sentence in these counties that have, historically, sentenced the most defendants to death, may have received representation by ineffective, ill-equipped, or inexperienced trial lawyers. Similarly, while counsel employed by the Office of Capital Writs (OCW) may provide more effective representation than what has historically been available to Texas's death row inmates during state habeas proceedings, many of the almost 400 individuals on Texas's death row were not represented by OCW during state habeas proceedings.

Under existing rules, a death row inmate whose attorney failed to raise a claim at the first opportunity is prohibited, in nearly all cases, from raising that claim in a later proceeding. While some procedural default rules may be necessary to preserve judicial economy, inmates facing execution should not be barred from presenting serious constitutional claims because of a mistake of a lawyer who was ill-equipped to handle a capital case in the first instance.

Waiver in State Habeas Proceedings

Texas places strict limits on the types of claims that can be raised in state habeas proceedings. The Texas Court of Criminal Appeals has held that "the writ of habeas corpus is an extraordinary remedy that is available only when there is no other adequate remedy at law," and that habeas "should not be used to litigate matters which should have been raised on appeal or at trial."[165] As a general rule, "a convicted person may not raise an issue in a habeas proceeding if the applicant could have raised that issue on direct appeal."[166] This rule applies to both ordinary trial errors and constitutional claims.[167] As such, the court has held that a variety of claims are not cognizable in habeas proceedings, ranging from claims of inadequate funding for experts[168] to claims alleging violation of the rules of evidence.[169] Thus, the court is barred from considering any trial error during state habeas proceedings, irrespective of the magnitude of such error or whether the claim was waived in prior proceedings.

There appear to be narrow exceptions to the rule prohibiting the consideration of claims that should have been raised at trial or on direct appeal. The precise application of these exceptions is unclear. In 1991, the Court of Criminal Appeals held that it would consider a claim related to the constitutionality of Texas's capital jury instructions, even though such claims are typically reserved for trial and direct appeal.[170] Recently, however, the court has been less willing to permit exceptions. In 2006, the court noted that its "trend . . . has been to draw stricter boundaries regarding what claims may be advanced on habeas."[171] In a 2012 dissenting opinion, a Court of Criminal Appeals judge described the "knowing use of perjured or false testimony" by the prosecution as "a rare exception to the rule against considering claims on habeas that could have been raised earlier."[172]

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165 *Ex parte* Jimenez, 364 S.W.3d 866, 880 (Tex. Crim. App. 2012) (internal quotation marks omitted).
166 *Id.*
167 *Id.*
168 *Id.* at 880–82.
169 *Ex parte* Ramey, No. AP-76533, 2012 WL 5413384, at *1 (Tex. Crim. App. Nov. 7, 2012).
170 *Ex parte* Goodman, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991).
171 *Ex parte* Richardson, 201 S.W.3d 712, 713 (Tex. Crim. App. 2006). *Richardson* was a non-capital case. *Id.*
172 *Ex parte* Chavez, 371 S.W.3d 200, 215 (Tex. Crim. App. 2012).

Conceivably, an inmate could attempt to present a claim of trial error during state habeas proceedings through an ineffective assistance of counsel claim. Claims of ineffective assistance of counsel are frequently litigated in state habeas proceedings.[173] To prevail on a claim that his/her trial or appellate attorneys were ineffective, the inmate must "prove, by a preponderance of the evidence, (1) that counsel's performance was deficient, falling below an 'objective standard of reasonableness,' and (2) that the deficient performance prejudiced the defense such that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'"[174] Thus, an inmate could argue that his/her attorneys were ineffective, for example, by failing to object to an alleged error at trial.[175]

However, Texas law limits an inmate's ability to successfully litigate a claim of trial error in this manner. The Court of Criminal Appeals has held that counsel's effectiveness must be "judged by the totality of the representation, not by counsel's isolated acts or omissions."[176] Moreover, the court "has been hesitant to designate any [trial] error as per se ineffective assistance of counsel as a matter of law" unless the error is particularly "egregious."[177] The court has reasoned that defense counsel's failure to object may be part of trial strategy.[178] Thus, precisely the circumstances that might waive a claim in state habeas proceedings—ineffective assistance of counsel—receive the most deferential review by the court.

Waiver in Direct Appeal Proceedings

Texas also imposes strict preservation requirements for defendants raising claims in direct appeal proceedings. Texas appellate courts will not consider a claim of error on appeal unless "a specific and timely complaint [was] made [at trial] on the record and ruled on by the trial judge."[179] The objection at trial must have been "clear enough for the trial judge to understand what the complaining party wanted, why they were entitled to it, and to take corrective action."[180] The court "will not address an objection on appeal if it varies from the objection raised at trial."[181] The Texas Court of Appeals has held that a defendant who fails to comply with these requirements is deemed to have waived the claim on direct appeal "regardless of how egregious the argument."[182]

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[173] *See, e.g.*, *Ex parte* Medina, 361 S.W.3d 633 (Tex. Crim. App. 2011), *Ex parte* Jimenez, 364 S.W.3d 866 (Tex. Crim. App. 2012).

[174] *Jimenez*, 364 S.W.3d at 883 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

[175] *See id.* at 882 (alleging that trial counsel were ineffective for failing to object and request a mistrial during the cross-examination of defense counsel's expert witness).

[176] *Id.* at 883 (quoting *Ex parte* Welborn, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990) (internal quotation marks omitted)).

[177] *Ex parte* Harrington, 310 S.W.3d 452, 459 (Tex. Crim. App. 2010) (quoting Thompson v. State, 9 S.W.3d 808, 813 (Tex. Crim. App. 1991) (internal quotation marks omitted)) (a non-capital case).

[178] *Jimenez*, 364 S.W.3d at 882–83.

[179] Harper v. State, No. AP-76,452, 2012 WL 4833834, at *3 (Tex. Crim. App. Oct. 10, 2012) (citing TEX R. APP. P. 33.1).

[180] *Id.*

[181] *Id.*

[182] Brown v. State, No. 01-11-00462-CR, 2012 WL 1893700, at *8 (Tex. App. May 24, 2012). The defendant in *Brown*, who had been convicted of sexual assault, argued on appeal that the prosecutor had made an improper closing argument during the punishment phase. *Id.* at *7. The prosecutor had stated, "But who knows how many times this defendant has done what he did in those three cases and just didn't get caught. He picks the right victims, women who are scared and maybe won't come forward. And so, who knows how many other victims are out there."

Conclusion

The Texas Court of Criminal Appeals will ordinarily not consider in state habeas claims that should have been raised at trial or on direct appeal. While there are some exceptions to this rule, those exceptions are ill-defined and appear to be very narrow. Texas also imposes strict procedural default rules in direct appeal proceedings. Accordingly, Texas is not in compliance with Recommendation #6.

Recommendation

The Texas Assessment Team acknowledges that some preservation and procedural default rules are necessary to ensure that the trial court has an opportunity to correct an error before the claim is reviewed by the Court of Criminal Appeals, as well as to protect the finality of judgments. However, these concerns must be balanced with the need to ensure that an inmate's claims are fully and fairly considered, particularly in death penalty cases, where the punishment is irreversible. The Team is concerned that the current procedural default rules in Texas capital cases do not achieve an appropriate balance of these interests. Texas imposes strict procedural default rules even in cases of egregious constitutional error. Once these claims are defaulted, they likely cannot be reviewed in federal court, as federal courts are generally prohibited from considering claims of error that were not reviewed in state court.[183]

Thus, the Assessment Team recommends that the Court of Criminal Appeals reexamine the strict application of procedural default rules in Texas capital cases to ensure that death row inmates are not executed despite serious and unresolved questions of constitutional error that may remain in their cases.

F. Recommendation #7

The states should establish post-conviction defense organizations, similar in nature to the capital resources centers defunded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.

Since 2009, most indigent capital habeas petitioners in Texas have been represented by the Office of Capital Writs (OCW), a statewide agency dedicated to the representation of death row inmates in habeas proceedings.[184] Texas's capital habeas statute provides that "[i]f the office of capital writs does not accept or is prohibited from accepting an appointment . . . , the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges

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Id. Although this argument clearly attempted to implicate the defendant in crimes for which there was no evidence, the Court of Appeals held that the error could not be considered because it was not raised at trial. *Id.* at *8.

[183] 28 U.S.C. § 2254(b)(1).

[184] *See* Act of June 19, 2009, ch. 781, 2009 Tex. Sess. Law (codified as amended at TEX. GOV'T CODE § 78.052(a) (2013)).

of the administrative judicial regions."[185] It appears OCW has refused only one appointment since it was established.[186]

Prior to the establishment of OCW, state habeas defense services were provided exclusively through list-qualified appointed counsel. A primary reason for OCW's establishment was the sustained criticism of the performance of several list-qualified state habeas attorneys.[187]

Texas law forbids OCW from "represent[ing] a defendant in a federal habeas review."[188] Federal law, however, entitles capital habeas petitioners in federal court to representation by at least one attorney.[189] Texas also does not guarantee counsel during state clemency proceedings.

Conclusion

The Texas Assessment Team applauds the State of Texas for establishing a statewide agency responsible for representing persons in capital habeas proceedings. This is a marked improvement over the fragmented, uneven, and ineffective provision of defense services that predominated Texas capital habeas cases until OCW's creation in 2009. While OCW has not existed long enough to accurately assess its quality of representation, establishment of a statewide agency with a professional staff dedicated to capital habeas representation is an important step toward assuring the provision of high-quality representation during this critical phase of a capital case. Texas, however, does not ensure counsel is provided during federal habeas and state clemency proceedings. Thus, Texas is in partial compliance with Recommendation #7.

G. Recommendation #8

> **For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.**

Qualifications of State Habeas Counsel[190]

Irrespective of whether a capital habeas petitioner is represented by the Office of Capital Writs (OCW) or list-appointed counsel, death row inmates are entitled to only one qualified attorney during state habeas proceedings.[191]

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[185] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(f) (2013).

[186] Email from Brad D. Levenson, Dir., Office of Capital Writs, to Ryan Kent (Sept. 19, 2012) (on file with author).

[187] Chuck Lindell, *Sloppy Lawyers Failing Clients on Death Row*, AM.-STATESMAN (Austin, Tex.), Oct. 29, 2006, at A1. For a representation of this criticism, see TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS (2002).

[188] TEX. GOV'T CODE ANN. § 78.054(b) (2013).

[189] 18 U.S.C. § 3599(a)(2), (c) (2013).

[190] For further discussion of the qualification of capital defense counsel, see Chapter Six on Defense Services.

[191] *Compare* TEX. CODE CRIM. PROC. ANN. art. 26.052(e) (2013), *with id.* at art. 11.071, § 2(f).

Texas statutory law does not impose any qualification standards on OCW attorneys.[192] While OCW may impose its own training, experience, and performance standards on its attorney employees, the Assessment Team was unable to determine whether such standards are imposed. Thus, while the Assessment Team applauds Texas for establishing an office dedicated to representing indigent inmates in capital habeas proceedings, it remains unclear whether OCW attorneys comport with the qualifications standards of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*).[193]

With respect to list-appointed state habeas counsel, Texas's statutory qualification standards require only that counsel "exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases," and that counsel not have been found "to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case."[194] While administrative judicial regions and counties may impose more qualification standards on these attorneys, it appears that few have done so.[195] An attorney may be removed from the roster by majority vote of the regional presiding judges "if they determine that the attorney has [] in any application for writ of habeas corpus filed in the trial court or forwarded to the Court of Criminal Appeals exhibited substandard proficiency in providing quality representation to defendants in death-penalty cases."[196]

The qualification standards for list-appointed counsel fall short of those required by the *ABA Guidelines*. The criteria are not sufficiently specific to ensure list-qualified appointed counsel possess the knowledge and skills required for effective capital-case representation. Attorneys are not required to have any special training in capital habeas representation, nor are there any experiential requirements delineated by the qualification standards. In short, the requirements are indistinct, permitting virtually any attorney who has not previously been found ineffective to qualify to represent a capital habeas petitioner.

The Assessment Team acknowledges that Texas acted to improve the quality of capital representation through establishment of OCW. However, there were more than 900 individuals sentenced to death in Texas between 1977 and 2008, almost all of whom were represented by list-appointed counsel in state habeas proceedings, as their cases arose before OCW was

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[192] *See* TEX. GOV'T CODE ANN. § 78.056(a) (2013) (limiting qualification standards to list-qualified attorneys).

[193] ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

[194] TEX. GOV'T CODE ANN. § 78.056(a) (2013). Although Texas law does not state explicitly that these standards may be enlarged on a county-by-county or regional basis, at least one administrative judicial regions has elected to do so.

[195] *See, e.g.*, STANDARDS FOR THE QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES IN THE EIGHTH ADMINISTRATIVE JUDICIAL REGION OF TEXAS PURSUANT TO ARTICLE 26.052 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, EIGHTH ADMIN. JUD. REGION OF TEX., at 2 (Sept. 11, 2006) (requiring list-qualified state habeas counsel to "have previously served as defense trial counsel, as appellate counsel, or as post-conviction habeas counsel, in at least one prior death penalty case that was tried to verdict"). *See generally Indigent Defense Data for Texas*, TEX. INDIGENT DEFENSE COMM., http://tidc.tamu.edu/public.net/ (last visited June 19, 2013).

[196] *Procedures Regarding Eligibility for Appointment of Attorneys as Counsel Under Article 11.071, Section 2(f), Code of Criminal Procedure, and Regarding the Maintenance of a Statewide List of Attorneys Eligible for Appointment as Required by Section 78.056, Government Code*, TEX. CTS. ONLINE, http://www.courts.state.tx.us/courts/pdf/ProceduresCapitalWritsApptList.pdf (last visited June 19, 2013) (procedures taking effect Jan. 1, 2010).

established.[197] Many of these persons are still on death row or have been executed and the impact of Texas's lax appointment standards for list-appointed counsel is well-documented.[198]

Compensation for State Habeas Counsel[199]

Texas statutory law requires that OCW receive funding from two sources to cover all of its expenses, including personnel costs: "(1) as specified in the General Appropriations Act; and (2) from the fair defense account . . . , in an amount sufficient to cover personnel costs and expenses not covered by appropriations."[200] For fiscal years 2012 and 2013, funding for OCW amounted to $922,135 and $862,136, respectively, all of which came from the Fair Defense Account.[201] OCW may refuse appointment if "the office has insufficient resources to provide adequate representation to the defendant."[202]

OCW attorneys earn salaries ranging from $52,000 to $62,000 per year.[203] By contrast, assistant county and district attorneys in Texas's 254 counties,[204] who are generally responsible for

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[197] *Death Sentences in the United States from 1977 By State and By Year*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008 (last visited June 19, 2013).

[198] RAYMOND PATERNOSTER ET AL., THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT 231–39 (2008); DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW 65–79 (2005); Stephen B. Bright, *The Politics of Capital Punishment: The Sacrifice of Fairness for Executions*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT 127–46 (James R. Acker et al. eds., 2003); John H. Blume & Stacey D. Neumann, *"It's Like Déjà Vu All Over Again":* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 159–64 (2007); TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS (2002); Rebecca Copeland, *Getting It Right from the Beginning: A Critical Examination of Current Criminal Defense in Texas and Proposal for a Statewide Public Defender System*, 32 ST. MARY'S L.J. 493 (2001); Samy Khalil, *Doing the Impossible: Appellate Reweighing of Harm and Mitigation in Capital Cases After* Williams v. Taylor, *with a Special Focus on Texas*, 80 TEX. L. REV. 193 (2001); Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805 (2000); TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 77–100 (2000); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Anthony Lewis et al., Panel Discussion, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105 (1994); Patrick Higginbotham & Mark Curriden, *Capital Defendants Deserve a Competent Judicial System*, DALLAS MORNING NEWS, Jan. 23, 2005; Henry Weinstein, *A Sleeping Lawyer and a Ticket to Death Row*, L.A. TIMES, July 15, 2000, at A1; Interview with Robert C. Owen, Clinical Prof., UNIV. OF TEX. (Oct. 18, 2010), *available at* http://www.texastribune.org/texas-dept-criminal-justice/hank-skinner/an-interview-with-ut-death-penalty-lawyer-rob-owen/ ("There are real problems with equality of defense representation in Texas. I think that it is not uniformly high quality.").

[199] For further discussion on funding and resources for capital defense counsel, see Chapter Six on Defense Services.

[200] TEX. GOV'T CODE ANN. § 78.052(b) (2013).

[201] EIGHTY-SECOND TEX. LEGIS., GENERAL APPROPRIATIONS ACT FOR THE 2012–13 BIENNIUM, at IV-28 (2011).

[202] TEX. GOV'T CODE ANN. § 78.054(a) (2013).

[203] Email from Brad D. Levenson, Dir., Office of Capital Writs, to Ryan Kent (Sept. 19, 2012) (on file with author).

[204] The Texas Code of Criminal Procedure specifies the duties of district and county attorneys. Specifically, the Code broadly assigns to district attorneys the responsibility of "represent[ing] the State in all criminal cases in the district courts of [their] district and in appeals therefrom." TEX. CODE CRIM. PROC. ANN. art. 2.01 (2013). Likewise, county attorneys "shall represent the State in all criminal cases under examination or prosecution in [their] county[,] and in the absence of the district attorney [they] shall represent the State alone." *Id.* at art. 2.02. County attorneys also must "aid the district attorney in the prosecution of any case in behalf of the State in the district court"

representation of the state in capital habeas proceedings, tend to earn much higher annual salaries. For example, prosecuting attorneys earn $94,000 in Harris County, $78,000 in Dallas County, and $76,000 in Bexar County.[205] While it is OCW policy to compensate "more senior attorney[s]" at a rate more commensurate with Texas prosecutors, experience levels of OCW's current attorney-employees do not yet warrant this greater compensation.[206]

It also appears that, due to budget constraints, OCW attorneys' caseloads are becoming unmanageable, and may require the office to begin refusing appointments. In its appropriations request to the Texas Legislature for fiscal years 2014 and 2015, the OCW noted that "[b]y July 2012, each OCW post-conviction attorney was handling an average of seven cases, above the national average" of four to six cases.[207] While OCW acknowledged that it "expects its attorneys to handle a case load larger than the national average," it warned that "the current appropriation level will force the OCW to decrease sooner the number of cases it accepts."[208] Instead, more cases will be given to list-qualified counsel, which could cost the state more money than relying on OCW.[209]

List-qualified counsel must be "reasonably" compensated as required by Texas statutory law,[210] but compensation is otherwise set by the individual county. The state is required to "reimburse a county for compensation of [private, locally-appointed post-conviction] counsel . . . and for payment of expenses . . . , regardless of whether counsel is employed by the office of capital writs."[211] However, the reimbursement to the county is capped at $25,000, and "[c]ompensation and expenses in excess of the $25,000 reimbursement provided by the state are the obligation of the county."[212]

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upon request of the district attorney. *Id.* Petitions for Article 11.071 writs fall within the ambit of these district and county attorneys' authority.

[205] *See Government Employee Salaries*, TEX. TRIB., http://www.texastribune.org/library/data/government-employee-salaries (last visited Sept. 28, 2012) (Sept. 2012 data on file with author). The average annual salary for Bexar County prosecutors includes employees with the Criminal District Attorney's Office whose titles are "Attorney" or "Prosecutor."

[206] Email from Brad D. Levenson, Dir., Office of Capital Writs, to Ryan Kent (Sept. 19, 2012) (on file with author).

[207] OFFICE OF CAPITAL WRITS, LEGISLATIVE APPROPRIATIONS REQUEST FOR FISCAL YEAR 2014 AND 2015 SUBMITTED TO THE GOVERNOR'S OFFICE OF BUDGET, PLANNING AND POLICY AND THE LEGISLATIVE BUDGET BOARD 1 (Aug. 22, 2012), *available at* http://www.ocw.texas.gov/media/9660/fy14-15_lar.pdf.

[208] *Id.*

[209] *Id.*

[210] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(f) (2013).

[211] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2A(a) (2013) (emphasis added).

[212] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2A(a) (2013). The Code makes clear, however, that

> [t]he limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement,

and that "a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement." *Id.* at § 2A(c). The cap on state reimbursement was introduced in 1999 when the Texas legislature shifted the burden for compensating state post-conviction counsel from the Texas Court of Criminal Appeals (using state funds) to the convicting court (using county funds). *Compare* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2(h) (1995), *with* TEX. CODE CRIM. PROC. ANN. art. 11.071, § 2A(a) (1999).

In Dallas County, "[w]ork on capital appeals and capital writs [are] compensated at a rate of $125 per hour for all reasonable and necessary documented legal activity."[213] Bexar County distinguishes between "in court" work and "out of court" work and imposes a cap of $15,000.[214] Tarrant County specifies a range from $50 to $125 per hour.[215] Harris County establishes a $25,000 "presumptive maximum for all fees incurred" during state habeas representation.[216]

The compensation rates in all four of these counties falls below the hourly compensation rate for attorneys appointed to represent indigent death-sentenced inmates pursuant to federal law, which at $178 per hour already may be too low to induce qualified counsel to undertake capital-case representation.[217] Moreover, caps on compensation—the policy of both Harris and Bexar Counties—pose "an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee."[218]

Funding for Investigators and Experts

OCW employs two post-conviction investigators who earn $58,000 per year.[219] These investigators also serve as mitigation specialists.[220] The office does not employ any other investigators, but its "budget has specific funding for experts and thus [OCW] hire[s] them in every case including psychiatrists, psychologists, neuropsychologists, forensic experts, social historians, etc."[221]

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[213] *Dallas Cnty. Dist. Cts.*, *Dallas County Procedures for Appointment of Counsel in Death Penalty Cases*, at 2 (amend. May 3, 2007).

[214] *Joint Order Adopting Fee Schedule*, No. 64592, at 3 (Bexar Cnty. Dist. Ct. Oct. 28, 2011).

[215] *Tarrant Cnty. Dist. Cts.*, *Tarrant County District Courts Felony Court-appointment Plan*, at 10–11 (amend. Feb. 1, 2013).

[216] *Harris Cnty. Dist. Cts.*, *Attorney Fee Schedule*, at 4 (eff. July 1, 2010).

[217] *See* 18 U.S.C. § 3599(g)(1) (2013); U.S. COURTS, *Federal Death Penalty and Capital Habeas Corpus Representations*, *in* GUIDE TO JUDICIARY POLICY (2011), *available at* http://www.uscourts.gov/uscourts/FederalCourts/AppointmentOfCounsel/vol7/Vol07A-Ch06.pdf; Letter from Wm. T. (Bill) Robinson, III, ABA President, to Samuel W. Phelps, Circuit Exec., U.S. Court of Appeals for the Fourth Circuit, on Proposed Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases (Jan. 30, 2012), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012jan30_attycompensationdeathpenalty.authcheckdam.pdf ("The Association's 25 years of experience recruiting and training defense counsel for death penalty cases has demonstrated the already very difficult task of recruiting skilled and experienced counsel to accept capital cases at the CJA rate of $178/hour. That is because the authorized rate is usually much less than what counsel can charge other clients in other kinds of cases.").

[218] ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 987–88 (2003).

[219] Email from Brad D. Levenson, Dir., Office of Capital Writs, to Ryan Kent (Sept. 19, 2012) (on file with author).

[220] *Staff Directory*, OFFICE OF CAPITAL WRITS, http://www.ocw.texas.gov/staff-directory.aspx (last visited June 19, 2013); Email from Brad D. Levenson, Dir., Office of Capital Writs, to Ryan Kent (Sept. 19, 2012) (on file with author).

[221] *Staff Directory*, OFFICE OF CAPITAL WRITS, http://www.ocw.texas.gov/staff-directory.aspx (last visited June 19, 2013); Email from Brad D. Levenson, Dir., Office of Capital Writs, to Ryan Kent (Sept. 19, 2012) (on file with author).

Whether represented by OCW or list-appointed counsel, capital habeas petitioners may seek appointment of investigators, mitigation specialists, and experts by the trial court.[222] Texas law states that "[n]ot later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims."[223] The application must state "the claims of the application to be investigated," "specific facts that suggest that a claim of possible merit may exist," and "an itemized list of anticipated expenses for each claim."[224] The court must grant the request in whole or in part if it is "timely and reasonable."[225] Alternatively, counsel may incur investigative and expert expenses without prior approval from the court and then obtain reimbursement from the court in an ex parte proceeding, provided the expenses are "reasonably necessary and reasonably incurred."[226]

Given that the determination of reasonable expenses is left to the individual district court judge, the Assessment Team was unable to determine whether habeas counsel are typically able to obtain the necessary funding for investigators and experts.

Conclusion

The Assessment Team was unable to determine whether OCW attorneys possess the training, qualifications, and resources necessary to provide high-quality legal representation to its clients. It is clear, however, that the standards for list-appointed counsel, who are still appointed to represent inmates when OCW is unable or unwilling to accept appointment, fall far below those of the *ABA Guidelines*. This fact is especially troubling given the historically poor performance of list-appointed counsel in many past habeas cases. Furthermore, OCW attorney-employees are not compensated at a rate commensurate with Texas prosecutors, and some Texas counties impose fee caps and low hourly rates on list-appointed counsel. And while Texas provides a mechanism for the appointment and compensation of experts in capital habeas proceedings, the effectiveness of this system is unclear.

For these reasons, Texas is in partial compliance with Recommendation #8.

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222 *See* TEX. CODE CRIM. PROC. ANN. art. 11.071, at § 3(b)–(d) (2013).
223 TEX. CODE CRIM. PROC. ANN. art. 11.071, at § 3(b) (2013).
224 *Id.*
225 TEX. CODE CRIM. PROC. ANN. art. 11.071, at § 3(c) (2013).
226 TEX. CODE CRIM. PROC. ANN. art. 11.071, at § 3(d) (2013).

Recommendation

The Assessment Team recommends that Texas enact a number of reforms to ensure the provision of high-quality representation during capital habeas proceedings. These recommendations are discussed in more detail in Chapter Six on Defense Services. Most significantly, the Team recommends that Texas

- Adopt statewide qualification standards for habeas counsel that include an assessment of the applicant-attorney's knowledge, skills, and commitment to zealous advocacy;
- Develop mechanisms to evaluate the proficiency and performance of attorneys seeking capital-case appointments during state habeas or clemency proceedings through locally-based independent authorities, like the capital selection committees, that must be comprised, at least, of individuals with demonstrated knowledge and expertise in capital representation.[227]
- Implement mechanisms for monitoring the performance of list-qualified appointed counsel, as specified in Guideline 7.1 of the *ABA Guidelines*;[228]
- Remove the distinction in compensation rates between in-court and out-of-court services. Flat fees should be prohibited and counsel should be compensated for actual time and services performed. Compensation should be consistent with the provision of high quality counsel that is necessary in a capital case;
- Compensate counsel for representing a death-sentenced inmate during clemency proceedings; and
- Compensate investigative, expert, and other ancillary services so that high-quality representation is provided at every stage of the legal proceedings, including state habeas and clemency.

The Assessment Team also encourages Texas to continue to fully fund OCW so that it has the necessary resources to accept capital appointments and hire well-qualified attorneys, support staff, and ancillary services.

H. Recommendation #9

State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.

Recommendation #10

State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and

[227] *See, e.g.*, La. Pub. Defender Bd., *Capital Defense Guidelines* § 919; Ohio Rules of Superintendence 20(III)(B). *See also* ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 965–69 (2003).

[228] *See* ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 970–75 (2003).

should consider in such proceedings the decisions of federal appeals and district courts.

Legal Framework

Subsequent Writs

Texas statutory law permits successive habeas proceedings, known as "subsequent writs," in limited circumstances. The court may not consider the merits of a claim in a subsequent writ unless the Court of Criminal Appeals determines that one of the following conditions is met:

> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special [sentencing] issues that were submitted to the jury in the applicant's trial . . . .[229]

The first condition, which relates to factual and legal claims that were not available at the time of the initial habeas application, is relevant to Recommendations #9 and #10. With respect to this condition, the statute further provides that "a legal basis of a claim is unavailable on or before [the filing of the initial application] if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date."[230] Furthermore, "a factual basis of a claim is unavailable on or before [the filing of the initial application] if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date."[231]

In 2013, the Texas Legislature also adopted legislation that permits, under very limited circumstances, a second or successive petition for habeas corpus if new scientific is now available that, had the new evidence been presented at trial, "on the preponderance of the evidence the person would not have been convicted."[232] This new law permits a subsequent or successive petition for habeas corpus only if "a claim or issue could not have been presented previously in an original application," or "if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted

[229] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a), (c) (2013).
[230] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(d) (2013).
[231] TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(e) (2013).
[232] TEX. CODE CRIM. PROC. ANN. art. 11.073(b)(1)(A)-(B); -(b)(2) (2013) (effective Sept. 1, 2013).

person on or before the date on which the original application or a previously considered application…"[233]

Given the general prohibition on subsequent writs, state courts may reject a death row inmate's claim of ineffective assistance of trial counsel, even if counsel failed to present that claim in his/her initial petition of habeas relief.[234] While the U.S. Supreme Court's opinion in *Trevino v. Thaler* clarifies that, in such cases, *federal* courts may review a "substantial claim" of trial counsel ineffectiveness notwithstanding a state court's finding of procedural default, it is unclear whether Texas courts will continue to prohibit a second or successive petition in such cases.[235]

Retroactivity

Claims involving the retroactivity of U.S. Supreme Court decisions frequently arise in subsequent, rather than initial, capital habeas applications, because new Supreme Court decisions arise in the relatively long period between the date that a death row inmate's initial habeas application must be filed and the date of his/her execution. When considering the retroactivity of a decision, the Court of Criminal Appeals applies the test adopted by the U.S. Supreme Court in *Teague v. Lane*.[236] Under the *Teague* standard, a new decision will be applied retroactively only "if it places certain kinds of primary, private individual conduct beyond the power of [the law] to proscribe" or "if it requires the observance of procedures that are implicit in the concept of ordered liberty."[237]

Failure to Consistently Apply *Penry* Retroactively in Subsequent Writs

In practice, the Texas Court of Criminal Appeals has often declined to permit subsequent writs or retroactively apply new U.S. Supreme Court decisions affecting constitutional rights. Perhaps most notably, the Court of Criminal Appeals has not consistently permitted subsequent writs or retroactive application with respect to the U.S. Supreme Court's *Penry* line of cases.

In the 1989 case *Penry v. Lynaugh* (*Penry I*), the U.S. Supreme Court held that Texas's capital sentencing scheme was unconstitutional because the three special sentencing questions did not provide a vehicle for the jury to give effect to mitigating evidence, as required by prior case law.[238] The Court specifically found that the second of the three special issues did "not provide a

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[233] TEX. CODE CRIM. PROC. ANN. art. 11.073(c) (2013) (effective Sept. 1, 2013).

[234] *Ex parte* Trevino, 2005 WL 3119064, *1 (dismissed as an "abuse of the writ").

[235] In *Trevino*, the U.S. Supreme Court held that

> where, as [in Texas], state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal, the federal courts will not bar habeas review for hearing 'a substantial claim of ineffective assistance of counsel at trial if, in the initial-review collateral proceeding, there was no counsel or that counsel was ineffective.'

Trevino v. Thaler, 569 U.S. ___ (2013); 133 S.Ct. 1911,1922 (quoting Martinez v. Ryan, 132 S.Ct. 1309, 1320 (2012)).

[236] *Ex parte* Keith, 202 S.W.3d 767, 769 (Tex. Crim. App. 2006) (citing Teague v. Lane, 489 U.S. 288 (1989)). The *Teague* standard is not binding on state courts. Danforth v. Minnesota, 552 U.S. 264, 291 (2008).

[237] *Keith*, 202 S.W.3d at 769 (quoting *Teague*, 489 U.S. at 307) (internal quotation marks omitted).

[238] Penry v. Lynaugh (*Penry I*), 492 U.S. 302 (1989) (citing Lockett v. Ohio 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982)).

vehicle for the jury to give mitigating effect to [the defendant's] evidence of mental retardation and childhood abuse."[239]

The Texas Legislature responded to *Penry I* in 1991 by amending the capital sentencing statute so that jurors would be instructed to consider "all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant" as potentially mitigating.[240] Before this statutory change was enacted, however, Texas courts provided capital jurors with a supplemental jury instruction in an attempt to comport with the requirements of *Penry I*.[241] The supplemental instruction required jurors to give a "negative finding" to one of the special sentencing questions if they found that the mitigating evidence justified a life sentence.[242] In the 2001 case *Penry v. Johnson* (*Penry II*), the U.S. Supreme Court held that this procedure also did not give the jury an adequate vehicle to give effect to mitigating evidence.[243] The Court noted that because the jurors were still instructed on the pre-*Penry I* special issues, "the jury charge as a whole [was] internally contradictory, and placed law-abiding jurors in an impossible situation."[244] In order to give effect to mitigation, jurors were forced to ignore the very sentencing questions on which they were instructed.[245]

In light of *Penry I* and *Penry II*, it appears that all death sentences imposed in Texas prior to the 1991 amendments to the capital sentencing statute were unconstitutional. This constitutes a substantial number of death sentences. Between 1974 and 1991 alone, Texas executed forty-two persons, all of whom were sentenced to death under the unconstitutional pre-*Penry* standard.[246] Others remain on death row. However, the Court of Criminal Appeals has not consistently applied the subsequent writ retroactively to grant new sentencing hearings to inmates who were sentenced under this unconstitutional scheme.

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[239] *Penry*, 492 U.S. at 324.

[240] Acts 1991, 72nd Leg., ch. 838 §§ 1–6, eff. Sept. 1, 1991.

[241] Penry v. Johnson (*Penry II*), 532 U.S. 782, 796–97 (2001).

[242] *Id.* at 789–90. The full instruction provided as follows:

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

Id.

[243] *Id.* at 797.

[244] *Id.* at 799.

[245] *See id.* at 799–80.

[246] *Executions, December 7, 1982 through June 13, 2013*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_executions_by_year.html (last visited June 19, 2013).

In Ex parte *Martinez*, for instance, the Court of Criminal Appeals granted a new sentencing hearing to Raymond Martinez in a subsequent habeas writ.[247] Martinez had been sentenced to death in 1989 using the supplemental jury instruction that was found unconstitutional in *Penry II*.[248] The court held that the supplemental instruction did not provide an adequate vehicle for the jury to give effect to mitigating evidence, specifically the evidence of Martinez's psychiatric problems.[249]

The Court of Criminal Appeals, however, reached a different conclusion on the same issue in Ex parte *Staley*.[250] Like Martinez, Steven Staley was sentenced to death after *Penry I* but before the Texas Legislature amended the sentencing statute in 1991, which he challenged by filing a subsequent writ application.[251] The supplemental jury instruction on mitigating evidence provided by the trial court differed somewhat from the instruction found unconstitutional in *Penry II*.[252] As the *Staley* dissent noted, however, there was "no functional difference between the instructions" with respect to the *Penry II* issue because "[t]he jury was instructed to render a true verdict and was also instructed to change its true verdict under certain circumstances."[253] Nevertheless, the Court of Criminal Appeals held that the subsequent writ requirements were not satisfied, and thus Staley's claim could not be considered on the merits.[254] Staley remains on death row.[255]

Other death row inmates who were sentenced to death before the Texas Legislature amended the sentencing statute to comport with *Penry I* also have been denied relief by the Court of Criminal Appeals. Shelton Jones, for instance, was sentenced to death by a jury that received a supplemental instruction similar to the instruction provided in *Penry II*.[256] The Court of Criminal Appeals held that Shelton met the statutory requirements for a subsequent habeas application to be considered on the merits.[257] However, the court denied relief on the grounds that the mitigating evidence in Shelton's case was not "outside the scope of the special issues" submitted to the jury.[258] The court contrasted Shelton's mitigating evidence with the evidence in other cases, noting that Shelton did not present evidence of mental illness or a troubled childhood.[259] Given the serious constitutional defects in Texas's pre-1991 sentencing scheme, however, it seems unlikely that the statute was constitutionally sufficient for any case arising during that period of time.

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[247] *Ex parte* Martinez, 233 S.W.3d 319, 319 (Tex. Crim. App. 2007).
[248] *Id.* at 323-24.
[249] *Id.*
[250] *See Ex parte* Staley, 160 S.W.3d 56, 57 (Tex. Crim. App. 2005).
[251] *Id.* at 58.
[252] *Id.* at 58–59.
[253] *Id.* at 66 (Price, J., dissenting). The supplemental instruction required the jury to "cross out" its finding on one of the special issues if it determined that the mitigating evidence warranted a life sentence. *Id.* at 60.
[254] *Id.* at 57 (citing TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a)(1)).
[255] *Offenders on Death Row*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_offenders_on_dr.html (last visited June 19, 2013).
[256] *Ex parte* Jones, No. AP-75896, 2009 WL 1636511, at *1 (Tex. Crim. App. June 10, 2009).
[257] *Id.*
[258] *Id.* at *7.
[259] *Id.*

Other Illustrative Cases

The Court of Criminal Appeals also denied a subsequent writ in Kenneth Granviel's case. Granviel had raised the insanity defense at trial, and a psychiatrist was appointed to assist him.[260] During Granviel's capital trial, however, the prosecution called the psychiatrist as a witness.[261] On direct appeal, Granviel alleged that this breached client confidentiality, because the psychiatrist had been appointed to assist him.[262] The Court of Criminal Appeals denied relief, holding that no confidentiality existed because the "expert is not appointed by the court as the expert of the State or the defense, but is the court's disinterested expert."[263]

Several years later, however, the court acknowledged in another case that its classification of the psychiatrist as "the court's expert" was both unconstitutional and a misinterpretation of Texas statutory law.[264] In response, Granviel filed a subsequent habeas application arguing that he was entitled to an independent expert.[265] The Court of Criminal Appeals denied the application in a one-page order.[266]

In Troy Farris's case, the Court of Criminal Appeals upheld the defendant's death sentence on direct appeal, then held in a subsequent case that Farris's case was "wrongly decided."[267] The court had held in Farris's direct appeal that it was proper for the trial court to exclude a prospective juror who said she was morally opposed to capital punishment but would "not violate her oath" if she were on the jury.[268] In the subsequent case, however, the court expressly overruled its decision in *Farris* and held that it is unconstitutional to exclude a juror who would "violate her conscience should she have to answer the questions in a way that assures death will be imposed."[269] Based on this new decision, Farris filed a subsequent habeas application, but the court denied relief in a one-page summary order.[270]

Conclusion

Texas permits subsequent habeas writs in limited circumstances. Texas law does not, however, permit subsequent writs due to the omissions of counsel under any circumstances. While the Texas habeas statute permits the court to consider subsequent writs when there is a newly available legal claim, the Court of Criminal Appeals has interpreted this provision narrowly and, at times, inconsistently, even when the claim is based on a U.S. Supreme Court decision directly affecting the fairness of the inmate's trial. Texas also applies the narrow *Teague* standard when determining whether case law should be applied retroactively.

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[260] Granviel v. State, 552 S.W.2d 107, 114-15 (Tex. Crim. App. 1976).
[261] *Id.*
[262] *Id.*
[263] *Id.* at 115.
[264] De Freece v. State, 848 S.W.2d 150, 159 (Tex. Crim. App. 1993) (citing TEX. CODE CRIM. PROC. ANN. art. 46.02; Ake v. Oklahoma, 470 U.S. 68 (1985); *Granviel*, 552 S.W.2d at 115).
[265] TEX. DEFENDER SERV., *supra* note 64, at 122.
[266] *Id.* The order was unpublished. *Id.*
[267] Riley v. State, 889 S.W.2d 290, 298 (Tex. Crim. App. 1993) (citing Farris v. State, 819 S.W.2d 490 (Tex. Crim. App. 1990)).
[268] *Farris*, 819 S.W.2d at 501.
[269] *Riley*, 889 S.W.2d at 300.
[270] TEX. DEFENDER SERV., *supra* note 64, at 123.

For these reasons, Texas is in partial compliance with Recommendations #9 and #10.

Recommendation

As discussed in Recommendation #6, the Assessment Team remains concerned that Texas is not striking the proper balance between finality and fairness in the review of capital cases during state habeas proceedings. In this instance, Texas rules and case law governing the application of new rules set out by the U.S. Supreme Court affords some death row inmates relief and not others, notwithstanding the gravity of the underlying error that the Supreme Court rule is meant to alleviate. The problem is exacerbated by Texas laws and practices that prevent a death row inmate from obtaining relief in subsequent writ proceedings, even when presenting a meritorious constitutional claim.

Thus, the Assessment Team recommends that the Court of Criminal Appeals adopt a more expansive view of what constitutes a "previously unavailable legal basis" when determining whether a subsequent writ should be reviewed on the merits in death penalty cases. Under its present standard, the court has rejected subsequent writs even when the newly-available court decision is directly related to the inmate's case. Moreover, Texas also should allow subsequent writs when a meritorious claim was not raised in a prior proceeding due to counsels' errors or omissions. As described in Recommendations #7 and #8, Texas has a long history of providing capital habeas petitioners with deficient and incompetent counsel. A death row inmate should not be forced to waive a claim of constitutional significance due to his/her attorney's poor performance.

The Assessment Team is particularly troubled by the Court of Criminal Appeals' inconsistent application of the U.S. Supreme Court's *Penry* decisions in state habeas proceedings. *Penry I* and *II* directly addressed the constitutionality of Texas's capital sentencing procedure. There can be no confidence in a death sentence based on an unconstitutional procedure which the U.S. Supreme Court has determined provides the jury an insufficient mechanism through which to consider evidence supporting a sentence less than death. Despite this, the court has granted relief to only some inmates who were sentenced under the unconstitutional procedure, while others remain on death row. As a result, inmates with nearly identical claims have received remarkably divergent treatment by the court. To remedy this, all remaining death row inmates who were sentenced to death prior to the *Penry*-mandated changes to Texas's capital sentencing scheme in 1991 should be granted new sentencing hearings so that their punishment can be reassessed under a constitutional standard.

I. Recommendation #11

In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.

Texas's Harmless Error Standard

The frequent invocation of the harmless error doctrine in state and federal habeas proceedings often prevents petitioners from obtaining relief, even in cases of clear constitutional error.[271] Given that virtually any fact could be relevant to the jury's decision to impose a death sentence, courts should be cautious when applying the harmless error standard to constitutional claims in death penalty cases. This is especially true at the state court level, where the court's findings are typically binding on the federal courts.

In *Chapman v. California*, the U.S. Supreme Court held that "before a federal constitutional error can be held harmless, the [appellate] court must be able to declare a belief that it was harmless beyond a reasonable doubt."[272] Under this standard, the prosecution must "prove that there was no injury" to the inmate as a result of the error.[273] In a subsequent case, *Brecht v. Abrahamson*, the Court held that states need not apply the *Chapman* harmless error standard in post-conviction proceedings.[274] Under this standard, post-conviction relief must be granted if the constitutional error "had substantial and injurious effect or influence in determining the jury's verdict."[275] Although the *Brecht* standard is less favorable to the inmate than *Chapman*, the burden remains with the prosecution to prove that the error was not harmless.[276]

The Texas Court of Criminal Appeals, however, has held that neither the *Chapman*[277] nor the *Brecht*[278] harmless error standards apply in Texas state habeas proceedings. Instead, a constitutional error will be considered harmless unless the inmate can prove "by a preponderance of the evidence, that the [constitutional] error contributed to his conviction or punishment."[279] Unlike the standards articulated in *Chapman* and *Brecht*, the Texas standard places the burden on the inmate to prove that s/he was prejudiced by a constitutional error in his/her case. Thus, even if the court agrees that there was a constitutional error during the inmate's trial, the conviction and death sentence will be upheld unless the inmate can demonstrate that the error was not harmless.

In one case, *Ex parte Fierro*, the Court of Criminal Appeals used this standard to deny habeas relief to a death row inmate despite serious doubts regarding his guilt.[280] Cesar Fierro had been convicted and sentenced to death for the murder of an El Paso cab driver.[281] There was no

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[271] ABA, *Death Without Justice: A Guide For Examining the Administration of the Death Penalty in the United States*, 63 OHIO ST. L.J. 487, 506 (2002).
[272] Chapman v. California, 386 U.S. 18, 24 (1972).
[273] *Id.*
[274] Brecht v. Abrahamson, 507 U.S. 619, 622–23 (1993); *see also* Fry v. Pliler, 551 U.S. 112 (2007) (applying *Brecht* to other types of errors).
[275] *Brecht*, 507 U.S. at 623 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).
[276] O'Neal v. McAninch, 513 U.S. 432, 436–43 (1995).
[277] *See Ex parte* Dutchover, 779 S.W.2d 76, 77-78 (Tex. Crim. App. 1989) (noting that the "harmless beyond a reasonable doubt" standard does not apply to collateral attacks such as habeas proceedings); *see also Ex parte* Chavez, 371 S.W.3d 200, 205 n.6 (Tex. Crim. App. 2012).
[278] *Ex parte* Fierro, 934 S.W.2d 370, 376–77 (Tex. Crim. App. 1996).
[279] *Id.* at 372.
[280] *See id.*
[281] Fierro v. State, 706 S.W.2d 310, 312 (Tex. Crim. App. 1986).

physical evidence connecting Fierro to the crime.[282] His conviction was based on a confession and the testimony of an alleged eyewitness.[283] In state habeas proceedings, however, Fierro argued that his confession was coerced by police.[284] Following an evidentiary hearing on this issue, the Texas district court found that "at the time of eliciting the Defendant's confession," the detective who interrogated Fierro "did have information that [Fierro's] mother and step-father had been taken into custody by the Juarez police with the intent of holding them in order to coerce a confession from the Defendant, contrary to [the detective's] testimony at the pretrial suppression hearing."[285] Thus, as Fierro claimed, he confessed in order to secure his parents' release from jail in Mexico. Accordingly, the district court recommended that Fierro should be granted a new trial.[286]

The Texas Court of Criminal Appeals, however, denied relief.[287] The court agreed that the detective's false testimony regarding Fierro's interrogation "likely caused the admission into evidence of an involuntary confession, thus raising the possibility that the error contributed to the verdict."[288] Nonetheless, the court held that because an eyewitness also testified in the case, Fierro "failed to carry his burden of proving harm by a preponderance of the evidence."[289] The court noted that had it applied the *Chapman* harmless error articulated by the U.S. Supreme Court, it would have granted habeas relief.[290]

While one of only two pieces of evidence used by the prosecution against Fierro would have been inadmissible but for a detective's perjured testimony, Fierro's conviction and death sentence were upheld. Moreover, the evidence supporting Fierro's claim that the detective who interrogated him had colluded with Juarez police was not discovered until his state habeas proceedings; thus, state habeas proceedings were Fierro's first opportunity to present this evidence. Nonetheless, he was subjected to a more restrictive harmless error standard than would have been applied on direct appeal, where the Court of Criminal Appeals would have applied the *Chapman* standard.[291] As one judge described in a dissenting opinion, although "[w]e all agree [Fierro] was deprived of due process of law at his first trial for capital murder . . . [,] the majority denies him another trial because, for reasons beyond his control, he was only able to raise his due process contention for the first time in post-conviction habeas corpus."[292]

Fierro's subsequent federal habeas petitions were denied on procedural grounds.[293] He remains on death row.[294]

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[282] *See id.* at 312–13.
[283] *Id.* at 312.
[284] *Ex parte* Fierro, 934 S.W.2d 370, 371 (Tex. Crim. App. 1996). Fierro had made a similar argument in a pre-trial suppression hearing. *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.* at 376-77.
[288] *Id.* at 376.
[289] *Id.* at 376–77.
[290] *Id.* at 376.
[291] *Id.* at 372.
[292] *Id.* at 383 (Clinton, J., dissenting).
[293] Fierro v. Johnson, 197 F.3d 147 (5th Cir. 1999); Fierro v. Cockrell, 294 F.3d 674 (5th Cir. 2002).
[294] *Offenders on Death Row*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_offenders_on_dr.html (last visited June 19, 2013).

Innocence Claims in State Habeas Proceedings

The Texas Court of Criminal Appeals also imposes strict standards for inmates presenting claims of actual innocence in both capital and non-capital habeas proceedings. The court has held that an inmate presenting new evidence alleging that s/he is innocent will be entitled to relief "only upon a showing of extreme materiality: the applicant must be able to show by clear and convincing evidence that, given the newly available evidence of innocence in addition to the inculpatory evidence presented at trial, no reasonable juror would have convicted him."[295] The court has stated that this requires the inmate to "unquestionably establish his innocence."[296] Under this demanding standard, an inmate who could prove that it is more likely than not that s/he is innocent would not be entitled to a new trial.[297]

As a result of this standard, the court has denied relief in a number of cases despite new evidence that at least called into question the inmate's guilt. For instance, the court denied relief to Neal Robbins, an inmate sentenced to life in prison for killing a seventeen-month-old child, despite the fact that the medical examiner amended the child's cause of death from "asphyxiation by compression" to "undetermined" after Robbins's trial.[298] Rosa Jimenez, who also was sentenced to life in prison for killing a toddler, presented evidence in state habeas proceedings from several medical experts that the death was an accident.[299] Jimenez, however, was also denied relief under the Court of Criminal Appeals' demanding innocence standard.[300]

Conclusion

Texas does not apply the *Chapman* reasonable doubt standard when determining whether a constitutional error is harmless in state habeas proceedings. Rather, the Texas Court of Criminal Appeals has mandated a much more restrictive test, which requires the petitioner to prove by a preponderance of the evidence that the error was *not* harmless. As such, even in cases of clear constitutional error that could have affected the outcome of the trial, a petitioner's conviction and death sentence may still be upheld. Texas is not compliance with Recommendation #11.

Recommendation

By requiring a death row inmate to prove, by a preponderance of the evidence, that a constitutional error was not harmless, Texas sacrifices fairness in order to ensure the finality of judgments. Particularly in those cases where state habeas is the first opportunity to raise a specific claim before the Court of Criminal Appeals, this rule can result in affirmance of a conviction and death sentence simply because of an inmate's inability to raise the claim any earlier, notwithstanding the fact that in some cases, like those described above, the information undermining the reliability of the proceeding is in the possession of another party and not the inmate.

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295 *Ex parte* Henderson, 384 S.W.3d 833, 835 (Tex. Crim. App. 2012).
296 *Ex parte* Chavez, 371 S.W.3d 200, 206 (Tex. Crim. App. 2012).
297 *See id.*
298 *Ex parte* Robbins, 360 S.W.3d 446, 448, 453 (Tex. Crim. App. 2011).
299 *Ex parte* Jimenez, 364 S.W.3d 866, 874–75 (Tex. Crim. App. 2012).
300 *Id.*

Thus, the Assessment Team recommends that Texas adopt the *Chapman* harmless error standard when considering claims of constitutional error in state habeas proceedings. This standard will help to avoid cases like *Fierro*, in which the harmless error doctrine is invoked and the defendant is denied relief, notwithstanding a clear error undermining the confidence in the outcome of the trial. Moreover, it will ensure that a defendant who presents his/her claim on direct appeal receives the same treatment as one who, due to no fault of the defendant, is unable to present a similar claim until state habeas proceedings.

Texas courts should also adopt a standard for actual innocence claims in state habeas that does not require the inmate to "unquestionably establish" innocence. While some deference to the jury's verdict may be necessary, and not every inmate who claims that s/he is innocent should be entitled to relief, the current standard virtually guarantees that some innocent inmates will remain incarcerated, including those under a sentence of death.

J. Recommendation #12

During the course of a moratorium, a "blue ribbon" commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.

Because Recommendation #12 is predicated on the implementation of a moratorium, it is not applicable to Texas at this time.

CHAPTER NINE

CLEMENCY

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Under a state's constitution or clemency statute, the Governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual, and (2) whether a person should be put to death. The clemency process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiency. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death row inmate, the state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

While elements of the clemency process—including criteria for filing and considering petitions and inmates' access to counsel—vary significantly among states, some minimal procedural safeguards are constitutionally required. A clemency system that is wholly arbitrary might warrant judicial intervention.[1]

From 1976, when the Court authorized states to reinstate capital punishment, through January 2012, clemency has been granted on humanitarian grounds 270 times in twenty-one capital jurisdictions in the United States.[2] Notably, 167 of these were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.[3] Another fifteen of these clemency grants occurred in Illinois when Governor Pat Quinn commuted the death sentences of the remaining men on death row to life without parole upon that state's repeal of its death penalty statute in 2011.[4]

Due to procedural restrictions on the judicial review of meritorious claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions, clemency can be the state's sole and final opportunity to address miscarriages of justice, even in cases involving actual innocence. A clemency decision-maker may be the only person or body

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[1] Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

[2] *See Clemency*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/clemency (last visited Sept. 5, 2013). This figure includes states that authorized capital punishment at any time during this period.

[3] *Id*. There have been five additional broad grants of clemency.

[4] 725 ILL. COMP. STAT. 5/119-1 (2011) (amending the Illinois Code of Criminal Procedure to abolish the death penalty); Christopher Wills, *Illinois Abolishes Death Penalty*, WASH. POST, Mar. 10, 2011, at A9.

that has the opportunity to evaluate all of the factors bearing on the appropriateness of the conviction or death sentence without regard to constraints that may limit a court's or jury's decision-making. Yet as the capital punishment process currently functions in many jurisdictions, meaningful review frequently is not obtained and clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

I. FACTUAL DISCUSSION: TEXAS OVERVIEW

A. Clemency Decision-Makers

In Texas, the Board of Pardons and Paroles and the Governor are responsible for making clemency decisions in death penalty cases.

1. Board of Pardons and Paroles

The Texas Board of Pardons and Paroles (Board) is responsible for providing recommendations to the Governor on all clemency matters.[5] In death penalty cases, the Board considers applications for the various forms of clemency that a death row inmate may request.[6] If a majority of the Board makes a written recommendation for clemency, the Governor may choose to accept the recommendation.[7] Without such a recommendation from the Board, the Governor lacks the power to commute a death sentence.[8]

The Governor, with the advice and consent of the Senate, appoints the seven Board members.[9] Members of the Board serve staggered six-year terms, must be representative of the general population, and must have resided in the state two years prior to their appointment.[10] One member is designated as the presiding officer, whose duties include reporting directly to the Governor, developing and implementing Board policies, and serving as the administrative head of the Board.[11] The Governor may remove a Board member, other than a member appointed by another Governor, at any time and for any reason.[12]

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[5] TEX, CONST. art. IV, § 11(b); TEX. CODE CRIM. PROC. ANN. art. 48.01 (2013). *See also* TEX. BD. OF PARDONS AND PAROLES, SELF EVALUATION REPORT 2 (September 2011).

[6] *See* 37 TEX. ADMIN. CODE § 143 (2013). For death row inmates, clemency most often will either take the form of a pardon or a commutation. Texas allows inmates to seek three types of pardons: full pardons, conditional pardons, and pardons based on innocence. Texas defines a full pardon as an "unconditional act of executive clemency by the governor which serves to release the grantee from the conditions of his or her sentence and from any disabilities imposed by law thereby." 37 TEX. ADMIN CODE § 141.111(14) (2013). Conditional pardons release an inmate from his/her sentence conditional upon certain requirements. 37 TEX. ADMIN CODE § 141.111(5) (2013). A pardon generally does not absolve a person of guilt, but rather forgives them for their crime, however a pardon based on innocence completely exonerates the recipient. James R. Acker & Charles S. Lanier, *May God–or the Governor–Have Mercy: Executive Clemency and Executions in Modern Death-Penalty Systems*, 36 CRIM. L. BULL. 200, 204–05 (2000); TEX. APPLESEED & TEX. INNOCENCE NETWORK, THE ROLE OF MERCY: SAFEGUARDING JUSTICE IN TEXAS THROUGH CLEMENCY REFORM, 1 (2005), *available at* http://standdown.typepad.com/The_Role_of_Mercy_Report.pdf.

[7] *See* RISSIE OWENS, TEX. BD. OF PARDONS & PAROLES, ANNUAL REPORT FISCAL YEAR 2010 (2010), *available at* http://www.tdcj.state.tx.us/bpp/publications/AR%20FY%202010.pdf.

[8] Letter from Tex. Defender Serv. to the Sunset Advisory Comm'n (May 21 2012). *See Generally* 37 TEX. ADMIN. CODE § 143 (2013).

[9] TEX. GOV'T CODE ANN. § 508.031 (2013).

[10] TEX. GOV'T CODE ANN. § 508.35 (2013). *See also* TEX. BD. OF PARDONS AND PAROLES, SELF EVALUATION REPORT 2, 10 (September 2011). Former employees of the Texas Department of Criminal Justice may not serve on the Board until two years after the termination of their employment, and no more than three Board members may be former employees of the Department at any given time. TEX. GOV'T CODE ANN. § 508.032(c)–(d) (2013).

[11] TEX. GOV'T CODE ANN. § 508.035 (2013). *See also* 37 TEX. ADMIN. CODE § 141.1(a) (2013).

[12] TEX. GOV'T CODE ANN. § 508.037 (c) (2013).

Although the Board is constitutionally required to keep a record of its actions and the reasons for its actions, the Court of Appeals of Texas has found this requirement to be satisfied by sending a letter to the inmate's counsel stating that "the Board has decided to not recommend the [clemency] petition. This decision is based on the fact that a majority of members of the Board has voted to not recommend the petition."[13] The court explicitly rejected an inmate's claim that "the individual Board *members* need and must state affirmative reasons to be unpersuaded to take the action to recommend clemency."[14]

The Board includes a Clemency Section charged with processing all clemency applications.[15] The Section is responsible for responding to inquiries, distributing clemency applications and instructions to Board members, reviewing and researching requests, and preparing clemency files for review by the Board members.[16] In 2010, the Clemency Section received 706 clemency applications and requests, forty-four of which were in capital cases.[17] Of those forty-four, twenty-nine were requests for commutation, nineteen were requests for reprieves of execution, and one was a request for a conditional pardon.[18] Of the total requests, the Board recommended clemency in two cases, both of which were for commutation of sentence.[19]

2. Governor of Texas

The Governor of Texas has the power to grant commutations and pardons with the written and signed recommendation of a majority of the Board of Pardons and Paroles.[20] If the Board does not recommend that the inmate be granted clemency, the Governor may only abide by the Board's decision to allow the execution to go forward or may grant a one-time stay of thirty days.[21] If the Board recommends commuting a death row inmate's sentence, the Governor may accept the recommendation of a lesser sentence or may override the Board's decision.[22] The

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[13] Faulder v. Tex. Bd. of Pardons and Paroles, 990 S.W.2d 944, 947 (Tex. App. 1999) (referring to TEX. CONST. art. IV §11).

[14] *Id*. (emphasis in original).

[15] *See* TEX. BD. OF PARDONS AND PAROLES, SELF EVALUATION REPORT 39 (Sept. 2011), *available at* http://www.sunset.state.tx.us/83rd/ppb/ser.pdf.

[16] *See id*.

[17] *See* TEX. BD. OF PARDONS AND PAROLES, SELF EVALUATION REPORT 4 (Sept. 2011).

[18] *See id*.

[19] *See id*.

[20] TEX. CONST. art. IV, § 11(b) ("In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction . . . , on the written signed recommendation and advice of the Board of Pardons and Paroles . . . to grant reprieves and commutations of punishment and pardons."). *See also* TEX. CODE CRIM. PROC. ANN. art. 48.01 (2011).

[21] TEX. CONST. art. IV, § 11. The Texas Constitution was amended in 1936, stripping the Governor of his/her power to issue pardons unilaterally because of public concern that the Governor was receiving cash payments in exchange for issuing pardons. *See Fear Force and Leather: The Texas Prison System's First Hundred Years,* TEX. STATE LIBRARY AND ARCHIVES COMM'N (June 13, 2012), https://www.tsl.state.tx.us/exhibits/prisons/inquiry/pardons.html (last visited Sept. 5, 2013); 37 TEX. ADMIN. CODE § 143.41(a) (2013) ("The governor shall have the power to grant one reprieve in any capital case for a period not to exceed 30 days.").

[22] GEORGE W. BUSH, A CHARGE TO KEEP 150 (1999).

Governor may also request that the Board investigate a person being considered for clemency and make a recommendation regarding clemency.[23]

B. Applying for and Obtaining Clemency

1. Applications for Clemency

A Texas death row inmate must apply for clemency through the Board of Pardons and Paroles' Clemency Section.[24] Clemency Section staff are responsible for obtaining information on the case from national and state crime information databases, local law enforcement, county officials, and the Department of Criminal Justice.[25] A clemency file is compiled containing the application as well as offense reports, court documents, and parole and probation adjustment information.[26] Once complete, the file is distributed to the Board Members, Governor, and General Counsel.[27]

The Board will consider recommending commutation of a death sentence if the Board receives (1) "a request from the majority of the trial officials of the court of conviction;"[28] or (2) "a written request of the offender or representative setting forth all grounds upon which the application is based."[29] The Governor may also request that the Board investigate an inmate's case.[30] The application for a commutation of sentence must include the following information:

(1) A completed application form;
(2) Certified court documentation for the conviction (indictment, judgment, and sentence); and
(3) Arrest reports for the conviction which do not require certification.[31]

The Board is also responsible for considering and recommending applications for pardons based on innocence.[32] The Board will only consider requests for full pardons if "exceptional circumstances" exist.[33] At least two trial officials of the sentencing court must recommend a pardon based on innocence and provide evidence of actual innocence, or a court must conclude that the inmate is actually innocent, before the Board will consider recommending a pardon.[34]

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[23] TEX. GOV'T CODE ANN. §508.050 (2013). *See also* 37 TEX. ADMIN. CODE § 143.58 (2013).
[24] *See* TEX. BD. OF PARDONS AND PAROLES, SELF EVALUATION REPORT 39 (Sept. 2011).
[25] *See* Board Policy-Making and Management Responsibilities, Board Directive, BPP-DIR.141.300 (Aug. 24, 2011), *available at* http://www.tdcj.state.tx.us/bpp/policies_directives/policies_directives.html.
[26] *See id.*
[27] *See* TEX. BD. OF PARDONS AND PAROLES, SELF EVALUATION REPORT 39 (Sept. 2011).
[28] The trial officials consist of the district attorney who prosecuted the case, the chief of the law enforcement agency that investigated the case, and the judge of the court that presided over the case. 37 TEX. ADMIN. CODE § 143.2 (2013).
[29] 37 TEX. ADMIN. CODE §143.57(a) (2013).
[30] TEX. GOV'T CODE ANN. §508.050 (2013). *See also* 37 TEX. ADMIN. CODE §143.58 (2013).
[31] *Forms*, TEX. BD. OF PARDONS AND PAROLES, http://www.tdcj.state.tx.us/bpp/forms/forms.html (last visited July 23, 2013).
[32] 37 TEX. ADMIN. CODE § 143.2 (2013).
[33] 37 TEX. ADMIN. CODE § 143.6 (2013).
[34] 37 TEX. ADMIN. CODE § 143.2(a) (2013).

For an application to be considered, the applicant for pardon for innocence must provide a certified order or judgment of a court and a certified copy of the findings of facts with respect to new evidence.[35]

In addition to clemency by commutation in capital cases, the Board of Pardons and Parole may consider recommending to the Governor a reprieve of execution.[36] The Board defines a reprieve as a temporary release from the terms of an imposed sentence.[37] The application on behalf of the condemned felon must include the following information:

(1) Applicant's name along with other pertinent identifying information;
(2) Identification of applicant's agents requesting application;
(3) Certified copies of the court documents including indictment, judgment, jury verdict, sentence, and verification of the scheduled execution date;
(4) A brief statement of the offense for which the prisoner has been sentenced, a brief statement of the legal issues raised during the judicial process of the case, and a brief statement of the effect of the prisoner's crime upon the family of the victim;
(5) The requested length of the reprieve, in increments of 30 days; and
(6) All grounds for which the reprieve is requested.[38]

As discussed, the Governor is permitted to grant one reprieve of up to thirty days without the Board's recommendation.[39] However, with the Board's recommendation, the Governor may grant reprieves for any amount of time the Board recommends.[40] A temporary reprieve may offer an inmate additional time for investigation and presentation of relevant factual and legal issue—to the courts or clemency decision-makers—relative to the inmate's conviction or death sentence.[41]

In requests for commutation of sentence as well as reprieves of execution, the Board must receive the written application no less than twenty-one calendar days prior to the scheduled execution date.[42] Supplemental information for both forms of application must be delivered to the Board no less than fifteen calendar days prior to the scheduled execution.[43]

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[35] *See* TEX. APPLESEED & TEX. INNOCENCE NETWORK, *supra* note 6, at 12–16.; *see* TEX. BD. OF PARDONS AND PAROLES, PARDON FOR INNOCENCE APPLICATION, *available at* http://www.tdcj.state.tx.us/bpp/forms/PFI%20App.pdf.

[36] 37 TEX. ADMIN. CODE §143.42 (2013).

[37] 37 TEX. ADMIN. CODE §141.111 (33) (2013).

[38] *Forms*, TEX. BD. OF PARDONS AND PAROLES, http://www.tdcj.state.tx.us/bpp/forms/forms.html (last visited July 23, 2013).

[39] TEX. CONST. § 11(b) (2013); 37 TEX. ADMIN. CODE § 143.41(a) (2013).

[40] 37 TEX. ADMIN. CODE § 143.41(b) (2013).

[41] *See infra* notes 132–138 on the case of Johnny Frank Garrett for whom Governor Ann Richards granted a 30-day reprieve to enable him to investigate claims of mental illness and other mitigation circumstances. Similarly, upon the Board's recommendation, Governor Rick Perry granted a 120-day reprieve for death row inmate Frances Newton "'to allow the courts the opportunity to order a retesting of gunpowder residue on the skirt the defendant wore at the time of the murders and of the gun used in the murders.'" Lise Olsen, *Perry Uses Clemency Sparingly on Death Row; Governor Has Never Called Off an Execution on a Claim of Innocence; Clemency: Board Plays a Role*, HOUS. CHRON., Oct. 18, 2009, at A1.

[42] 37 TEX. ADMIN. CODE §§ 143.43, 143.57 (2) (2013).

[43] 37 TEX. ADMIN. CODE § 143.57(2)(c) (2013).

2. Clemency Interviews, Hearings, and Meetings

An inmate seeking a commutation or reprieve may request an interview with a member of the Board.[44] If a request is made, the Board Chairperson is required to designate a board member to conduct the interview with the inmate.[45] During the interview, only the inmate, the designated Board Members, and Texas Department of Criminal Justice staff are permitted to be present.[46] Statements made by the inmate at the interview may be considered during the Board's review of the application.[47]

Alternatively, the Board may hold a hearing on the application for reprieve or commutation of sentence.[48] In these hearings, trial officials may participate and present information, victims' families must be permitted to attend or submit comments, and members of the general public and advocates for and against the death penalty may submit written information for the Board's consideration.[49] These hearings are open to the public, with the exception of the portions discussing confidential matters.[50]

Board members are not required to meet in-person to discuss clemency, including in death penalty cases.[51]

3. Governor's Decision

If the Board of Pardons and Paroles votes to grant a death row inmate clemency, the Governor may either accept or reject its recommendation.[52]

4. Representation During Clemency Proceedings

Texas has no rule, regulation, or law providing counsel to represent death row inmates during clemency proceedings. However, the U.S. Supreme Court has held that federal permits, although does not require, "federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation."[53]

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[44] 37 TEX. ADMIN. CODE § 143.43(e) (2013).
[45] 37 TEX. ADMIN. CODE § 143.43(e) (2013).
[46] 37 TEX. ADMIN. CODE § 143.43(e) (2013).
[47] 37 TEX. ADMIN. CODE § 143.57 (2013).
[48] 37 TEX. ADMIN. CODE § 143.43 (2013).
[49] 37 TEX. ADMIN. CODE § 143.43(i) (2013).
[50] 37 TEX. ADMIN. CODE § 143.43(h) (2013).
[51] TEX. GOV'T CODE ANN. §§ 508.047(b), 551.124 (2013); *see also* Faulder v. Tex. Bd. of Pardons and Paroles, 990 S.W.2d 944 (Tex. Crim. App. 1999); Tex. Bd. of Pardons and Parole Survey Response, provided by Bettie L. Wells, General Counsel, Bd. of Pardons and Parole to Sarah Turberville, 1 (Jan. 22, 2013) ("Texas Government Code Section 508.047(b) does not require the Board to meet to perform the member's duties in clemency matters.") [hereinafter Board of Pardons and Paroles Survey].
[52] TEX. GOV'T CODE ANN. § 508.050 (2011). *See also* 37 TEX. ADMIN. CODE § 143.58 (2013).
[53] Harbison v. Bell, 556 U.S. 180, 194 (2009) (authorizing federally-appointed counsel, pursuant to 18 U.S.C. § 3599, to represent death row inmates in state clemency proceedings).

C. Clemency Decisions

From 1976 to August 1, 2013, Texas granted clemency to two death row inmates facing imminent execution.[54]

The death sentences of twenty-eight juvenile offenders were commuted in Texas after the U.S. Supreme Court's decision in *Roper v. Simmons* prohibiting the execution of juvenile offenders.[55] Two additional offenders' sentences were commuted in light of the U.S. Supreme Court's prohibition of the execution of persons with mental retardation in *Atkins v. Virginia*.[56] In addition, there have been a number of commutations granted in Texas for "judicial expediency," in which a commutation of sentence was "given by the executive because courts had vacated, or were likely to vacate, the death sentence, and a commutation would save the time and expense of going through a new sentencing proceeding."[57]

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[54] *Clemency*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/clemency (last visited Jul. 19, 2013). Then-Governor George W. Bush granted clemency in 1998 to Henry Lee Lucas and Governor Rick Perry granted clemency in 2007 to Kenneth Foster. *Id.*

[55] Roper v. Simmons, 543 U.S. 551 (2005); Lisa Falkenberg, *Perry Forced to Commute Teens' Death Sentences*, HOUS. CHRON., Jun. 23, 2005.

[56] Atkins v. Virginia, 536 U.S. 304 (2002). Governor Perry commuted the death sentences of Doil Edward Lane and Robert Smith after they were each found by the courts to have mental retardation. Steve Barnes, *National Briefing Southwest: Texas: Governor Commutes Death Sentence*, N.Y. TIMES, Mar. 13, 2004, at A; *Kansas Girl's Killer Won't be Executed in Texas*, AP ALERT, Mar. 11, 2007.

[57] Michael L. Radelet and Barbara A. Zsembik, *Executive Clemency in Post*-Furman *Capital Cases*, 27 U. RICH. L. REV. 289, 292 (1993) (noting that between 1976 and 1992, there were thirty-six death sentence commutations in Texas for judicial expediency purposes).

II. ANALYSIS

A. Recommendation #1

Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

Recommendation #2

If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with clemency petitioners.

A 2005 study comparing Texas' clemency process to the processes of thirty-eight other states found that Texas has "distinctive procedural rules that place unnecessary obstacles in the paths of those who seek pardon and commutation recommendations from the Board of Pardons and Paroles."[58] For example, Texas is the only state in the United States that permits its Board of Pardons and Paroles to make clemency decisions without first meeting as a body.[59] As the Board is not required to hold official hearings when reviewing every death penalty clemency case, any official hearing the Board chooses to hold in a clemency case is exempt from the provisions of the Texas Open Meetings Act.[60] In place of a meeting or a public hearing, Board members receive information for a particular case, assembled by the Board staff.[61] This information provides the basis for Board members' votes, which they may call or fax into the Board's office.[62]

Death row inmates requesting clemency have the right to request an in-person interview with the Board.[63] However, such an interview—which is conducted in private and is limited in attendance to the prisoner, Board members, and staff of the Texas Department of Criminal Justice—is no substitute for a hearing.[64] Under Chairman Jack Kyle, the Board held one hearing, for Johnny Frank Garrett in 1992, and during Governor Bush's term from 1995-2000, the Board never held a hearing.[65] According to Kyle, logistics and time constraints precluded any other

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[58] TEX. APPLESEED & TEX. INNOCENCE NETWORK, *supra* note 6, at 2.

[59] The Board was, for a short period, required to meet as a body when making clemency decisions until a 1993 amendment to the statute exempted it from meeting entirely. *See* TEX GOV'T. CODE ANN. §508.047(b) (West 2004); Acts 1990, 71st Leg., 6th C.S., ch 25, 19 (repealed 1993); Acts 1993, 73rd Leg., ch 988,§ 10.03. *See also* TEX. APPLESEED & TEX. INNOCENCE NETWORK, *supra* note 6, at 2; Press Release, Office of State Senator Rodney Ellis, *Senate Passes Ellis Board of Pardons and Paroles Meetings Legislation* (18 May 2005), http://www.senate.state.tx.us/75r/Senate/Members/Dist13/pr05/p051805a.htm (last visited Sept. 6, 2013).

[60] TEX. APPLESEED & TEX. INNOCENCE NETWORK, *supra* note 6, at 27.

[61] *Id.*

[62] *Id.*

[63] 37 TEX. ADMIN. CODE § 143.43(d) (2013).

[64] *Id.*; *see also* Steve Woods, *A System Under Siege: Clemency and the Texas Death Penalty,* 32 TEX. TECH. L. REV. 1145, 1166–68 (2001).

[65] Christy Hoppe, *Tucker case focuses attention on board: Record of clemency denials stirs call for disbandment*, DALLAS MORNING NEWS, Feb. 1, 1998, at A1.

hearings from taking place.[66] Moreover, Kyle said that he perceived presenting witnesses and evidence as the purview of the courts rather than the parole board.[67]

Although the Fifth Circuit Court of Appeals has held that the Texas Board of Pardons and Paroles is not constitutionally deficient for failing to meet in person before deciding clemency matters,[68] the Board has been criticized for this practice.[69] U.S. District Judge Sam Sparks, in a lower court decision upholding the Board's practices, stated that "[i]t is abundantly clear the Texas clemency procedure is extremely poor and certainly minimal. Administratively, the goal is more to protect the secrecy and autonomy of the system rather than carrying out an efficient, legally sound system."[70] Further, Judge Sparks found that "none of the members" of the Board fully read the clemency petitions and that the Board provided no written statement of reasons for their decisions.[71] Board member Linda Garcia said that while Board members are allowed to include comments in their recommendations to the Governor, she was not aware that any Board members did so.[72] Judge Sparks concluded that "[t]here is nothing, absolutely nothing that the Board of Pardons and Paroles does where any member of the public, including the Governor, can find out why they did this."[73] He remarked that "a flip of the coin would be more merciful than these votes."[74]

The Board's ability to make clemency recommendations without meeting as a group or with the petitioner is one of the most significant factors contributing to the opaqueness of Texas' clemency process. Without holding public meetings or interviews and without the regular announcement of the basis for clemency decisions, as is the current procedure in Texas, it is nearly impossible to identify the factors considered by the decision-makers or to determine whether a thorough review of each request for clemency by a death row inmate was conducted.

Notably, this practice may not only result in the Board providing a minimal review, but, in the aggregate, it may also be a cause for the extraordinarily high denial rate of clemency petitions in Texas. As of August 1, 2013, Texas has executed 503 inmates in the modern death penalty era and has commuted the sentence of only two inmates facing imminent execution.[75] Comparatively, the state with the second highest number of executions after Texas—Virginia—has executed 110 inmates while commuting the sentence of eight inmates.[76]

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66 *Id.*

67 *Id.*

68 Faulder v. Tex. Bd. of Pardons & Paroles, 178 F.3d 343 (5th Cir. 1999).

69 *See, e.g.*, Jim Vertuno, *Groups renew call for changes to clemency process*, ASSOCIATED PRESS, Feb. 18, 2005.

70 Renae Merle, *Judge Criticizes Texas Clemency Process*, ASSOCIATED PRESS, Dec. 29, 1998.

71 Alan Berlow, *The Texas Clemency Memos*, THE ATL. MAG., Aug. 2003, *available at* http://www.theatlantic.com/magazine/archive/2003/07/the-texas-clemency-memos/2755/#.

72 Janet Elliott, *Parole Panelists who urged mercy defer to Perry*, HOUS. CHRON., May 20, 2004, at A25.

73 Berlow, *supra* note 71.

74 *Id.*

75 *Clemency*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/clemency (last visited Aug. 2, 2013); *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited Aug. 2, 2013).

76 *Clemency*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/clemency (last visited Aug. 2, 2013); *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976 (last visited Aug. 2, 2013).

Because the Texas Board of Pardons and Paroles is not required meet in-person before making decisions regarding clemency for death row inmates, nor does it make public the reasons for granting or denying a clemency petition, Texas is not in compliance with Recommendations #1 or #2.

Recommendation

As 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," the thoroughness and transparency of Texas clemency proceedings must be improved.[77] Accordingly, the Assessment Team recommends that Texas law should be amended to require the Board of Pardons and Paroles to conduct a public hearing, attended by all members of the Board, in any case in which clemency is sought by a death row inmate. No recommendation for or against clemency should be made until the hearing is concluded and the Board has offered an opportunity to meet with the inmate and his/her counsel.

These new provisions will permit the Board to give more meaningful consideration to both the inmate's petition, as well as other parties in opposition to or in support of the clemency application.

B. Recommendation #3

The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.

The State of Texas does not require the Governor or the Board of Pardons and Paroles to conduct any specific procedural review or consider independently any specific facts, evidence, or circumstances when making clemency decisions. In fact, Texas law states that the condemned prisoner must persuade the Board to recommend granting clemency without asking members to resolve technical questions of law.[78]

Generally, it is difficult to determine the reasons for which the Board recommends or the Governor decides to grant or deny requests for clemency, or the process by which they come to a final decision on clemency matters. While the Texas Administrative Code requires clemency petitioners to submit copies of court materials to the Board,[79] a death row inmate is left to decide what facts and circumstances should be included in the clemency application. Moreover, due to the opaque nature of the Board's decision-making process, it is unclear how and whether the Board considers material contained in a clemency application.

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[77] AM. BAR ASS'N, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES (2002), *available at* http://www.prisonpolicy.org/scans/FINALJUNE28.pdf.

[78] 37 TEX. ADMIN. CODE § 143.42(8) (2013).

[79] Individuals requesting a reprieve of execution must submit to the Board "certified copies of the indictment, judgment, verdict of the jury, and sentence in the case, including official documentation verifying the scheduled execution date, if said information not contained in the sentence. *See* 37 TEX. ADMIN. CODE 143.42(3) (2013).

With respect to the Governor's decision, each gubernatorial administration appears to establish its own method for deciding clemency issues in death penalty cases. Former Governor George W. Bush stated that, "in every case, I would ask: is there any doubt about this individual's guilt or innocence? And have the courts had ample opportunity to review all the legal issues in this case?"[80] Governor Bush also stated, "I don't believe it is my role to replace the verdict of a jury with my own unless there are new facts or evidence of which a jury was unaware, or evidence that the trial was somehow unfair."[81] However, this method appears to preclude consideration of legal claims that may not have been considered on the merits by the courts, such as procedurally defaulted ineffective assistance of counsel claims. Governor Rick Perry has stated that he reviews two issues in clemency cases: "whether the person received due process and had access to all the available options the law provides, and whether the person is guilty."[82]

In several instances, Governors have relied on the fact that a capital case was subjected to appellate review as a basis for denying clemency. Although the Board did not recommend clemency in the case of Betty Lou Beets, former Governor Bush stated that he was confident Beets was guilty of the crime and that "the courts, both state and federal, have thoroughly reviewed all the issues raised by the defendant."[83] Denying a stay of execution in the case of Gary Graham, Governor Bush also noted that the case had been reviewed more than twenty times by state and federal courts.[84]

It appears as though the Board and Governors have generally assumed that the merits of a case have already been reached by the courts. For the reasons discussed in earlier portions of this Report—specifically Chapter Seven on the Direct Appeal and Proportionality Review and Chapter Eight on State Habeas Corpus Proceedings—this frequently, in fact, is not the case. For this reason, it does not appear that Texas is in compliance with Recommendation #3.

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[80] GEORGE W. BUSH, A CHARGE TO KEEP 141 (1999).

[81] Berlow, *supra* note 71.

[82] Ed Timms, *Beazley Stay May Not Be About Age: Quality of Counsel in Appeal Affects Other Death-Row Cases; Representation During Key Part of Process Cited in Carjacker's Request,* DALLAS MORNING NEWS, Aug. 17, 2001, at 35A.

[83] Hugh Aynesworth, *Texas executes "Black Widow" for killing husband, Bush denies stay after Supreme Court rejects appeal*, WASH. TIMES, Feb. 25, 2000, at A3.

[84] *Graham Executed Amid Controversy*, NEWSDAY, June 23, 2000, at A04.

C. Recommendation #4

The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not the appropriate punishment.

Recommendation #4 requires clemency decision-makers to consider "all factors" that might lead the decision-maker to conclude that death is not the appropriate punishment. According to the ABA, these factors include, but are not limited to, the following, which are not listed in any particular order of priority:

(1) constitutional claims that were barred in court proceedings due to procedural default, non-retroactivity, abuse of writ, statutes of limitations, or similar doctrines, or whose merits the federal courts did not reach because they gave deference to possibly erroneous, but not "unreasonable," state court rulings;
(2) constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
(3) lingering doubts of guilt (as discussed in Recommendation #6);
(4) facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
(5) patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Recommendation #5);
(6) inmates' mental retardation, mental illness, and/or mental competency (as discussed in Recommendation #6); and
(7) inmates' age at the time of the offense (as discussed in Recommendation #6).[85]

Given that it appears that neither the Board nor the Governor has implemented guidelines for clemency decisions, as well as the general opacity of the clemency decision-making process (discussed at length in Protocols #1–2), the factors considered by clemency decision-makers are largely unknown and may or may not include consideration of the facts above.

While it is not common practice, several Texas Governors have made public statements concerning the factors relied upon during the clemency decision-making process. For example, on August 31, 2007, Governor Perry granted clemency to Kenneth Foster who was convicted under the Texas law of parties.[86] Although Governor Perry did not comment on the law that allows an accomplice to be given the death penalty, he expressed concern "about the Texas law

[85] AM. BAR ASS'N, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES (2002), *available at* http://www.prisonpolicy.org/scans/FINALJUNE28.pdf.
[86] Press Release, Office of the Gov. Rick Perry, *Perry Commutes Death Sentence* (Aug. 30, 2007), *available at* http://governor.state.tx.us/news/press-release/118/.

that allows capital murder defendants to be tried simultaneously" and that he believed it to be an issue for the Texas Legislature to examine.[87]

Board members appear to apply varying standards when reviewing clemency applications. For example, former Board member Cynthia Tauss considered "whether the defendant is guilty, whether he has had full access to the courts, and whether she believes the jury would have reached the same verdict if it had all of the information she does."[88] Former Board member Paddy Burwell, however, said he was greatly concerned with "whether the defense attorney in the case was qualified" and whether the inmate was defended by his attorney "with vigor."[89]

Notably, in Texas several death row inmates have raised issues related to violations of the Vienna Convention on Consular Relations in their clemency petitions.[90] Under Article 36 of the Convention, the United States has an obligation to inform detained foreign nationals of their right to contact their consulate regarding their arrest.[91] Death row inmate Humberto Leal García sought clemency in June 2011. Because Leal García, a Mexican national, was not informed of his consular rights before he was tried and sentenced to death, Mexico filed a complaint with the International Court of Justice (ICJ) on behalf of Leal García and fifty-three other Mexican nationals on death row in the United States.[92] Despite calls from the ICJ, President Obama, former President George W. Bush, and the United Nations, Governor Perry did not grant a stay of execution.[93] "Texas is not bound by a foreign court's ruling," a spokesperson for Governor Perry said.[94] It is unclear what factors were considered by the Governor in rejecting Leal García's clemency petition.

Conclusion

Due to the lack of laws, procedures, standards, and guidelines requiring the Governor or Board to conduct any specific type of review or consider any specific factors, and because of the secrecy surrounding the decision-making process to grant or deny clemency in Texas death penalty

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[87] Miguel Bustillo, *Governor Calls of Texas Execution,* L.A. TIMES, Aug. 31, 2007, http://articles.latimes.com/2007/aug/31/nation/na-commute31 (last visited Sept. 5, 2013).

[88] James Kimberly, *Parole Board often deaf to claims of Innocence,* HOUS. CHRON., Feb. 6, 2001, http://www.chron.com/news/article/Parole-Board-often-deaf-to-claims-of-innocence-1998562.php (last visited Sept. 6, 2013). Cynthia Tauss of League City served a six-year term on the Board that expired in February 2001.

[89] *Id*. Paddy Burwell of Westhoff served a term on the Board from 1999 to 2004.

[90] *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

[91] Vienna Convention on Consular Relations, art. 36, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

[92] Of the fifty-four complainants before the ICJ, sixteen were residents of Texas' death row: Juan Carlos Alvarez, César Roberto Fierro Reyna, Hector García Torres, Ignacio Gómez, Ramiro Hernández Llanas, Ramiro Rubi Ibarra, Humberto Leal García, Virgilio Maldonado, Angel Maturino Resendiz, Jose Ernesto Medellin Rojas, Roberto Moreno Ramos, Daniel Angel Plata Estrada, Rubén Ramírez Cardenas, Felix Rocha Diaz, Oswaldo Regalado Soriano, Edgar Arias Tamayo. Application Instituting Proceedings, Case Concerning Avena and Other Mexican Nationals (Mexico v. United States), 2004 ICJ 12, 25–34 (Jan. 9, 2003).

[93] Reid J. Epstein, *Court won't block Texas execution,* POLITICO, July 7, 2011, http://www.politico.com/news/stories/0711/58528.html (last visited Sept. 6, 2013).

[94] Chris Strohm, *Should Texas Execute a Mexican? Rick Perry Will Decide,* THE ATL. MAG., July 7, 2011, http://www.theatlantic.com/politics/archive/2011/07/should-texas-execute-a-mexican-rick-perry-will-decide/241577/ (last visited Sept. 6, 2013).

cases, the Texas Assessment Team is unable to determine whether Texas is in compliance with Recommendation #4.

D. Recommendation #5

Clemency decision-makers should consider as factors in their deliberations any patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death row inmate.

In 2000, then-Texas Attorney General John Cornyn identified at least six cases where the death penalty was imposed based on improper racial testimony presented at trial by psychologist Dr. Walter Quijano.[95] Quijano regularly told juries that defendants who are black or Hispanic are more likely to commit future crimes.[96] In one such case, Quijano testified to the future dangerousness of Duane Edward Buck, saying that black men were more likely to be repeat offenders.[97] Buck had previously petitioned the Texas Board of Pardons and Paroles and Governor Rick Perry for clemency based on Quijano's testimony.[98] A Harris County prosecutor who had worked on Buck's case also wrote to the Board and Governor asking that they stop the execution: "I felt compelled to step forward," the attorney wrote, because of the "improper injection of race in the sentencing hearing in Mr. Buck's case."[99] The Board initially rejected Buck's plea for clemency and Governor Perry, who was at the time campaigning for the Republican presidential nomination, did not respond to Buck's request.[100] As of August 1, 2013, Mr. Buck had petitioned the Texas Court of Criminal Appeals for a new sentencing hearing due to the improper testimony presented at his original trial.[101]

Napoleon Beazley, who was seventeen at the time he committed a capital offense, also presented claims of racial bias at trial in his petition for clemency. Beazley, a black teenager, was convicted by an all-white jury for killing a white man.[102] However, it is not clear if the Board considered this claim when deciding to deny Beazley's petition. Beazley was executed on May 28, 2002.[103]

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[95] Statement, Tex. Att'y Gen. John Cornyn, Regarding Death Penalty Cases (June 9, 2000), *available at* https://www.oag.state.tx.us/newspubs/newsarchive/2000/20000609death.htm.

[96] Five of the death row inmates were granted new sentencing hearings because of the improper racial testimony. Manny Fernandez, *Victim and Prosecutor Back Death Row Inmate's Bid for Resentencing*, N.Y. TIMES, Mar. 28, 2013 http://www.nytimes.com/2013/03/29/us/texas-death-row-inmates-resentencing-bid-has-support-of-victim-and-prosecutor.html?pagewanted=all&_r=0 (last visited Sept. 6, 2013).

[97] *Id.*

[98] David Savage, *High Court Spares Inmate: Justices halt Texas execution of a black man whose race was cited in sentencing*, L.A. TIMES, Sept. 16, 2011, at 1.

[99] *Id.*; Michael Landauer, *Texas Death Penalty: Even prosecutor seeks to stop Thursday's planned execution in case where race evidence was presented*, DALLAS MORNING NEWS, Sept. 12, 2011.

[100] Savage, *supra* note 98.

[101] Bob Ray Sanders, *'Race' in case stains Texas justice system*, FT. WORTH STAR-TELEGRAM, July 6, 2013, *available at* http://www.star-telegram.com/2013/07/06/4984577/race-in-case-stains-texas-justice.html.

[102] Lee Hancock, *Beazley Is Put to Death: Age Issue Doesn't Sway Parole Board to Urge Clemency, "It was senseless," Inmate Says of Crime That Led to Execution*, DALLAS MORNING NEWS, May 29, 2002, at 17A.

[103] *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, ASSOCIATED PRESS, Nov. 24, 2005.

When asked whether the Board considers patterns of racial or geographic disparity when making clemency decisions, the Board responded that "if the information is contained in a document provided to the Board, the Board members will review and consider the information."[104]

Thus, while death row petitioners have raised claims of racial discrimination at clemency, it is unclear the extent to which this information is reviewed and considered by the Board and the Governor in any given case. For this reason, the Texas Assessment Team is unable to ascertain whether Texas is in compliance with Recommendation #5.

E. Recommendation #6

> **Clemency decision-makers should consider as factors in their deliberations the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence of lingering doubt about the inmate's guilt.**

When prompted to "describe the Board's scope of review actually performed when making clemency decisions. Where possible, please provide examples of individual cases that illustrate how a factor (such as age, mental illness, or evidence of innocence) was considered," the Board responded:

> The Board reviews and considers the clemency application and attachments and/or exhibits; all documents received from the county of conviction, e.g., judgment, sentence, police report, autopsy report, etc.; prison records which includes demographic, criminal history, medical, etc.; internal staff and legal memos; letters from trial officials, family members of the victim and death penalty opponents; other information provided by the offender during the interview, e.g., personal history (residence, education, employment, military), substance abuse, physical/mental history, social history and marital and family history and institutional adjustments; and if a hearing is held, all information, evidence and arguments presented during the hearing.[105]

Mental Retardation

Treatment of Clemency Applications Prior to *Atkins v. Virginia*

Prior to the U.S. Supreme Court decision prohibiting the execution of people with mental retardation, several inmates have sought clemency due to evidence of mental retardation.[106] In the case of Mario S. Marquez, the inmate's counsel stated that his client had an I.Q. of sixty-five with the mental capacity of a five-year-old,[107] and had dropped out of high school.[108] These

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[104] Board of Pardons and Paroles Survey, *supra* note 51, at 5.
[105] *Id.*, *supra* note 51, at 5.
[106] In 2002, the U.S. Supreme Court held in *Atkins v. Virginia* that the execution of people with mental retardation violates the Constitution's prohibition on cruel and unusual punishment. 536 U.S. 304 (2002).
[107] Peter Cooney, *Texas Prepares to Execute Mentally Retarded Inmate*, REUTERS, Jan. 17, 1995.

facts, however, were never presented to the jury at trial.[109] It also appears that the Texas Attorney General's Office acknowledged that Marquez's I.Q. was "in the upper range of mildly mentally retarded."[110] It is unclear whether this information was considered by the Board of Pardons and Paroles or the Governor before deciding to deny clemency and Marquez was executed on January 17, 1995.[111]

Death row inmate Joseph John Cannon suffered from brain damage at age six, was diagnosed at age eleven with neurological dysfunction, speech and motor impairments, and then was subsequently diagnosed with schizophrenia and low intelligence.[112] Cannon was twice tried for the murder he committed;[113] at the second trial, his attorneys elected not to present Cannon's history of mental illness to the jury.[114] This information was included in Cannon's plea for clemency, although it is unclear whether the Board considered it when making its decision.[115] Cannon was executed on April 22, 1998.[116]

Death row inmate Terry Washington's clemency petition argued that his sentence should be commuted based on his mental retardation and ineffective assistance of counsel at trial. His trial attorneys never presented evidence that Washington had been born with fetal alcohol syndrome or that he was mentally retarded.[117] Notably, then-counsel to Governor Bush, Alberto Gonzalez, in his memorandum on clemency prepared for the Governor, omitted the issues presented by Washington's clemency petition concerning his mental disabilities or that Washington's attorneys had made no effort to present the issue to the jury.[118] The Board declined to extend clemency to Washington and the Governor chose not to grant him a thirty-day reprieve.[119] Washington was executed on May 6, 1997.[120]

Treatment of Clemency Application Post-*Atkins*

After the *Atkins* decision was handed down, Governor Rick Perry commuted the sentence of Doil Lane on the recommendation of the Board of Pardons and Paroles because a trial court had determined that Lane was mentally retarded.[121]

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[108] David Stout, *Texan Who Killed Ex-Wife and Her Niece Is Executed*, N.Y. TIMES, Jan 18, 1995, at 16.
[109] *Id.*
[110] Cooney, *supra* note 107.
[111] *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103.
[112] *Texas Execution: Death Row Serves as the Final Stop for Systems' Failures*, DALLAS MORNING NEWS, April 19, 1998, at 2J.
[113] Cannon v. State, 691 S.W.2d 664, 679 (Tex. Crim. App. 1985). Cannon was also a juvenile at the time of his capital offense. *Texas Execution*, *supra* note 112.
[114] *Texas Execution*, *supra* note 112.
[115] *Id.*
[116] *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103.
[117] Steve Mills, Ken Armstrong, and Douglas Holt, *Flawed Trials lead to death chamber; Bush confident in system rife with problems*, CHI. TRIB., June 11, 2000, at 1.
[118] Alan Berlow, *The Texas Clemency Memos*, THE ATL. MAG., Aug. 2003.
[119] Hoppe, *supra* note 65.
[120] Berlow, *supra* note 118.
[121] *Ex parte* Lane, Nos. WR-67,161-01, WR-67,161-02, 2007 WL 2199993, at *1 (Tex. Crim. App. Aug. 1, 2007); *Kansas Girl's Killer Won't be Executed in Texas*, AP ALERT, Mar. 11, 2007.

Nonetheless, many Texas death row inmates continue to seek clemency on the basis of their mental retardation. This may be in large part attributable to Texas's failure to adopt a statutory legal and procedural framework to determine if a person facing the death penalty has mental retardation in the first instance.[122] Among such inmates are Milton Mathis, executed on June 21, 2011,[123] who had an I.Q. of sixty,[124] and Yokamon Hearn, executed on July 18, 2012, who argued that he should not be executed because he had been born with fetal alcohol syndrome and suffered cognitive delays.[125]

Recently, Marvin Lee Wilson presented a paradigmatic case for clemency. Wilson, as stated by a federal court, had an I.Q. score of sixty-one—well within the commonly accepted range for mental retardation.[126] Wilson also suffered from "significant limitations in all three areas of adaptive functioning."[127] The federal court nonetheless denied relief, citing limitations placed on the court by federal law to review Wilson's claim on the merits,[128] which was later affirmed by the U.S. Court of Appeals for the Fifth Circuit.[129] Wilson was denied clemency and executed on August 7, 2012.[130]

Mental Illness

In some cases, the Board and Governor have been presented with evidence of a death row inmate's severe mental illness, however it does not appear that any death row inmate in Texas has received a commutation of a death sentence on this basis.[131]

In one case, an inmate was granted a thirty-day reprieve to investigate his claims of mental illness. Johnny Frank Garrett had been diagnosed with paranoid schizophrenia and believed that

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[122] *See* Chapter Thirteen on Mental Retardation and Mental Illness. In the absence of a statutory framework, the Texas Court of Criminal Appeals' applies a definition of mental retardation that substantially deviates from the American Association of Intellectual and Developmental Disabilities' definition on the modern, scientific understanding of mental retardation. *Ex parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004). *See also* Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-Atkins Claims of Mental Retardation*, 39 Hastings Const. L.Q. 1, 142 (2011).

[123] TDS Memo., Aug. 30, 2012 (on file with author).

[124] Michael Graczyk, *Milton Mathis executed for Houston double slaying*, ASSOCIATED PRESS, June 22, 2011.

[125] Associated Press, *Texas inmate put to death for slaying, is state's 1st to be executed using single lethal drug,* WASH. POST, July 18, 2012; *see also USA (Texas): Further Information: Clemency Petition filed for Texas Inmate: Yokamon Hearn*, AMNESTY INT'L (July 4, 2012), http://www-secure.amnesty.org/en/library/asset/AMR51/055/2012/en/f574ed3d-0497-4fa3-ae09-d15ec8d68494/amr510552012en.html.

[126] Wilson v. Quarterman, No. 6:06cv140, 2009 WL 900807, at *5 (E.D. Tex. Mar. 31, 2009).

[127] *Id.* at *8.

[128] *Id.* at *7–8 (citing 28 U.S .C. § 2254(e)(1)). The federal district court was critical of the Texas appellate court's analysis, but denied relief, noting that federal law requires federal courts to defer to a state court's factual findings unless those findings are clearly erroneous. *Id.*

[129] Wilson v. Thaler, 450 Fed. App'x 369, 378 (5th Cir. 2011).

[130] Jordan Smith, *Death Watch: Texas Goes Through With Wilson Execution*, AUSTIN CHRON., Aug. 8, 2012, http://www.austinchronicle.com/blogs/news/2012-08-08/death-watch-texas-goes-through-with-wilson-execution/ (last visited Aug. 31, 2013).

[131] *See also* Chapter Thirteen on the Mental Retardation and Mental Illness for a detailed discussion of mental illness and death penalty in Texas.

lethal injection would not result in his death.[132] Garrett had been convicted and sentenced to death for killing a nun when he was seventeen years old.[133] The religious order to which the victim had belonged requested that then-Governor Ann Richards commute Garrett's death sentence because Garrett had been diagnosed as chronically psychotic and suffered from brain damage as a result of extensive abuse as a child.[134] Although Governor Richards could not commute his sentence absent a recommendation from the Board, she granted Garrett a thirty-day stay to investigate his claims of mental illness and other mitigating circumstances.[135] "In this case," the Governor said, "there were a few questions in my mind, and then to be petitioned by the sisters who were really the only family that this victim has, to grant this thirty-day delay, it seemed the right thing to do."[136] Nonetheless, the Board of Pardons and Paroles voted unanimously to deny Garrett clemency.[137] Garrett was executed on February 11, 1992.[138]

In the case of death row inmate Kelsey Patterson, it appears that the Board considered Patterson's mental health prior to denying clemency. Before his conviction, Patterson had spent significant periods of time in state hospitals for schizophrenia and the circumstances concerning his offense raised questions about Patterson's mental health.[139] During his trial, Patterson also testified about "remote control devices" and "implants" that he thought the military had put in his head to control his actions.[140] Nonetheless, prosecution expert witness Dr. James P. Grigson testified that Patterson was sane at the time of the murders.[141] On appeal, a Fifth Circuit Court of Appeals Judge repeatedly asked the assistant attorney general "What are we doing here? … This is a very sick man."[142] The Fifth Circuit, however, upheld the denial of relief in Patterson's case "[b]ecause the state court did not *unreasonably* determine that Patterson had failed to raise a 'substantial doubt' as to his competence to be executed."[143] Patterson's clemency petition further argued that "execution of someone like Kelsey whose paranoid schizophrenia is severe and chronic serves neither the retributive nor the deterrent functions the death penalty was intended for."[144]

The Board of Pardons and Paroles voted to commute Patterson's death sentence by a vote of five to one.[145] This appears to be the first case for which the Board has recommended clemency based on mental illness since the reinstatement of the death penalty in Texas.[146] Board member

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132 Marc Bookman, *13 Men Condemned to Die Despite Severe Mental Illness*, MOTHER JONES, Feb. 12, 2013.

133 Kathy Fair, *Johnny Garrett Is Put to Death for Slaying Nun; Woman Is Stabbed, Raped*, HOUS. CHRON., Feb. 11, 1992, at A9.

134 *Plea from Pope John Delays Execution in Texas*, SOUTH FLA. SUN-SENTINEL, Jan. 8, 1992, at 3A; *Nun's Murderer Executed in Texas*, WASH. POST, February 11, 1992.

135 *Id.*

136 *Id.*

137 *Nun's Murderer Executed in Texas*, WASH. POST, February 11, 1992.

138 *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103.

139 *Finding Justice for Mentally Ill Defendants*, AM.-STATESMAN (Austin, Tex.), May 10, 2004. After shooting two strangers in the street, Patterson stripped to his socks and walked naked in the street until police arrived. *Id.*

140 Brandi Grissom, *Scrutinizing Perry's Extensive Execution Record*, N.Y. TIMES, Sept. 2, 2011, at A19.

141 *Id.*

142 *Finding Justice for Mentally Ill Defendants*, *supra* note 139.

143 Patterson v. Dretke, 370 F.3d 480, 486 (5th Cir. 2004) (emphasis added).

144 Janet Elliott, *Parole Panelists who urged mercy defer to Perry*, HOUS. CHRON., May 20, 2004, at A25.

145 *Id.*

146 Bookman, *supra* note 132.

Linda Garcia said she voted to commute the sentence because of "concerns about some mental health issues that were present."[147] Charles Aycock, who voted against clemency, said he focused on the "narrow issue to determine if he was competent to understand he was being executed."[148] Aycock stated that "[a]ll of the [previous court] opinions indicated there was not a substantial doubt he was competent. I based my decision on that."[149]

Despite the Board's recommendation to commute Patterson's sentence, Governor Rick Perry denied clemency, thus becoming the first Texas governor to reject the Board's decision in a capital case since 1982.[150] While recognizing Patterson's mental health history, Governor Perry stated that

> State and Federal courts have reviewed this case no fewer than ten times, examining his claims of mental illness and competency, as well as various other legal issues. In each instance the courts have determined there is no legal bar to his execution.
>
> This defendant is a very violent individual. Texas has no life without parole sentencing option, and no one can guarantee this defendant would never be freed to commit other crimes were his sentence commuted. In the interests of justice and public safety, I am denying the defendant's request for clemency and a stay.[151]

Patterson was executed on May 18, 2004.[152]

Among other death row inmates whose clemency petitions were based on diagnoses of severe mental illness are:

- James Blake Colburn who had been diagnosed with schizophrenia at age seventeen,[153] and had spent time in mental institutions.[154] Despite this history of mental illness, the Board of Pardons and Paroles denied his petition for clemency.[155] Colburn was executed on March 26, 2003.[156]

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147 Elliott, *supra* note 144.
148 *Id.*
149 *Id.*
150 *Id.*
151 *Gov. Rick Perry Denies Commutation, Stay for Kelsey Patterson*, Press Release, May 18, 2004. Texas adopted a life imprisonment without parole sentencing option for capital cases in 2005. S.B. 60, 79th Leg., Reg. Sess. (Tex. 2005).
152 *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103.
153 Bookman, *supra* note 132.
154 *Texas Executes Schizophrenic for 1994 Murder*, REUTERS, Mar. 27, 2003.
155 Michael Graczyk, *Mentally Ill Inmate Facing Death This Week Loses Clemency Bid*, AP, Mar. 24, 2003.
156 *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103.

- Larry Keith Robison, who was also diagnosed with paranoid schizophrenia and heard voices telling him to harm others.[157] It appears that Robison's parents informed mental health authorities of Robison's increasingly aggressive behavior, but they were told that the state could not provide resources for Robison unless he actually became violent.[158] In 1982, Robison killed five people.[159] Despite pleas from Pope John Paul II as well as national and international human rights organizations, the Board of Pardons and Paroles unanimously voted to reject Robison's clemency petition.[160] Robison was executed on January 21, 2000.[161]
- Robert Vannoy Black, Jr., whose attorneys presented the Board of Pardons and Paroles with evidence that Black suffered from post-traumatic stress syndrome after serving in Vietnam.[162] The Board turned down Black's request for clemency and he was executed on May 22, 2002.[163]

Considerations of Age at the Time of Offense

Prior to the U.S. Supreme Court's prohibition on the execution of juvenile offenders in 2005,[164] Texas had executed thirteen individuals who were sentenced to death for crimes they committed when they were under the age of eighteen.[165] It appears most, if not all, of these offenders had petitioned the Board and Governor for clemency.[166] While Texas no longer executes those who

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[157] John Aloysius Farrell, *Lethal Dilemma Five of the Prisoners Scheduled for Execution in Texas Early Next Year Will Highlight Gov. George W. Bush's Death Penalty Role*, BOSTON GLOBE, Dec. 19, 1999, at A1; Bookman, *supra* note 132.

[158] *Id.*

[159] *Mentally Ill Killer Executed in Texas*, REUTERS, Jan. 22, 2000.

[160] Debra Dennis, *Execution nears despite mercy pleas: Pope among those seeking last-minute stay for killer*, DALLAS MORNING NEWS, Jan. 21, 2000, at 33A.

[161] *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103.

[162] *Executed Man's Supporters Promise To Continue Fight*, AP, May 21, 1992.

[163] *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103.

[164] *See generally* Roper v. Simmons, 543 U.S. 551 (2005).

[165] These thirteen include: Charles Rumbaugh, executed on September 11, 1985; Jay Pinkerton, executed on May 15, 1986; Johnny Frank Garrett, executed on February 11, 1992; Curtis Harris, executed on July 1, 1993; Ruben Cantu, executed on August 24, 1993; Joseph John Cannon, executed on April 22, 1998; Robert Earl Carter, executed on May 31, 2000; Glen Charles McGinnis, executed on January 25, 2000; Gary Graham, executed on June 22, 2000; Gerald Lee Mitchell, executed on October 22, 2001; Napoleon Beazley, executed on May 28, 2002; T.J. Jones, executed on August 8, 2002; and Toronto Patterson, executed on August 28, 2002. Victor L. Steib, *The Juvenlie Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973—April 30, 2004*, *available at* http://www.internationaljusticeproject.org/pdfs/JuvDeathApril2004.pdf; Harvey Rice, *Teen-age Murderer Executed/'No one wins,' Says Inmate Who Killed Man at Age of 17*, HOUS. CHRON., May 29, 2002, at A1.

[166] For example, the Board voted unanimously to deny Johnny Frank Garrett clemency, and he was executed on February 11, 1992. *Nun's Murderer Executed in Texas,* WASH. POST, Feb. 11, 1992; *Amnesty Says Governments Torturing, Killing Children*, HOUS. CHRON., Oct. 21, 1992. The Board also voted not to recommend clemency for Toronto Patterson. He was executed on August 28, 2002. *Death Row Inmate Toronto Patterson Executed*, HOUS. CHRON., Aug. 28, 2002. In the case of Glen Charles McGinnis, numerous entities and individuals asked then-Governor George W. Bush and the Board of Pardons and Paroles to grant clemency to McGinnis since he was a juvenile at the time of the offense. Steven A. Drizin and Stephen K. Harper, *Old Enough to Kill, Old Enough to Die*, S.F. CHRON., Apr. 16, 2000, at 1. Despite these pleas for clemency and other mitigating factors—such as extensive childhood abuse—Governor Bush stated that he wanted to send "a strong message that the consequences of violent criminal behavior will be swift and sure." *Id.* He refused to grant a reprieve. *Id.* Ultimately, all but one member of the Parole Board voted to allow the execution to go forward, and McGinnis was executed on January 25,

were juveniles at the time of their crimes, it appears that at least some members of the Board of Pardons and Paroles considered age when making decisions regarding clemency prior to *Roper v. Simmons*. There is no indication that age was a factor in any Governors' consideration of clemency requests.

In particular, the execution of Napoleon Beazley—who had been sentenced to death at age seventeen—demonstrates how Texas may not give appropriate consideration to extenuating circumstances relative to fair and consistent decision-making in clemency cases.[167] Brendolyn Rogers-Johnson, a member of the Board at the time, voted to commute Beazley's sentence stating that she considered his age at the time of the crime and his clean criminal record prior to his conviction.[168] Board member Paddy Burwell, while stating that he "could not commute a person just because he was seventeen at the time of the crime,"[169] nonetheless voted to grant Beazley clemency because he believed "[Beazley] was not tried by a jury of his peers" since Beazley was black and was convicted by an all-white jury.[170] However, a majority of the Board ultimately denied a recommendation for clemency.[171] Governor Perry also refused to grant a stay of execution explaining that "to delay his punishment would be to delay justice."[172]

Napoleon Beazley's case is striking in that it reached the clemency stage in Texas at the same time that Christopher Simmons, a Missouri death row inmate, was challenging the constitutionality of the death penalty for juveniles.[173] Both men were seventeen when they committed murder[174] and both filed claims in federal and state courts, including the U.S. Supreme Court, arguing that the execution of minors was cruel and unusual punishment.[175] Simmons' and Beazley's cases diverged, though, when the Supreme Court of Missouri granted Simmons a stay pending the outcome of his case in that court, while the Texas Board of Pardons

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2000. *ABA Calls of Governor Bush to Grant Reprieve in Execution of Juvenile Offender*, PR NEWSWIRE, Jan. 25, 2000; *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103. The Board also voted fourteen-to-three to deny a stay of execution to death row inmate Gary Graham, who was seventeen at the time he committed a capital offense. Kathy Walt, *The Graham Execution*, NEWSDAY, June 23, 2000, at A17. The Board also voted unanimously to deny Graham a pardon. *Id.* Graham was executed on June 22, 2000. *Graham Executed Amid Controversy*, NEWSDAY, June 23, 2000, at A04.

[167] Sara Rimer, *In Similar Cases, One Inmate In Executed, One Wins Stay*, N.Y. TIMES, May 29, 2002, at A14.

[168] Sara Rimer, *Man Who Killed at 17 Is Scheduled to Die*, N.Y. TIMES, May 27, 2002, at A7.

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] Rimer, *supra* note 167; Rice, *supra* note 165.

[173] Six death row inmates who committed crimes as juveniles were also executed between 2000 and 2002, when the Courts were considering Simmons' case: Glen McGinnis, Gary Graham, Gerald Mitchell, Napoleon Beazley, T.J. Jones, and Toronto Patterson. Of these inmate's cases, Beazley's most resembles Christopher Simmons's. Aside from Beazley, Graham was the only one of the six to file claims in federal court arguing that the execution of juveniles violated the Eighth Amendment. His case, however, was adjudicated nearly ten years earlier, and only Beazley filed a writ of certiorari in the U.S. Supreme Court. *See* Graham v. Collins, 950 F.2d 1009 (1992); Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001) *cert. denied sub nom.* Beazley v. Cockrell, 122 S.Ct. 329 (2001). For this reason, the Assessment Team compares the legal trajectory of Beazley's case, and not those of the other five inmates', to Simmons's case.

[174] Rimer, *supra* note 167. *See* Beazley v. Johnson, 242 F.3d 248 (5th Cir. 2001), *cert. denied sub nom.* Beazley v. Cockrell, 122 S.Ct. 329 (2001). *See also* Roper v. Simmons, 125 S.Ct. 1183 (2005).

[175] Rimer, *supra* note 167.

and Paroles voted ten to seven to deny Beazley's clemency request.[176] Beazley was executed on May 28, 2002.[177] After the execution, Board member Burwell told reporters that he was "really apprehensive that this is a day we're going to be sorry about for a long time . . . I just feel like something really wrong has happened."[178]

Two years later, Christopher Simmons' case reached the Supreme Court.[179] Ultimately the Court held that the execution of offenders who had committed crimes as juveniles violated the Eighth Amendment's prohibition on cruel and unusual punishment.[180] As a result, the Texas Board of Pardons and Paroles unanimously recommended that Governor Perry commute the death sentences of all inmates on death row who had committed their crimes when they were under the age of eighteen.[181] Governor Perry commuted the death sentences of twenty-eight juveniles on Texas' death row,[182] the largest number of juveniles on any death row in the United States at that time.[183]

Considerations of Lingering Doubt of Inmate's Guilt

Many petitions for clemency in Texas have also included claims of innocence. It appears that the Board of Pardons and Paroles and the Governor have taken such claims into account in a small number of cases. In fact, former-Governor George W. Bush explicitly noted lingering doubts of an inmate's guilt as one of the criteria he used to evaluate clemency petitions.[184]

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[176] *Id.*; Rice, *supra* note 165. The stay of execution in *Simmons* case was issued before petitioner's brief was submitted in the Supreme Court of Missouri on Jan. 31, 2003. *Id.*

[177] Rice, *supra* note 165. Brandi Grissom, *Scrutinizing Perry's Extensive Execution Record*, N.Y. TIMES, Sept. 2, 2011, at A19. The District Judge who presided over Beazley's trial, the American Bar Association, the district attorney in Beazley's home county, the European Union, and Nobel Peace Prize recipients Archbishop Desmond Tutu and F.W. de Klerk—former President of South Africa—supported Beazley's plea for clemency due to his age at the time of the offense. Rimer, *supra* note 168. In addition, eighteen members of Texas' legislature wrote to Governor Perry asking him to commute Beazley's sentence. *Id.*

[178] Mr. Burwell voted to grant Beazley clemency. Rimer, *supra* note 167.

[179] Phil Magers, *Analysis: Execution of Juveniles*, UPI NEWS, March 15, 2004, http://www.upi.com/Business_News/Security-Industry/2004/10/12/Analysis-Texas-death-row-awaits-ruling/UPI-43391097618078/ (last visited Sept. 6, 2013).

[180] Roper v. Simmons, 543 U.S. 551 (2005).

[181] *Gov. Perry Issues Commutations in Accordance with U.S. Supreme Court Order*, U.S. STATE NEWS, June 22, 2005.

[182] Catherine A. Stone, *Texas Governor Reduces Death Sentences for 28*, U-WIRE, June 24, 2005. The juvenile offenders whose death sentences were commuted in light of *Roper v. Simmons* were Robert Aaron Acuna, Steven Brian Alvarado, Randy Arroyo, Mark Sam Arthur, Johnnie Bernal, Edward Brian Capetillo, Raymond Levi Cobb, John Curtis Dewberry, Justin Wiley Dickens, Tony Tyrone Dixon, Derek Jermaine Guillen, Jimmy Jackson, Eddie C. Johnson, Anzel Keon Jones, Leo Little, Michael Lopez, Jose Ignacio Monterrubio, Efrain Perez, Whitney Lee Reeves, Jorge Alfredo Salinas, Christopher Julian Solomon, Oswaldo Regalado Soriano, Robert Springsteen IV, Son Vu Khai Tran, Raul Omar Villarreal, Bruce Williams, Nanon McKewn Williams, and Geno Capoletti Wilson. *Gov. Perry Issues Commutations in Accordance with U.S. Supreme Court Order*, U.S. STATE NEWS, June 22, 2005.

[183] Stone, *supra* note 182. "While these individuals were convicted by juries of brutal murders and sentenced to die for their heinous crimes, I have no choice but to commute these sentences to life in prison as a result of the Supreme Court ruling," Governor Perry said. *Id.*

[184] GEORGE W. BUSH, A CHARGE TO KEEP 141 (1999).

One such case where serious doubts of guilt appear to have been considered is death row inmate Henry Lee Lucas. Lucas was sentenced to death after he confessed to the 1979 murder of a young woman.[185] Later, Lucas recanted and law enforcement and reporters discovered that Lucas had fabricated hundreds of confessions to other crimes over many years.[186] Then-Texas Attorney General Dan Morales had also established that it was likely that Lucas' alibi–that he was in Florida at the time of the murder–was true.[187]

The Board of Pardons and Paroles recommended that the Governor commute Lucas' sentence to life imprisonment. Lucas was the first death row inmate to succeed in securing a recommendation from the Board that the Governor grant clemency since Texas reinstated the death penalty.[188] Governor Bush said of Lucas' trial,

> [A]t the time it made its decision, the jury did not know and could not have known that Henry Lee Lucas had a pattern of lying and confessing to crimes that evidence later proved that he did not commit. His confession, now recanted, was the only evidence which linked him to this crime. Today's knowledge about his pattern of lies raises doubt.
>
> Henry Lee Lucas is unquestionably guilty of other despicable crimes for which he has been sentenced to spend the rest of his life in prison. However, I believe there is enough doubt about his particular crime that the State of Texas should not impose its ultimate penalty by executing him.[189]

In several other cases where serious lingering doubts of guilt were presented, however, clemency was not granted.

Cameron Todd Willingham

In a now well-known case, death row inmate Cameron Todd Willingham presented questions surrounding his guilt, consistently maintaining that he had not set the fire that killed his three children. Several concerns with Willingham's conviction came to light during his time on death row.[190] First, at Willingham's trial, Dr. James P. Grigson testified regarding Willingham's future dangerousness.[191] Three years later, Grigson was expelled from the American Psychiatric Association for repeatedly giving diagnoses without ever meeting the individuals in question and for testifying in court that he could predict with one hundred percent certainty whether a person would commit violent acts in the future.[192] Additionally, after Willingham was convicted, the

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[185] *Id.*
[186] *Id.* at 158.
[187] *Id.* at 160.
[188] David Grann, *Trial By Fire: Did Texas Execute An Innocent Man?*, NEW YORKER, Sept. 7, 2009.
[189] James R. Acker & Charles S. Lanier, *supra* note 6, at n. 45 (citing Governor Bush's June 26, 1998 speech on the subject).
[190] Grann, *supra* note 188.
[191] *Id.*
[192] *Id.*

jailhouse informant who had told police that Willingham confessed the crime to him recanted in a letter to the prosecutor.[193] Willingham's lawyer, however, was never informed of the letter.[194]

Finally, Dr. Gerald Hurst, one of the nation's leading arson experts, subsequently reviewed the fire in the Willingham case and found "no evidence of arson."[195] Dr. Hurst's report and Willingham's clemency petition were submitted to both Governor Perry and the Board of Pardons and Paroles.[196] The Board of Pardons and Paroles faxed in their votes not to grant Willingham clemency, and Governor Perry announced in a written statement he had decided not to grant clemency "based on the facts of the case."[197] Willingham was executed on February 17, 2004.[198] The case has since been reviewed by at least seven of the nation's leading arson experts, all of whom concluded that the original investigators relied on outdated theories and folklore when they determined that the fire was intentionally set.[199]

Billy Gardner

Death row inmate Billy Gardner also petitioned for clemency based on claims of innocence. One witness who testified against Gardner initially said she had her back to the assailant and did not see him, but later gave a description of the shooter as a man with a goatee.[200] No other witnesses could remember Gardner ever having facial hair.[201] Two other witnesses described the shooter as a man with reddish-blond hair; Gardner, however, had black hair.[202] In addition, the driver of the get-away car named Gardner as his accomplice only after prosecutors threatened to charge the driver with the murder.[203] The driver received complete immunity from prosecution for the murder in question along with probation for several pending firearms and forgery charges; the prosecution also agreed not to prosecute the driver's wife for her involvement in the offense.[204] None of these issues were raised by Gardner's trial counsel although they were raised on appeal and appear to have been included in the clemency petition.[205] The Board of Pardons and Paroles nonetheless voted thirteen to one against recommending clemency.[206] Although the Governor was aware that immunity was given to the driver in exchange for his testimony, it appears the

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[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.* It is unclear whether the problems with the testimony of Dr. Grigson and the informant were presented to the Board.
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] Berlow, *supra* note 118.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] Christine M. Wiseman, *Representing the Condemned: A Critique of Capital Punishment*, 79 MARQ. L. REV. 731, 732–35, 742 (1996).
[206] Memo from Alberto Gonzales, Tex. Gen. Counsel to George W. Bush, *Gov. of Tex. on the Scheduled Execution of Billy Conn Gardner* (Feb. 14, 1995), *available at* http://www.theatlantic.com/past/docs/issues/2003/07/berlow-documents.htm.

Governor was not informed of the inconsistent witness identifications when he denied clemency.[207] Gardner was executed on February 16, 1995.[208]

David Spence

David Spence also petitioned for clemency based on doubts of guilt. The evidence against Spence consisted primarily of bite marks on the victim's body that were said to match Spence's teeth, in addition to the testimony of several jailhouse informants.[209] Bite marks are a notoriously faulty identification tool.[210] In addition, it was later revealed that Spence was not incarcerated at the time that one of the jailhouse informants had testified that Spence confessed the murders to him.[211] Several other informants later said investigators showed them crime scene photos, autopsy photos, and witness statements before the informants provided information to prosecutors.[212] Others received recommendations for leniency for their testimony, while two informants—who later recanted—said they had been given cigarettes, television privileges, and alcohol in exchange for their testimony.[213] Although it is unclear why the Board of Pardons and Paroles denied Spence's request for clemency, Governor Bush's criminal justice advisor said that the Governor thought the verdict was fair and the sentence justified.[214] Spence was executed on April 3, 1997.[215]

Troy Dale Farris

Troy Dale Farris was convicted for murder based on the testimony of his brother-in-law, Jimmy Daniels, who claimed Farris had confessed to him a year after the crime.[216] The Texas Court of Criminal Appeals, however, found that Daniels' credibility was "seriously undermined" by the fact that his grand jury and trial testimony were inconsistent and, therefore, inconsistent with Farris' guilt.[217] Moreover, the court found, "the circumstantial and forensic evidence offered at trial not only failed to connect" Farris to the murder, it "also failed in nearly all material respects to confirm the testimony" offered at trial.[218] Nevertheless, the court upheld the conviction, stating, "unless the court concludes that a 'rational trier of fact' could not have found the defendant guilty based on all the evidence before it, the court upholds the jury's decision."[219]

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[207] Alan Berlow, *The Texas Clemency Memos*, THE ATL. MAG., Aug. 2003.
[208] *Id.*
[209] Steve Mills, Ken Armstrong, and Douglas Holt, *Flawed Trials lead to death chamber; Bush confident in system rife with problems*, CHI. TRIB., June 11, 2000, at 1; Raymond Bonner and Sara Rimer, *A Closer Look at Five Cases That Resulted in Executions of Texas Inmates*, N.Y. TIMES, May 14, 2000, at 13O.
[210] COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *Strengthening Forensic Science in the United States: A Path Forward* 47 (2009), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf [hereinafter 2009 NAS REPORT].
[211] Steve Mills, Ken Armstrong, and Douglas Holt, *supra* note 209
[212] *Id.* (noting that, in total, six jailhouse informants testified against Spence at trial).
[213] Bonner and Rimer, *supra* note 209.
[214] *Id.*
[215] *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103.
[216] Raymond Bonner and Sara Rimer, *A Closer Look at Five Cases That Resulted in Executions of Texas Inmates*, N.Y. TIMES, May 14, 2000, at 13O.
[217] *Id.*
[218] *Id.*
[219] *Id.*

A majority of the members of the Board of Pardons and Paroles voted not to grant Farris any form of clemency; seven members, however, voted for either a commutation or a thirty-day reprieve.[220] Board member Daniel Lang stated he voted to grant some form of clemency because he "had some questions on the fairness" of the prosecution.[221] The criminal justice advisor to Governor Bush said that the Governor had "looked at all the facts of the case and chose not to" grant a reprieve.[222] Farris was executed on January 13, 1999.[223]

Gary Graham

In the case of Gary Graham, his attorneys maintained that he was innocent of the murder for which he was convicted. No physical evidence existed tying Graham to the crime, and the prosecution's case rested on the testimony of one eyewitness.[224] Moreover, Graham's trial attorney did not call any of the other eyewitnesses who contended that Graham was not the killer, and the attorney reportedly operated under the assumption that Graham was guilty.[225]

The Board of Pardons and Paroles, however, denied Graham's request to hold a hearing to examine potentially exculpatory evidence presented by Graham's attorneys.[226] The Board voted fourteen to three to deny Graham a stay of execution, twelve to five against a commutation, and unanimously against a pardon.[227] Only one member, Lynn Brown, explained his reasoning in writing stating that he would have granted a reprieve "for the specific purpose of deposing witnesses . . . while under oath and penalty of perjury and acquiring results of polygraphs" in order to determine "the whereabouts of Graham during the evening [of the crime]."[228] Brown said that "the things that took me so long to come to a conclusion about are those issues that got lost—his age at the time of the offense, the length of the trial and the quality of the lawyers. It wasn't the best presentation of the evidence."[229] Graham was executed on June 22, 2000.[230]

Co-Defendants Sentenced to Death

In at least two cases, prosecutors tried two defendants for the same crime where only one of them had actually committed the offense. In one such case, James Beathard had gone with acquaintance Gene Hathorn to Hathorn's family home.[231] Beathard said he thought they were going there to make a drug deal, so he ran into the woods when Hathorn took out a gun and

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220 *Id.*
221 *Id.*
222 *Id.*
223 *Id.*
224 Joseph Fiorenza and Bill Lawson, *Innocent of the Crime*, HOUS. CHRON., July 15, 1993.
225 *Plea from Pope John Delays Execution in Texas*, SOUTH FLA. SUN-SENTINEL, Jan. 8, 1992, at 3A.
226 Stephen E. Silverman, *There is Nothing Certain Like Death in Texas: State Executive Clemency Boards Turn a Deaf Ear to Death Row Inmates' Last Appeals*, 37 ARIZ. L. REV. 375, 376 (1995).
227 Kathy Walt, *The Graham Execution/Parole Board Keeps Low Profile After Its Decision/Chairman Says Graham's Guilt Was Supported By The Evidence*, HOUS. CHRON., June 23, 2000, at A17.
228 *Id.*
229 *Id.*
230 *Graham Executed Amid Controversy*, NEWSDAY, June 23, 2000, at A04
231 James Kimberly, *A deadly distinction: Part III / Parole Board often deaf to claims of Innocence / Panel, appeals court disagree over which can review evidence*, HOUS. CHRON., Feb. 6, 2001, at A5.

began shooting.[232] At Beathard's trial, Hathorn testified for the prosecution, testifying that Beathard had been the one who shot Hathorn's family because Hathorn had promised him part of his inheritance.[233] Later, prosecutors tried Hathorn for the same murders and ridiculed the version of events to which Hathorn had testified in Beathard's trial.[234] After his conviction, Hathorn recanted his testimony and corroborated Beathard's account that Beathard had run out of the home when Hathorn began shooting.[235] Three members of the Board of Pardons and Paroles voted to grant Beathard clemency, however a majority voted to go ahead with the execution.[236] Beathard was executed on December 9, 1999.[237]

In a similar case, Joseph Nichols robbed a Houston deli with Willie Williams.[238] In the course of the robbery, the storeowner had been killed with one bullet.[239] Prosecutors first charged Williams with shooting the storeowner.[240] During the trial, prosecutors presented evidence that Nichols had run away from the store, while Williams actually fired the shot.[241] Williams was convicted and later executed in 1995.[242] After Williams was tried, prosecutors charged Nichols with the same crime.[243] This time, they argued that Nichols, rather than Williams, fired the fatal shot and Nichols was also convicted of the murder and sentenced to death.[244] Nichols was executed on March 7, 2007.[245] It is not clear whether doubts about either Williams or Nichols' guilt played a part in the Board's decision not to grant either clemency.

In addressing claims of innocence, the courts and the Board of Pardons and Paroles appear to have differing views as to whether the responsibility falls upon the courts or the Board to address inmates' claims of innocence. Retired Judge Michael McCormick, former presiding judge of the Texas Court of Criminal Appeals, explained "[a]ctual innocence claims have to go through the clemency process. That's what it is there for."[246] Yet former Board Chairman Gerald Garrett said that "the argument about guilt or innocence should rest with the courts" and that the Board is appointed to advise the Governor on mercy, not to consider claims of innocence.[247] Another former Board member, LaFayette Collins, who was on the Board when it considered Cameron Todd Willingham's case, said that as a Board member "you don't vote guilt or innocence. You don't retry the trial. You just make sure everything is in order and there are no glaring errors."[248] When asked why the reevaluation of the arson finding in Willingham's case did not constitute a

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232 *Id.*
233 *Id.*
234 *Id.*
235 *Id.*
236 *Id.*
237 *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103.
238 Nichols v. State, 754 S.W.2d 185, 188 (Tex. Crim. App. 1988) (en banc) (overruled on other grounds).
239 *Id.*
240 Williams v. State, 674 S.W.2d 315, 317 (Tex. Crim. App. 1984) (en banc).
241 *Id.*
242 *Texas Carries Out Double Execution*, S.F. CHRON., Jan. 31, 1995, at A3.
243 Nichols v. Collins, 802 F. Supp. 66, 73 (S.D. Tex. 1992)
244 *Id.*
245 *Nichols Executed in Hunstville over 1980 Slaving*, ASSOCIATED PRESS, Mar. 8, 2007.
246 Kimberly, *supra* note 88.
247 *Id.*
248 Grann, *supra* note 188.

"glaring error," Collins said "We get all kinds of reports, but we don't have the mechanisms to vet them."[249] Collins added that, although the rules allow the Board to hold hearings to consider new evidence, "in my time there had never been one called."[250] Former Board member Paddy Burwell recalled several death row cases where he stated that he received subtle pressure from other members of the Board to vote against clemency, recalling that "I don't think they care whether a person is guilty or not."[251]

Conclusion

The Board of Pardons and Paroles and the Governor have been presented with issues of mental illness, age, and lingering doubts of guilt in death penalty petitions for clemency. Due, however, to the overall opacity of the death penalty system, the Assessment Team is unable to determine if Texas is in compliance with Recommendation #6.

F. Recommendation #7

Clemency decision-makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.

Several death row inmates have submitted clemency requests to the Board of Pardons and Paroles and the Governor where the inmate's rehabilitation or positive acts were a central basis for the request. Again, the Board noted that "if the information is contained in a document provided to the Board, the Board members will review and consider the information," regarding an inmate's rehabilitation or positive acts.[252] Given the Texas capital punishment scheme's emphasis on future dangerousness, consideration of the inmate's actual behavior and acts on death row should be of significant import for consideration by the Board and Governor.

Death row inmate Karla Faye Tucker presented such information regarding her rehabilitation while on death row in 1998. After claiming to have found the "power of forgiveness," Tucker requested clemency from the Board and Governor on the basis that she no longer posed a danger to society and that she was no longer the same individual who committed the crimes for which she had been sentenced to death.[253] Tucker and her supporters called for her life to be spared, arguing that because of the good works she had performed from prison—counseling inmates and others—her execution would represent a waste of life which could otherwise positively contribute to society.[254] In a public statement denying Tucker's request for a thirty-day reprieve, then-Governor George W. Bush explained that "[t]he courts, including the United States Supreme Court, have reviewed the legal issues in this case, and therefore I will not grant a 30-

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249 *Id.*
250 *Id.*
251 Olsen, *supra* note 41.
252 Board of Pardons and Paroles Clemency Survey, *supra* note 51, at 6.
253 Mary Sigler, *Mercy, Clemency, and the Case of Karla Faye Tucker,* 4 OHIO ST. J. CRIM. L. 455 (2007).
254 *Id.*

day stay."[255] Governor Bush also said he based his decision on the same standards applied to every other clemency case—whether there are any doubts of guilt and whether the courts have had ample opportunity to review all of the legal issues in the case.[256] The Board also denied Tucker's clemency request and she was executed on February 3, 1998, becoming the first woman executed in Texas since the Civil War.[257]

In the case of Johnny Joe Martinez, the victim's mother requested clemency for the death row inmate stating that he had rehabilitated himself. Lana Norris, the victim's mother, wrote to the Board that

> There is no doubt in my mind, that to execute Mr. Martinez would be a double crime against society. Here is a young man that has truly repented and regrets his actions of July 15, 1993. If his sentence is commuted to a life sentence, he will be fifty-four before his first possible chance of parole. During that time, he could be a positive influence on other inmates that he comes in contact with. He may be able to help them understand how to change their life and direction for the better. Please do not cause another mother to lose her son to murder needlessly![258]

Paul Peterson, the victim's father, echoed this, stating that "[s]ociety must protect itself from those who do not value the lives and property of others. However, I doubt that Johnny Martinez would be a threat to society by the time he would be eligible for parole if his sentence were commuted to life."[259] Despite the pleas of the victim's family, the Board voted nine to eight deny clemency.[260] Martinez was executed on May 22, 2002.[261]

Death row inmate James Allridge also petitioned for clemency based on his rehabilitation.[262] On death row, Allridge had no record of infractions, became a skilled artist, and counseled other inmates.[263] The Board of Pardons and Paroles, however, rejected Allridge's petition.[264] Allridge was executed on August 27, 2004.[265]

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[255] *Historylinks*: *Execution of Karla Faye Tucker*, YouTube (July 25, 2012), *available at* http://www.youtube.com/watch?v=ZaoUloApZdo.

[256] GEORGE W. BUSH, A CHARGE TO KEEP 141 (1999).

[257] *Karla Faye Tucker's Last Hours,* CNN, Feb. 3, 1998, http://www.cnn.com/US/9802/03/tucker/ (last visited Sept. 5, 2013).

[258] *"Here Is a Young Man That Has Truly Repented . . . ."* DALLAS MORNING NEWS, May 15, 2002, at 15A.

[259] *Id.*

[260] Maro Robbins, *Author Does Good Job of Showing Unfairness of Death Penalty*, SAN ANTONIO EXPRESS-NEWS, June 12, 2005, at 07J; David R. Dow, *Obituary of Johnny Joe, available at* http://www.lairdcarlson.com/celldoor/00401/Dow0401ObituaryforJohnnyJoe.htm

[261] *Timeline of U.S. Executions Since the Death Penalty Was Re-Instated in 1976*, *supra* note 103.

[262] Howard Witt, *Death Row Inmate Says He's Changed; Total Reformation Deserves Clemency, Supporters Argue*, CHI. TRIB., Aug. 25, 2004, at 8.

[263] *Id.*

[264] *Id.*

[265] *National Briefing Southwest: Texas: Another Execution*, N.Y. TIMES, Aug. 27, 2004, at A15.

In the case of Willie Pondexter, Pondexter was nineteen years old when he participated in a murder.[266] Pondexter's attorney said that

> by the time Pondexter was executed, more than ten years after this crime had been committed, he was simply not remotely the same person he had been at the time the crime occurred. He had completely grown up. He had matured. There were guards on death row who approached me and told me that they didn't think that he should be executed. Several of them signed affidavits that we submitted to the Board of Pardons and Paroles on his behalf to try to have his sentence converted into a life sentence.
>
> He is somebody who, at the time that he was executed, I would have had no hesitation, none, asking him to babysit for our son. He was simply not dangerous anymore.[267]

Despite these claims, the Board of Pardons and Paroles did not grant Pondexter clemency, and he was executed on March 3, 2009.[268]

Timothy Wayne Adams' petition also raised the inmate's rehabilitation in his plea for clemency, claiming that the murder for which he was sentenced to death was an "aberration in his life."[269] In the petition, Adams' counsel stated "in his eight years on death row, Mr. Adams has not had a single disciplinary write-up," and that "since his incarceration Adams has had the opportunity to reflect on his actions, which has brought him even closer to God and deepened his devotion to Jesus Christ."[270] The Board voted unanimously to deny clemency in Adams' case.[271] Adams was executed on February 22, 2011.[272]

Because it appears that neither the Governor nor the Board of Pardons and Paroles has considered possible rehabilitation or other positive acts in their evaluations of death row inmates' clemency petitions, Texas is not in compliance with Recommendation #7.

Recommendation

As clemency is an equitable remedy, not a legal remedy, there should be few if any procedural barriers to the Board's review of a death row inmate's application for a reprieve or commutation of sentence. The Board's review should assist the Governor in making the final clemency determination, rather than curtail the Governor's review. Texas should have confidence that the

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[266] Michael Graczyk, *Killer of Woman, 85, Set to Die*, ASSOCIATED PRESS, Mar. 3, 2009.
[267] *Fresh Air: 20 Years of Defending Death Row Inmates*, NAT'L PUB. RADIO, Feb. 8, 2010.
[268] Michael Graczyk, *Texas Executes Killer of Elderly Woman in Robbery*, ASSOCIATED PRESS, Mar. 4, 2009.
[269] *See In re Timothy Wayne Adams*, Clemency Petition, *available at* http://www.deathpenaltyinfo.org/documents/TAdamsPET.pdf.
[270] *Id.* at 3.
[271] Associated Press, *Timothy Wayne Adams' clemency petition denied; execution set for Tuesday,* KHOU.COM (Hous. Tex.), Feb. 18, 2011, http://www.khou.com/news/Timothy-Wayne-Adams-clemency-petition-denied-execution-set-for-Tuesday-116509443.html (last visited Sept. 6, 2013).
[272] *Texas Man Who Killed His Child is Executed*, UNITED PRESS INT'L, Feb. 23, 2011.

final safeguard to prevent wrongful execution is a meaningful one. Its current clemency process—which does not provide a right to counsel, permits the Board to make a decision without a hearing, and permits the Board to make a recommendation to deny or grant clemency without meeting as a body—does not well-serve this imperative.

The U.S. Supreme Court has stated that "[e]xecutive clemency has provided the 'fail safe' in our criminal justice system ensuring that claims of innocence do not go uninvestigated, and that offenders are shown mercy as justice requires."[273] Various members of the Board of Pardons and Paroles, however, have explicitly stated that it is not their role to determine the guilt or innocence of the petitioner. Moreover, Texas clemency decision-makers appear to have repeatedly denied clemency stating that all relevant issues have been vetted by the courts; however, as the many cases above demonstrate, in the modern death penalty many claims that may warrant a grant of clemency have or *cannot* be reviewed on the merits in the court system. Accordingly, the Texas Capital Punishment Assessment Team is convinced that clemency in Texas has not served as the "fail safe" contemplated by our system of justice.

Thus, the Team recommends that clemency in death penalty cases include a more meaningful and thorough review of each individual case to determine if any grounds—including mercy—warrant a commutation to a sentence less than death. First, the Board of Pardons and Paroles should adopt guidelines directing its members to independently review all clemency applications and consider all factors that might lead a decision-maker to conclude that death is not the appropriate punishment. These factors, include, but are not limited to:

- constitutional claims that were procedurally barred in court proceedings or whose merits the federal courts did not reach;
- constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
- lingering doubts of guilt;
- facts that no fact-finder considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
- patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction;
- the inmate's acts of rehabilitation while under a sentence of death;
- the inmate's mental retardation, mental illness, and/or mental competency; and
- the inmate's age at the time of the offense.

Notably, only one Texas death row inmate facing imminent execution has received a commutation on any of the above bases in the modern death penalty era. A set of standards or guidelines by which clemency petitions are evaluated would help create common ground among Board members who come to the Board from varying professional backgrounds and experiences. It would also ensure that the Board's decision is better insulated from political considerations or

[273] Herrera v. Collins, 506 U.S. 390, 415 (1993).

impacts as Board members would be required to base their recommendation on a set of principles or standards in every case. Finally, such guidelines would also assist advocates who represent death row inmates in the preparation of clemency applications, as advocates could better marshal their limited resources in to investigation and presentation of specific claims that the Board must consider in every capital clemency case.

Second, as demonstrated by Napoleon Beazley's case, legal developments in Texas and in other jurisdictions may have significant relevance and bearing on the Board's recommendation for a reprieve or commutation of sentence. Accordingly, the Board could be well-served by use of a designated legal officer whose responsibility it is to collect and advise the Board on legal trends in the administration of the death penalty in all capital clemency cases.

G. Recommendation #8

In clemency proceedings, death row inmates should be represented by counsel and such counsel should have qualifications consistent with the *American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases.*

Recommendation #9

Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.

Right to Counsel, Investigators, and Experts

The *ABA Guidelines* note that "[e]xecutive clemency plays a particularly important role in death penalty cases."[274] Also noting that "the Supreme Court has begun to apply due process protection to clemency proceedings," the *ABA Guidelines* state that counsel must "assembl[e] the most persuasive possible record for the decision maker [and] … carefully examine the possibility of pressing legal claims asserting the right to a fuller and fairer process."[275] While lawyers may take on representation for a death row inmate at clemency, in Texas there is no right to counsel in capital clemency proceedings, nor has Texas adopted any standards regarding qualifications for attorneys during clemency proceedings.[276] In fact, it also appears that the Texas' Government Code precludes representation for indigent inmates at clemency through the Office of Capital Writs (OCW).[277] Although federally-appointed counsel for federal habeas

[274] AM. BAR ASS'N, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 936 (2003) [hereinafter *ABA Guidelines*].
[275] *ABA Guidelines*, *supra* note 274, at 937.
[276] Survey from Carole J. Powell, Deputy Chief Pub. Defender, El Paso Cnty. Pub. Defender, at 2 (Oct. 9, 2012) (on file with author); Survey from Philip Wischkaemper, Deputy Dir., Regional Pub. Defender for Capital Cases, at 2 (Sept. 27, 2012) (on file with author).
[277] *See* Chapter 6 on Capital Defense Services.

proceedings are permitted to continue representation through clemency proceedings, such representation is neither required nor guaranteed.[278]

Notably, an inmate's last in-person plea for a reprieve from execution must be made without the presence of counsel: in the event that an interview is conducted with a death row inmate petitioning for clemency prior to execution, attendance is limited to the prisoner, Board Members, and staff of the Texas Department of Criminal Justice.[279] Furthermore, a death row inmate is not afforded the opportunity to rebut opposition to his/her application for clemency.[280]

Sufficiency of Time to Prepare Clemency Applications

An application for a temporary reprieve may not be filed with the Board of Pardons and Paroles until an execution date has been set.[281] The Texas Code permits the Board to summarily deny a "[s]uccessive or repetitious reprieve application[]."[282]

To request a commutation of a death sentence to a lesser penalty or a reprieve of execution, the clemency petitioner must submit the written application no later than twenty-one calendar days prior to the execution.[283] While petitioners may file a petition for commutation of sentence at any time, in at least two cases, court proceedings were still pending or courts issued rulings just days before an inmate's scheduled execution, giving inmates little time to meet the Board's filing deadlines.[284] According to analysis conducted by the Houston Chronicle, as of 2009, at least 50 of the past 200 executions were carried out without any clemency board review at all" and "[o]ther death row inmates' final pleas for mercy were rejected for arriving after the board's deadline."[285]

Conclusion

Texas death row inmates are not guaranteed counsel for clemency proceedings and it appears that death row inmates are not given adequate time for the preparation of clemency applications. Thus, Texas is not in compliance with Recommendations #8 or #9.

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[278] Harbison v. Bell, 556 U.S. 180, 185–86 (2009).

[279] 37 TEX. ADMIN. CODE § 143.43(d) (2013).

[280] Shelly Yeatts, *Responding to Requests for Clemency,* TEX. DISTRICT AND CNTY. ATT'YS ASS'N, http://www.tdcaa.com/journal/responding-requests-clemency (last visited Sept. 5, 2013); 37 TEX. ADMIN. CODE § 143.43

[281] 37 TEX. ADMIN. CODE § 143.42 (2013) ("Reprieve Recommended by the Board").

[282] 37 TEX. ADMIN. CODE § 143.43(l) (2013).

[283] 37 TEX. ADMIN. CODE § 143.57 (2013) ("Commutation of Death Sentence to a Lesser Penalty").

[284] *See* Clemency Petition of Robert Black Jr. (on file with author) (on file in the Capital Punishment Clemency Petitions collection in the M.E. Grenander Department of Specials Collections and Archives, University Libraries, University at Albany, SUNY); Clemency Petition of Troy Dale Farris (on file with author) (on file in the Capital Punishment Clemency Petitions collection in the M.E. Grenander Department of Specials Collections and Archives, University Libraries, University at Albany, SUNY).

[285] Lise Olsen, *Perry Uses Clemency Sparingly on Death Row; Governor Has Never Called Off an Execution on a Claim of Innocence; Clemency: Board Plays a Role*, HOUS. CHRON., Oct. 18, 2009, at A1.

Recommendation

Clemency is the last opportunity for a prisoner facing execution to receive a reprieve from this unalterable punishment. Accordingly, preparation and presentation of a clemency petition in death penalty cases requires skill and resources. Thus, the Texas Assessment Team recommends that Texas assign counsel to assist death row inmates in preparation and presentation of their clemency petitions. The State should ensure that funding is sufficient to compensate counsel and provide for investigative and expert resources. The effort to provide counsel and resources to clemency petitioners facing execution could be aided considerably by the use of law school clinics dedicated to investigation and presentation of materials in support of a commutation or reprieve for death row inmates petitioning for clemency.

H. Recommendation #10

Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant clemency.

A member of the Board and Pardons and Paroles may not perform their clemency responsibilities or participate in a Board meeting until s/he has completed training as outlined in Texas Government Code.[286] Individuals are required to complete at least one course training program which provides information on the following topics, among others: the enabling legislation that created the Board, the rules, budget, role and functions of the Board, and the Board's ethics policies and requirements of the conflict of interest laws.[287] Board members are not, however, required to participate in any training programs specific to clemency in death penalty cases.[288] Although the members are educated on the powers of the Board to grant clemency, it is unclear whether they participate in any specific training concerning the limitations on the judicial system's ability to grant relief under circumstances that might warrant clemency.

In addition, while Texas Governors may have taken a variety of factors into account when deciding to grant or deny clemency in death penalty cases, there is no indication that a formal process exists to educate Governors or their staff on the clemency process—including the fact that clemency often is the last and only opportunity to prevent miscarriages of justice due to the court system's inability to review many meritorious claims.

Finally, as described throughout this Chapter—and as noted by Judge Sam Sparks[289]—the public is provided little information on the clemency process in Texas. As a result of the lack of transparency surrounding clemency decisions, it appears the public is uninformed of the powers

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[286] TEX. GOV'T CODE ANN. § 508.0362 (Outlining the training requirements for persons who are qualified and appointed for office as a member of the board). *See also* TEX. BD. OF PARDONS AND PAROLES, SELF EVALUATION REPORT 12 (Sept. 2011), *available at* http://www.sunset.state.tx.us/83rd/ppb/ser.pdf.

[287] TEX. GOV'T CODE ANN. § 508.0362.

[288] *See id.*

[289] *See supra* notes 70–74 and accompanying text.

of the Board and Governor to grant or deny clemency and of the limitations on the courts to grant relief under some circumstances where clemency may be appropriate.

For the foregoing reasons, Texas is not in compliance with Recommendation #10.

Recommendation

As described throughout this Chapter, notwithstanding the oftentimes numerous appeals involved in death penalty cases, there are circumstances in which new facts bearing on the appropriateness of the death sentence have not been examined. Clemency decision-makers, many of whom may not be familiar with procedural obstacles erected in a capital case as it goes through the court system, should be made aware of this frailty of the criminal justice system that can result in a circumstance that is not reversible.

Accordingly, the Assessment Team recommends that Texas establish guidelines on the clemency process to be used by successive Board members and gubernatorial administrations. Though the following list is not meant to be exhaustive, such guidelines should encompass:

- A description of the clemency process, including training on the limitation on appellate courts to review the merits of legal claims and an explanation of the relationship between the judiciary's power to review cases and the executive's power to pardon;
- Examples of issues raised in past clemency cases which were not reviewed on the merits by the courts;
- Criteria used to assess the merits of a petition for clemency;[290]
- From whom the Governor's staff should seek consultation, such as the petitioner and his/her attorneys, the Texas Attorney General, and the prosecutor who tried the case; and
- Filing deadlines and other procedural matters.

The Assessment Team encourages members of the legal community—particularly current and former appellate judges—to be involved in the education and training of clemency decision-makers in accordance with the guidelines above. Further, these guidelines should be made available to all subsequent Board members, Governors, their staff, and all other parties engaged in the clemency process.

I. Recommendation #11

To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

It does not appear that clemency decisions are sufficiently insulated from political considerations or impacts in Texas. For example, members of the Board are appointed by the Governor who

[290] See Recommendations #3–7 for a detailed description of factors to be considered in evaluation of a capital clemency petition.

has the ability to remove any Board member at any time, for any reason.[291] With the exception of several disqualifying factors, the Governor has full discretion to appoint whomever s/he wishes to the Board. This near-absolute discretion can interfere with the Board's ability to independently review clemency applications and make objective recommendations to the Governor. As former Governor Bush described, Board members often share the Governor's political and ideological position—he appointed individuals "who are qualified, who share my conservative philosophy and approach to government . . . my appointees [to the Board] reflect my no-nonsense approach to crime and punishment."[292]

Furthermore, it appears the Governor's clemency power in death penalty cases, while circumscribed by the Board, has also often become part of the campaign rhetoric in gubernatorial elections. For example, in an advertisement for the gubernatorial election of 1990, Governor Mark White was shown walking down a hallway surrounded by photographs of men who were executed during his 1983–1987 administration and stated, "[o]nly a governor can make executions happen. I did, and I will."[293] Governor Perry also faced criticism for refusing to release an advisory memo from his general counsel regarding clemency for Cameron Todd Willingham on the eve of his execution, an action which later played an important role in the discussion of Willingham's possible innocence.[294]

Politicization of clemency decisions further diminishes the critical function of the Board and the Governor as the final safeguard to evaluate the fairness and judiciousness of the death penalty in the context of the crime and the offender. It also appears that politicization has led to "the accepted belief amongst the defense bar that members of [the Board] are effectively under instructions not to grant clemency in capital cases, that the clemency process is completely a public relations exercise designed to improve the Texas image."[295]

Accordingly, Texas is not in compliance with Recommendation #11.

Recommendation

As described under Recommendation #7, a set of standards the Board must follow in evaluating all capital clemency cases would serve to better insulate the Texas capital clemency process from political impacts or considerations. In addition, the Assessment Team recommends that Texas law be amended to prohibit dismissal of members of the Board of Pardons and Paroles without good cause. Furthermore, as mentioned in Recommendation #10, education of clemency decision-makers on the myriad bases for commutation of a death sentence could also serve to minimize the Board's consideration of political impacts in their deliberative processes.

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[291] TEX. GOV'T CODE ANN. § 508.037(c) (2011).

[292] George W. Bush, A CHARGE TO KEEP, 151 (1999).

[293] David Garland, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION, 292 (Oct. 2010). Former Governor Mark White is a member of the Texas Capital Punishment Assessment Team.

[294] *Id.*

[295] Joe Mario Trevino Clemency App. CAPITAL PUNISHMENT CLEMENCY PETITIONS, UNIV. OF ALBANY, at 31 (1999), *available at* http://library.albany.edu/speccoll/findaids/apap214/trevino_joemario.pdf.

CHAPTER TEN

CAPITAL JURY INSTRUCTIONS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the "awesome responsibility" of deciding whether another person will live or die.[1] Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors' decision-making. Sometimes, however, jury instructions are poorly written and conveyed. As a result, instructions may tend to confuse jurors, rather than communicate.[2]

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. Trial courts may give instructions that lead jurors to misunderstand their responsibility or to believe that reviewing courts independently will determine the appropriate sentence. In some cases, jurors may conclude that their decisions are not vitally important in determining whether a defendant will live or die.

Furthermore, courts must ensure that jurors do not act on the basis of serious misimpressions, such as a belief that a sentence of "life without parole" does not ensure that the offender will remain in prison for the rest of his/her life. Jurors holding this or other mistaken beliefs may vote to impose a death sentence because they erroneously assume any lesser sentence eventually will result in the release of the offender within some number of years.

Jurors also must understand the meaning of mitigation as well as their ability to bring mitigating factors to bear when considering capital punishment. Unfortunately, jurors often confuse mitigation with aggravation, or they may believe that they cannot consider evidence as mitigating unless it is proved beyond a reasonable doubt to the satisfaction of every member of the jury.

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[1] Caldwell v. Mississippi, 472 U.S. 320, 341 (1985) (quotations omitted).

[2] *See* William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003); *see also* James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial*, 16 LAW & HUM. BEHAV. 203, 204 (1992) (listing "[p]ast research . . . demonstrat[ing] jurors' inadequate comprehension of judges' instructions").

I. FACTUAL DISCUSSION

A. Jury Selection

The Texas Constitution provides that "[i]n all criminal prosecutions the accused shall have a speedy public trial by an impartial jury."[3] A defendant charged with capital murder may not waive his/her right to a jury trial if the prosecution seeks the death penalty.[4]
In a capital trial, the jury is composed of twelve jurors and two alternates.[5] Both the prosecution and the defendant are entitled to fifteen peremptory challenges during jury selection.[6] If two or more defendants are being tried together, the prosecution is entitled to eight peremptory challenges for each defendant, and each defendant is entitled to eight peremptory challenges.[7]
During jury selection, the trial court presents prospective jurors with "questions concerning the principles . . . of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion."[8] Upon request, the state and the defense are entitled to examine each juror individually and apart from the entire panel.[9]

Either the prosecution or the defense may challenge a potential juror for cause if s/he

(1) is not a qualified voter in the state; however, failure to register is not a disqualification;
(2) has been convicted of a misdemeanor theft or a felony;
(3) is under indictment or legal accusation of a misdemeanor theft or a felony;
(4) is insane;
(5) has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render the juror unfit for jury service, or that the juror is legally blind and the court in its discretion is not satisfied that the juror is fit for jury service in that particular case;
(6) is a witness in the case;
(7) served on the grand jury that found the indictment;
(8) served on a petit jury in a former trial of the same case;
(9) has a bias or prejudice in favor of or against the defendant;
(10) has an established conclusion as to the guilt or innocence of the defendant that would influence the juror in finding a verdict; or
(11) cannot read or write.[10]

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[3] TEX. CONST. art. I, § 10.
[4] TEX. CODE CRIM. PROC. ANN. art. 1.14(a) (2013).
[5] TEX. CODE CRIM. PROC. ANN. art. 35.26(b) (2013).
[6] TEX. CODE CRIM. PROC. ANN. art. 35.15(a) (2013). A peremptory challenge is one "made to a juror without assigning any reason therefor." TEX. CODE CRIM. PROC. ANN. art. 35.14 (2013). *See also* BLACK'S LAW DICTIONARY 1251 (9th ed. 2009) (defining *peremptory challenge* as "[o]ne of a party's limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex").
[7] TEX. CODE CRIM. PROC. ANN. art. 35.15(a) (2013).
[8] TEX. CODE CRIM. PROC. ANN. art. 35.17(2) (2013).
[9] *Id.*
[10] TEX. CODE CRIM. PROC. ANN. art. 35.16(a) (2013). In addition to the answers a juror provides during jury selection, the trial court may consider other evidence when assessing a for-cause challenge. TEX. CODE CRIM. PROC. art. 35.18 (2013).

If both parties consent and the for-cause challenge is not based on the second, third, or fourth grounds listed above, the grounds for challenge may be waived and the person may serve on the jury.[11] Additionally, the prosecution may challenge a juror for cause if the juror

(1) has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty;
(2) is related within the third degree to the defendant; or
(3) has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment.[12]

The defense may also challenge a potential juror for cause if the juror is related to the person injured by the commission of the offense, is related to any prosecutor in the case, or "has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation" of the punishment.[13]

B. Mandatory Jury Charges and Instructions in All Capital Cases

Article 37.071 of the Texas Code of Criminal Procedure specifies the sentencing procedures that must be followed in capital cases. If a defendant is found guilty of a capital offense[14] and the State seeks the death penalty, then "the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole. The proceeding shall be conducted in the trial court and . . . before the trial jury as soon as practicable."[15] "Evidence may be presented by the state and the defendant . . . as to any matter that the court deems relevant to [the] sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty."[16]

Once all evidence has been presented and the parties have had an opportunity to argue for or against a death sentence, specific procedures must be followed according to Article 37.071. In particular, subsection (b) requires the court to submit the following issue to the jury: "[W]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society[.]"[17] Furthermore, if the defendant has been convicted as a party to a capital-eligible offense or, instead, has been held criminally responsible for a capital-eligible offense committed by another person, then a second issue also must be submitted: "[W]hether the defendant actually caused the death of the deceased or did not actually cause the

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[11] TEX. CODE CRIM. PROC. ANN. art. 35.16(a), 35.19 (2013).
[12] TEX. CODE CRIM. PROC. ANN. art. 35.16(b) (2013).
[13] TEX. CODE CRIM. PROC. ANN. art. 35.16(c) (2013).
[14] Under Texas statutory law, a defendant commits a capital offense if s/he "intentionally or knowingly causes the death of an individual" and the prosecution establishes beyond a reasonable doubt any of the nine criteria enumerated in Texas's capital murder statute. *See* TEX. PENAL CODE ANN. § 19.03 (2013); *see also* Chapter One.
[15] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(1) (2013).
[16] *Id.*
[17] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (2013). The state explicitly is barred by the article from offering evidence "to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct." *Id.* at § 2(a)(2).

death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken."[18]

In presenting these special issues, the trial court must inform the jury of the State's burden to "prove each issue . . . beyond a reasonable doubt," and it must direct the jury to "return a special verdict of 'yes' or 'no' on each issue."[19] The court also must "charge the jury" that

> (1) in deliberating on [these] issues . . . it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;
> (2) it may not answer any [of these] issue[s] . . . "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree; and
> (3) members of the jury need not agree on what particular evidence supports a negative answer to any [of these] issue[s] . . . .[20]

If the jury unanimously answers "yes" to the issues presented under subsection (b), then it must resolve a third and final issue:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.[21]

As with the issues presented under subsection (b), the trial court must—in presenting this third and final issue[22] to the jury—instruct and charge the jury in accordance with the Texas Code of Criminal Procedure. First, the court must clarify for the jury the meaning of the "life imprisonment without parole" sentence:

> (A) [The court shall] instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the

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[18] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(2) (2013). *See also* TEX. PENAL CODE ANN. §§ 7.01–7.02 (2013).

[19] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(c) (2013). Incidentally, subsection (c) does not explicitly state that the jury must be charged as to the State's burden of proof, nor does it explicitly state that the jury must be told of the manner in which it must answer the special issues submitted under subsection (b). *Compare* TEX. CODE CRIM. PROC. ANN. art. 37.071, §2(b) (stating that "the court shall submit the following issues to the jury") *and* §2(d) (stating that "[t]he court shall charge the jury") (2013), *with* TEX. CODE CRIM. PROC. ANN. art. 37.071, §2(c) (2013) (stating that "[t]he state must prove" and that "the jury shall return").

[20] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(d) (2013).

[21] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013).

[22] The issues found in Article 37.071 of the Texas Code of Criminal Procedure often are referred to as "special issues." *See, e.g.*, Smith v. Texas, 543 U.S. 37, 38 (2004) (per curiam); Mosley v. State, 983 S.W.2d 249, 251 (Tex. Crim. App. 1998). Accordingly, this same nomenclature will be used throughout this Chapter.

court will sentence the defendant to imprisonment in the Texas Department of Criminal Justice for life without parole; and

(B) [the court shall] charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole.[23]

Second, subsection (f) specifies that the trial court must "charge the jury" that it

(1) shall answer the [third] issue "yes" or "no";
(2) may not answer the [third] issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;
(3) need not agree on what particular evidence supports an affirmative finding on the [third] issue; and
(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.[24]

In accordance with these provisions, pattern jury charges and instructions—for example, those suggested by a leading publication, *Texas Criminal Jury Charges*—make reference to each of the charges specified under Article 37.071.[25]

Finally, with respect to mandatory jury charges and instructions, Article 36.14 governs in capital and non-capital cases alike, and for both the guilt/innocence and penalty phases. This broadly-drafted provision requires the court to deliver to the jury "a written charge distinctly setting forth the law applicable to the case," and it further requires that the charge "not express[] any opinion as to the weight of the evidence, not sum[] up the testimony, discuss[] the facts or us[e] any argument . . . calculated to arouse the sympathy or excite the passions of the jury."[26]

C. Discretionary Jury Instructions in Capital Cases

Jurors in capital cases also may receive additional instructions either in the court's final charge or in subsequent communications with the court.[27] The Texas Court of Criminal Appeals has urged caution, however, with respect to trial courts' issuing additional instructions.[28] In

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[23] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(2) (2013).

[24] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f) (2013).

[25] *See* ELIZABETH BERRY, GEORGE GALLAGHER & PAUL MCCLUNG, TEXAS CRIMINAL JURY CHARGES § 4:460 (2009). *See also Jury Charges*, TEX. DIST. & CNTY. ATT'YS ASS'N, http://www.tdcaa.com/jury_charges (last visited May 22, 2013) ("Prosecutors should consider adopting the [State Bar of Texas's] criminal pattern jury charges and encouraging trial judges and defense attorneys to do the same.").

[26] TEX. CODE CRIM. PROC. art. 36.14 (2013).

[27] *See* TEX. CODE CRIM. PROC. ANN. arts. 36.14–36.16 (regarding the court's charge), 36.27 (regarding jury communications with the court) (2013).

[28] *See* Walters v. State, 247 S.W.3d 204, 213–14 (Tex. Crim. App. 2007) (finding a requested instruction to be "a marginally 'improper judicial comment' because it is simply unnecessary and fails to clarify the law for the jury"); Brown v. State, 122 S.W.3d 794, 802 (Tex. Crim. App. 2003) (agreeing that the instruction "intent or knowledge may be inferred by acts done or words spoken" "improperly tells the jury how to consider certain evidence before it," even though the instruction is "neutral and [] does not pluck out any specific piece of evidence" (internal quotations omitted)).

particular, "if [an] instruction is not derived from the [Texas] code, it is not 'applicable law'" and, therefore, neither party would be entitled to it.[29]

[29] *Walters*, 247 S.W.3d at 214.

II. ANALYSIS

A. Recommendation #1

> **Jurisdictions should work with attorneys, judges, linguists, social scientists, psychologists and jurors to evaluate the extent to which jurors understand instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand revised instructions to permit further revision as necessary.**

The State of Texas has not formally adopted pattern jury instructions for use in capital cases, although Texas law does impose certain requirements on trial courts with respect to capital jury instructions.[30] Instead, trial courts may rely on unofficial pattern instructions. For example, among the more widely accepted authorities is *Texas Criminal Jury Charges*,[31] first published in 1964 by Paul J. McClung and recently revised and updated by state judges Elizabeth Berry and George Gallagher.[32] In addition, the State Bar of Texas (SBOT) publishes its *Texas Criminal Pattern Jury Charges*, one volume of which pertains to "crimes against persons."[33] SBOT's *Texas Criminal Pattern Jury Charges* were "written by a committee consisting of members drawn from the bench, prosecutors' offices, defense practice, and academia."[34]

In practice, court instructions in capital cases vary from trial court to trial court. Typically, the contents of these instructions emulate the language contained in Texas's statutory law and may,

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[30] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. arts. 37.071 (prescribing the special issues that a capital jury must answer and prohibiting "[t]he court, the attorney representing the state, the defendant, or the defendant's counsel [from] inform[ing] a juror or a prospective juror of the effect of a failure of a jury to agree on [those] issues"), 36.14 (establishing requirements of, and limits to, the court's charge) (2013).

[31] *See* BERRY ET AL., *supra* note 25. The Texas Court of Criminal Appeals and several districts of the Texas Court of Appeals have cited favorably *Texas Criminal Jury Charges*. *See, e.g.*, Cobarrubio v. State, 675 S.W.2d 749, 751 n.8 (Tex. Crim. App. 1983), *overruled by* Lawrence v. State, 700 S.W.2d 208, 213 (Tex. Crim. App. 1985). Perez v. State, No. 03-01-00514-CR, 2002 WL 1289842, at *5 (Tex. App. June 13, 2002) (third district); Mendoza v. State, 61 S.W.3d 498, 505 (Tex. App. 2001) (fourth district); Johnson v. State, No. 05-95-01024-CR, 1999 WL 1268056, at *7 n.6 (Tex. App. Dec. 30, 1999) (fifth district); Walters v. State, 206 S.W.3d 780, 783 n.3 (Tex. App. 2006) (sixth district), *vacated*, 247 S.W.3d 204 (Tex. Crim. App. 2007); Ratheal v. State, No. 07-97-0353-CR, 1998 WL 847584, at *1 n.1 (Tex. App. Dec. 8, 1998) (seventh district); North v. State, No. 08-05-00248-CR, 2007 WL 416691, at *9 (Tex. App. Feb. 8, 2007) (eighth district); Hernandez v. State, 10 S.W.3d 812, 819 (Tex. App. 2000) (ninth district); Lankford v. State, 255 S.W.3d 275, at 280 n.5 (Tex. App. 2008) (tenth district); Fox v. State, No. 13-03-230-CR, 2006 WL 2521622, at *4 n.32 (Tex. App. Aug. 31, 2006) (eleventh district); Lacaze v. State, 346 S.W.3d 113, 119 (Tex. App. 2011) (fourteenth district). *But see* Middleton v. State, 125 S.W.3d 450, 454 (Tex. Crim. App. 2003) (impliedly disagreeing with the recommendation from *Texas Criminal Jury Charges* that "probable cause" be defined for a jury); Johnson v. State, 739 S.W.2d 299, 305 n.4 (Tex. Crim. App. 1987) (explicitly criticizing the pattern instruction on alternative theories of culpability for "fail[ing] [to] sufficiently inform [] the jury which specific mode or modes of conduct enumerated [under Texas law] . . . may form an alternative basis for conviction").

[32] *Texas Criminal Jury Charges—About the Authors*, JAMES PUBL'G, http://www.jamespublishing.com/bios/tjcbio.htm (last visited May 22, 2013).

[33] *See Jury Charges*, TEX. DISTRICT & CNTY. ATT'YS ASS'N, http://www.tdcaa.com/jury_charges (last visited May 22, 2013).

[34] *Texas Criminal Pattern Jury Charges—Crimes Against Persons*, STATE BAR OF TEX., http://texasbarbooks.net/texas-pattern-jury-charges/crimes-against-persons (last visited May 22, 2013).

at times, be modified after input from the prosecution and the defense.[35] It is clear that there is variation throughout the state with respect to the instructions given in capital cases.[36]

Moreover, Texas case law presumes that juries "follow the instruction[s] as given," and appellate courts as a rule will not sustain challenges to trial court instructions "in the absence of evidence that the jury was actually confused by the charge."[37] The Texas Assessment Team is not aware of any state-sponsored effort to evaluate the coherency of instructions in death penalty cases.

Texas's failure to investigate the clarity of the instructions used in capital cases is concerning. Numerous nationwide studies have revealed that jurors, particularly jurors participating in capital cases, often do not understand the applicable law articulated in these instructions.[38] Since 1991, the Capital Jury Project has interviewed 1,198 jurors who have served in 353 capital trials in fourteen states, including Texas.[39] Texas-specific data compiled by the Project indicate that jurors in Texas death penalty cases are no exception to this troubling nationwide reality.[40]

For example, 18.7% of interviewed Texas capital jurors failed to understand that aggravating circumstances needed to be found beyond a reasonable doubt.[41] Moreover, high percentages of these jurors misunderstood the guidelines for considering mitigating evidence.[42] In particular, 39.6% of Texas jurors "failed to understand . . . that they [could] consider any mitigating evidence" while 66% of interviewed jurors "incorrectly thought [that] they had to be convinced beyond a reasonable doubt on findings of mitigation."[43] Finally, and in contrast to the U.S.

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[35] *See, e.g.*, Texas v. Turner, No. 54,233 (Tex. Dist. Ct. Fort Bend Cnty. June 7, 2011) (tracking statutory language); Texas v. Mullis, No. 08-CR0333 (Tex. Dist. Ct. Galveston Cnty. Mar. 21, 2011) (largely tracking statutory language, but including instruction on evidence of extraneous crimes or bad acts); Texas v. Cole, No. 1250754 (Tex. Dist. Ct. Harris Cnty. Oct. 27, 2011) (largely tracking statutory language, but including instruction inhibiting the consideration of mercy, as well as instruction that State is not required to prove future dangerousness "beyond all possible doubt"); Texas v. Batiste, No. 1212366 (Tex. Dist. Ct. Harris Cnty. June 23, 2011) (same).

[36] *Compare* Texas v. Rockwell, No. 1195088D (Tex. Dist. Ct. Tarrant Cnty. Jan. 26, 2012) (ten pages of instructions divided into ten parts), *with* Texas v. Hummel, No. 118429D (Tex. Dist. Ct. Tarrant Cnty. June 28, 2011) (six pages of instructions with no division into parts).

[37] Williams v. State, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996) (citing Rose v. State, 752 S.W.2d 529, 554 (Tex. Crim. App. 1987) (plurality opinion)). It also is the case that "[n]ormally, if the instruction is not derived from the [Texas] code, it is not 'applicable law'" and, therefore, neither party would be entitled to it. Walters v. State, 247 S.W.3d 204, 214 (Tex. Crim. App. 2007).

[38] *See, e.g.*, William J. Bowers et al., *Jurors' Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence*, 46 CRIM. L. BULL. 1147, 1151–52 (2010) (summarizing certain findings of the Capital Jury Project, including that jurors "[f]ail[] to understand sentencing requirements" and "[m]istakenly believ[e] the death penalty is required by law"); James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial*, 16 LAW & HUM. BEHAV. 203, 204 (1992) (listing "[p]ast research . . . demonstrat[ing] jurors' inadequate comprehension of judges' instructions").

[39] *What is the Capital Jury Project?*, CAPITAL JURY PROJECT, http://www.albany.edu/scj/13189.php (last visited May 22, 2013).

[40] *See, e.g.*, William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 73 (2003) (Texas-specific data). The Capital Jury Project "collect[s] . . . information about jury decision making from in-depth interviews with jurors who have actually served in capital trials around the nation." *Id.* at 55.

[41] *Id.* at 68, 71.

[42] *Id.*

[43] *Id.*

Supreme Court's holding in *Mills v. Maryland*, 72.9% of Texas jurors incorrectly assumed that any findings on mitigation had to be unanimous.[44]

Interviewed Texas capital jurors also held erroneous beliefs about whether the death penalty is required. As described in a 2003 study summarizing Capital Jury Project methodologies and findings,

> [interviewed] jurors were asked whether the evidence in their case established that the defendant's crime was "heinous, vile or depraved" and whether the defendant would be "dangerous in the future." . . . Jurors were then asked whether, after hearing the judge's sentencing instructions, they thought the law *required them to impose death* if the defendant's crime was "heinous, vile or depraved" or if the defendant would be "dangerous in the future."[45]

In reply, 44.9% of Texas capital jurors believed that death was required if the defendant's crime was "heinous, vile or depraved."[46] Moreover, 68.4% believed that death was required if the defendant would be "dangerous in the future," the highest percentage among the fourteen jurisdictions surveyed by the Capital Jury Project.[47] This is in spite of the fact that, as a matter of federal and state law, a finding of future dangerousness can never suffice to *require* the death penalty.[48]

Because Texas has not worked to improve jurors' understanding of the instructions used in capital cases, the state is not in compliance with Recommendation #1.

Recommendation

As suggested by the Capital Jury Project's data, it is imperative that the State of Texas take steps to revise the instructions typically given in capital cases. Texas should, at a minimum, provide better clarity on issues clearly identified as problematic by the Capital Jury Project, such as juror comprehension of the burden proof at various points in the capital decision-making phase, that jurors need not be unanimous on their findings of mitigation, and that imposition of a death sentence is never required, notwithstanding a finding that the defendant poses a future danger.

These steps should also include promulgating instructions, with input from attorneys, judges, linguists, social scientists, psychologists, and jurors, to ensure that jurors better understand their roles and responsibilities in death penalty cases. The Supreme Court of Texas, for example, recently revised pattern jury instructions in civil cases "'in plain language that jurors are more

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[44] *Id.*; *see also* Mills v. Maryland, 486 U.S. 367, 384 (1988).

[45] Bowers & Foglia, *supra* note 40, at 72 (emphasis added).

[46] *Id.* at 73. Notably, the heinousness, vileness, or depravity of a crime are not mentioned as aggravating circumstance under Texas law.

[47] *Id.* at 72–73. After Texas, 52.1% of interviewed Alabama capital jurors erroneously believed that the law required them to impose death if the defendant would be "dangerous in the future." *Id.* at 72. *See also* Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1032–33 (2001).

[48] *See* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 336 (1976); TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013).

likely to understand and therefore to follow.'"[49] Any official pattern instructions[50] must do more than recite the language of the Texas Code of Criminal Procedure. For example, official pattern instructions could also clarify important legal concepts in plain language, as the Florida Supreme Court sought to achieve with the 2009 revision of its *Standard Jury Instructions in Criminal Cases*.[51]

Finally, Texas must monitor closely and continually whether any changes to these instructions ameliorate jurors' tendency to misunderstand their "awesome responsibility."

B. Recommendation #2

Jurors should receive written copies of "court instructions" (referring to the judge's entire oral charge) to consult while the court is instructing them and while conducting deliberations.

Article 36.18 of the Texas Code of Criminal Procedure provides that "[t]he jury may take to their jury room the charges given by the court after the same have been filed."[52] Although the article is cast in discretionary language and allows the jury to deliberate without having received a copy of the court's instructions, it is the routine practice of Texas's trial courts to provide jurors with the court's instructions.[53] It does not appear, however, that jurors receive these copies "while the court is instructing them." Article 36.18 permits jurors to "take to their jury room the charges given by the court *after the same have been filed*," and the timing of this filing appears to occur after the charges have been "given by the court."[54]

Accordingly, the State of Texas partially complies with Recommendation #2.

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[49] Mary Alice Robbins, *Jury Instructions in Plain Language Included in Proposed Amendments to Texas Rules of Civil Procedure*, TEX PARTE BLOG, Dec. 14, 2010, http://texaslawyer.typepad.com/texas_lawyer_blog/2010/12/jury-instructions-in-plain-language-included-in-proposed-amendments-to-texas-rules-of-civil-procedur.html (quoting Kennon L. Peterson, Rules Att'y, Sup. Ct. of Tex.).

[50] Official pattern instructions should not, however, be understood as representing all that the trial court may communicate to the jury in a capital case. *See* Recommendation #3, *infra* notes 55–74, and accompanying text.

[51] *See In re* Standard Jury Instructions in Criminal Cases, 22 So.3d 17 (Fla. 2009) (per curiam) (authorizing changes to Florida's standard jury instructions to improve juror comprehension in capital cases). For example, the Florida Supreme Court amended a penalty phase instruction to alert the jury that it is "neither compelled nor required to recommend death." *See* FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 7.11 (2013).

[52] TEX. CODE CRIM. PROC. ANN. art. 36.18 (2013). The second and final sentence of Article 36.18 prohibits the jury from "tak[ing] with them [to their jury room] any charge or part thereof which the court has refused to give." *Id.*

[53] *See* Jones v. State, 220 S.W.2d 156, 161 (Tex. Crim. App. 1949) (noting that the Code of Criminal Procedure uses "the word 'may' . . . and not the word 'shall'" and finding that a jury is not "required to have such charge in their physical possession all during their deliberations"); *see also* Thomason v. State, 160 S.W. 359, 361 (Tex. Crim. App. 1913) ("Neither is any reversible error shown in the fact that in some way inadvertently the jury failed to take with them one of appellant's special charges . . . . By the approval of the charge by the court and giving and reading it to the jury, the appellant got the full benefit thereof."). *But see* TEX. CODE CRIM. PROC. ANN. art. 36.19 (2013) (referring to the "requirement[s]" of Articles 36.14, 36.15, 36.16, 36.17, and 36.18).

[54] TEX. CODE CRIM. PROC. ANN. arts. 36.18 (emphasis added), 36.17 (2013). *See, e.g.*, Brossette v. State, 99 S.W.3d 277, 283–84 (Tex. App. 2003) (recounting the trial court's remark to the jury, prior to reciting the court's charge, that the jury need not "'panic because the copy of this charge will go with you to the jury room so you don't have to memorize it as you hear it'").

C. Recommendation #3

Trial courts should respond meaningfully to jurors' requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors' questions about applicable law.

As discussed under Recommendation #1, jurors in capital cases routinely struggle to understand jury instructions.[55] Their confusion may be attributed to a number of factors, including "the syntax of the instructions, the manner of presentation, and the general unfamiliarity of laypersons with legal terminology."[56] Accordingly, judges must respond meaningfully to jurors' requests for clarification of the instructions to ensure that jurors comprehend and are able to apply applicable law.

The Texas Code of Criminal Procedure establishes the procedures by which the jury may communicate with the court. Specifically, "[a]ny communication relative to the cause must be written, prepared by the foreman and shall be submitted to the court through the bailiff."[57] The provision also requires the court to "answer any such communication in writing."[58] In responding to a jury's request for clarification, however, a judge retains significant discretion to respond "as he deems proper."[59] If a question to the court is deemed improper, "the court should inform the jury that their request is not proper by referring to the court's charge."[60] Accordingly, trial court judges retain broad discretion to determine the proper response to these requests for clarification.[61]

For example, in *Richard v. State*, a capital murder case in which the defendant and two accomplices were tried for murdering a restaurant employee in the course of a robbery, the jury sought "clarification on the difference of failing to stop vs. intent to aid."[62] The judge's only

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[55] *See* Recommendation #1, *supra* notes 38–47, and accompanying text (describing the Texas-specific findings of the Capital Jury Project). *See also* James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial*, 16 LAW & HUM. BEHAV. 203, 204 (1992) (listing "[p]ast research . . . demonstrat[ing] jurors' inadequate comprehension of judges' instructions); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 10–11 ("[L]inguists, psychologists, and other academics have shown that jurors tend to have great difficulty understanding the instructions that are supposed to guide their decision-making.").

[56] Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 550 (1994). *See also* Tiersma, *supra* note 55, at 13–19 (discussing evidence that jurors often do not appreciate the meaning of the words *mitigate* and *mitigation*).

[57] TEX. CODE CRIM. PROC. ANN. art. 36.27 (2013).

[58] TEX. CODE CRIM. PROC. ANN. art. 36.27 (2013).

[59] TEX. CODE CRIM. PROC. ANN. art. 36.27 (2013).

[60] Gamblin v. State, 476 S.W.2d 18, 20 (Tex. Crim. App. 1972) (citing Walker v. State, 440 S.W.2d 653 (Tex. Crim. App. 1969); Allaben v. State, 418 S.W.2d 517 (Tex. Crim. App. 1967)).

[61] *Cf.* Boyle v. United States, 129 S.Ct. 2237, 2244 (2009) ("A trial judge has considerable discretion in choosing the language of an instruction so long as the substance of the relevant point is adequately expressed."); Walters v. State, 247 S.W.3d 204, 214 (Tex. Crim. App. 2007) ("Normally, if the instruction is not derived from the code, it is not 'applicable law.'").

[62] Richard v. State, 830 S.W.2d 208, 214 (Tex. App. 1992) (internal quotations omitted). In *Richard*, the distinction between "failing to stop" the killing and "intending to aid" the killing was meaningful in light of section 6.01(c) of the Texas Penal Code, which read: "A person who omits to perform an act does not commit an offense unless a statute provides that the omission is an offense or otherwise provides that [the person] has a duty to perform

reply to the jury was, "Please refer to the court's charge."[63] Finding the charge had given a "correct statement of the law," the Court of Appeals upheld the judge's refusal to clarify the distinction between a failure to prevent a killing and an intent to aid in the commission of a killing—a distinction of unmistakable significance in determining the defendant's culpability for the restaurant employee's death.[64]

Similarly, in *McFarland v. State*, the trial court refused to supply the jury with a definition of "society" as that word is used in the future dangerousness special issue, which the jury decides before the defendant receives his/her sentence of death or life without possibility of parole.[65] The Texas Court of Criminal Appeals "has repeatedly held that . . . the jury is presumed to understand [terms such as 'probability,' 'criminal acts of violence,' and 'continuing threat to society'] without an instruction."[66] The Court also concluded, in *Middleton v. State*, that no definition of "probable cause" needed to be supplied to the jury, despite the fact that "the term probable cause has different meanings in different contexts and is not commonly defined in such a way that permits jurors to know its meaning and apply it easily."[67]

In addition, Texas trial courts also reject efforts by counsel to improve clarity through proposed supplemental instructions.[68] In *Patrick v. State*, for example, the trial court declined to define several key words and phrases in the "future dangerousness" special issue as requested by the defense, a decision later upheld by the Texas Court of Criminal Appeals.[69] Regardless of the wisdom or appropriateness of the defenses' suggestions in *Patrick*, the proposed instructions sought to address concerns that lay jurors would misunderstand the trial court's charge, evidence for which may be found in the results of the Capital Jury Project's research efforts in Texas and elsewhere.[70]

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the act." TEX. PENAL CODE ANN. § 6.01(c) (1989). If, as the defendant argued, he did not have a legal duty to prevent his accomplices from killing the victim, then the jury's merely finding that he "failed to stop" the killing would have been insufficient to support a guilty verdict. *Richard*, 830 S.W.2d at 214.

[63] Richard v. State, 830 S.W.2d 208, 214 (Tex. App. 1992) (internal quotations omitted).

[64] *Id.*

[65] McFarland v. State, 928 S.W.2d 482, 517 (Tex. Crim. App. 1996), *abrogated on other grounds by* Mosley v. State, 983 S.W.2d 249, 264 (Tex. Crim. App. 1998).

[66] Murphy v. State, 112 S.W.3d 592, 606 (Tex. Crim. App. 2003) (citing Feldman v. State, 71 S.W.3d 738, 757 (Tex. Crim. App. 2002); Ladd v. State, 3 S.W.3d 547, 572 (Tex. Crim. App. 1999)); *see also* Russeau v. State, 291 S.W.3d 426, 434 (Tex. Crim. App. 2009) (presuming that the jury understands the word *militate* as it appears in the mitigation special issue); *id.* at 435 (holding that "the jury is presumed to understand the phrase ['continuing threat to society'] without further instruction"). *But see* Elizabeth S. Vartkessian, *Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to Be Unreceptive to Mitigation Evidence*, 29 QUINNIPIAC L. REV. 237, 260–62 (2011) (describing, after reviewing eight capital case transcripts and interviewing jurors involved in those cases, "how influential [voir dire] is" with respect to shaping jurors' understanding of the special issues and their associated terminology).

[67] Middleton v. State, 125 S.W.3d 450, 460 (Tex. Crim. App. 2003) (Price, J., dissenting).

[68] Both the prosecution and the defense may request additional or "special" charges under Article 36.15 of the Texas Code of Criminal Procedure. *See* TEX. CODE CRIM. PROC. ANN. art. 36.15 (2013).

[69] Patrick v. State, 906 S.W.2d 481, 494 (Tex. Crim. App. 1995) ("We have repeatedly noted that neither is our statute unconstitutionally vague for failure to define the terms of which appellant complains, nor need the trial court give the jury definitions for terms which it is presumed they understand.") (citing Boyd v. State, 811 S.W.2d 105 (Tex. Crim. App. 1991); Fearance v. State, 771 S.W.2d 486 (Tex. Crim. App. 1988); King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977)).

[70] *See* Recommendation #1, *supra* notes 38–47 and accompanying text (describing the Texas-specific findings of the Capital Jury Project).

Case outcomes often depend upon jurors' proper understanding of the instructions they have been given, yet these cases illustrate a broad tendency in Texas to resist clarifying jury instructions, regardless of whether the request for clarification was made by the jury or the defendant. For example, in *Overton v. State* the jury found the defendant guilty of capital murder for the death of her foster child, a death precipitated by sodium poisoning.[71] Yet "all twelve members [of the jury] stated [in post-trial interviews] that they had found [the defendant] guilty of capital murder by omission for not acting quickly enough to save [her foster child]; none believed that she had poisoned him."[72] As one juror asserted in an affidavit filed with the defendant's appeal, "The jury found that [the defendant] failed to procure medical care within a reasonable time frame . . . . It seemed to me, based upon the wording of the charge, that we had no choice but to find her guilty of capital murder."[73]

While trial courts may respond meaningfully to jurors' requests for clarification of instructions, Texas law permits trial courts to refuse to clarify legal concepts that are of the utmost importance during the penalty phase of a capital case. Moreover, in light of the Texas Court of Criminal Appeals' general disfavor of additional, clarifying instructions,[74] trial courts may be reluctant to offer such instructions for fear of reversal on appeal—in other words, despite their discretion to do otherwise, trial courts have an incentive *not* to provide additional guidance, even if it is needed.

The State of Texas, therefore, only partially complies with Recommendation #3.

The Assessment Team acknowledges that juror questions pose a difficult challenge to trial judges—in particular, in seeking to clarify jurors' understanding of the relevant issues, a judge who deviates substantially from statutory language risks creating reversible error. The inclination on the part of judges to avoid this risk underscores the importance of alleviating, in the first instance, jurors' confusion as to their roles and responsibilities through revised capital case instructions (as prescribed by the Assessment Team under Recommendation #1). In so doing, not only will the clarity of instructions and quality of decision-making be improved, the need for judges to respond to individual juror questions may be obviated altogether.

D. Recommendation #4

> **Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.**

Recommendation #4 includes two distinct yet related requirements: first, trial courts must provide clear jury instructions concerning alternative punishments; second, trial courts must

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[71] Overton v. State, No. 13-07-00735-CR, 2009 WL 3489844, *11, 19 (Tex. Crim. App. Oct. 29, 2009) (unpublished).

[72] Pamela Colloff, *Hannah and Andrew*, 40 TEX. MONTHLY 108 (2012).

[73] *Id.* (internal quotations omitted).

[74] *Walters*, 247 S.W.3d at 214 (holding that, "if [an] instruction is not derived from the [Texas] code, it is not 'applicable law'" and, therefore, neither party would be entitled to it).

allow testimony concerning parole practices to be admitted during the sentencing phase of a capital trial.

Instructions on Alternative Punishments

As a matter of statutory law, Texas trial courts must instruct jurors on the two available punishments in a capital case: "imprisonment . . . for life without parole or [] death."[75] Before a death sentence will be imposed, a jury must unanimously answer "no" to the third special issue articulated in Article 37.071 of the Texas Code of Criminal Procedure, which reads:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.[76]

Furthermore, the trial court is compelled, also under Article 37.071, to "instruct the jury that[,] if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the Texas Department of Criminal Justice for life without parole."[77]

Article 37.071 of the Texas Code of Criminal Procedure requires trial courts to "charge the jury that a defendant sentenced to confinement for life without parole . . . is ineligible for release from the department on parole."[78] This is in accordance with the U.S. Supreme Court's holding in *Simmons v. South Carolina*, which held that "where [a] defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."[79]

In addition, the version of Article 37.071 in effect from September 1, 1999, through August 31, 2005, when life without possibility of parole became the only alternative sentence to capital murder, required trial judges in capital cases to "charge the jury in writing" that

> [u]nder the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not

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[75] TEX. PENAL CODE ANN. § 12.31(a) (2013).

[76] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013).

[77] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(2)(A) (2013). Prospective jurors likewise are informed of these two available punishments in capital cases. TEX. PENAL CODE ANN. § 12.31(b) (2013) ("In a capital felony trial in which the state seeks the death penalty, prospective jurors shall be informed that a sentence of life imprisonment without parole or death is mandatory on conviction of a capital felony.").

[78] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(2)(B) (2013).

[79] Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (plurality opinion); *see also id.* at 178 (O'Connor, J., concurring) ("Where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible.").

> until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.[80]

As the instructions above each describe clearly the applicable law concerning alternative punishments in death penalty cases, Texas currently complies with the first requirement of Recommendation #4.

Parole and Parole Practices Testimony

Jurors often are concerned that they might err on the side of leniency, particularly in capital cases.[81] This concern on the part of jurors, coupled with the widely-held yet mistaken belief that a defendant sentenced to life without possibility of parole will one day be freed,[82] compels capital defendants to proffer parole practices testimony. In Texas, it appears that trial courts have discretion to admit such testimony.

Although parole once was held "not [to be] a proper consideration for jury deliberation on punishment in a capital murder trial,"[83] changes to Texas's death penalty sentencing procedures have led to changes with respect to parole practices testimony.[84] For example, capital jurors have received insight into the workings of Texas's parole practices through argument and testimony, as in *Roberts v. State*.[85]

On the other hand, in *Renteria v. State*—a capital case prosecuted under the same Article 37.071 as in *Roberts*—the Texas Court of Criminal Appeals narrowed its approval of parole practices testimony. Defense counsel had sought to inform the jury that, if the defendant received a "stacked life sentence, then the 40-year minimum [articulated in the written charge under Article 37.071] becomes a myth," as the defendant "would have to do more than 40 [years] before

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[80] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(2)(B) (2004) (internal quotations omitted).

[81] *See generally* William J. Bowers & Margaret Vandiver, *In Their Own Words: How Capital Jurors Explain Their Life or Death Sentencing Decisions*, Capital Jury Project Working Paper No. 6 (May 26, 1992) (unpublished).

[82] *See* Shari Seidman Diamond, *Instructing on Death: Psychologists, Juries, and Judges*, 48 AM. PSYCHOLOGIST 423, 429 (1993) (finding that "only half of the jurors [questioned in the study] said they believed that [a] defendant would die in prison if [s/]he received [a] a sentence [of life in prison without the possibility of parole]").

[83] *Jones*, 843 S.W.2d at 495 (internal quotations omitted).

[84] *See* Act of June 17, 2005, ch. 787, 2005 Tex. Reg. Sess. Law Serv. 5124; Sells v. State, 121 S.W.3d 748, 756 (Tex. Crim. App. 2003) (assuming, without deciding, that the statutory change renders questioning about parole permissible in some situations).

[85] *See, e.g.*, Roberts v. State, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007) (in a capital case, noting that the defense had "elicit[ed] testimony concerning the procedures of the Parole Board and the factors taken into account in determining whether to release someone"). *See also* Ripkowski v. State, 61 S.W.3d 378, 393 (Tex. Crim. App. 2001) (in a capital case, noting that the defense had "called as a witness William Baker, a regional supervisor for the Texas Department of Criminal Justice—Parole Division, who testified to the forty year eligibility requirement" and other aspects of Texas's parole practices). The version of Article 37.071 in effect during Ripkowski's capital trial did not require trial judges to deliver a written charge respecting parole practices, but *Roberts* indicates that, even after Article 37.071's modification in 1999 to include the mandatory charge, parole practices testimony remained admissible.

becoming eligible for release on parole."[86] The Texas Court of Criminal Appeals upheld the trial court's exclusion of proffered testimony from two defense witnesses regarding "the minimum amount of time [that the capital defendant] would spend in prison,"[87] agreeing that judicial stacking of the defendant's preexisting, non-capital sentences with a life sentence for his capital offense remained "speculative."[88] "[P]arole," the *Renteria* Court unanimously held, "is not a proper issue for jury consideration except to the extent explicitly provided for in Article 37.071, Section 2(e)(2)(B)."[89]

Importantly, *Renteria* is both an unpublished and recent opinion of the Texas Court of Criminal Appeals. It also articulated the Court's view of an older version of Article 37.071, which—as mentioned—now requires trial courts to "charge the jury that a defendant sentenced to confinement for life without parole . . . is ineligible for release from the department on parole."[90] Nevertheless, it is clear that capital jurors continue to receive charges pertaining to parole, and they may also hear testimony pertaining to parole practices.[91] What remains unclear is the extent to which trial courts may refuse to permit this testimony and, if so, whether the Texas Court of Criminal Appeals will regard this refusal as an abuse of the trial court's discretion.[92]

The Assessment Team is troubled, however, by the prosecution's use of parole practices testimony. In *Ruiz v. State*, for example, the prosecution presented such testimony to "emphasiz[e] . . . appellant's parole *ineligibility*, in an attempt to persuade the jury that, in the absence of the 'incentive' of parole to regulate his behavior, the appellant would be more likely to commit acts of violence in the penitentiary."[93] Empirical evidence contradicts this assertion.[94] Furthermore, in *Ruiz* and other cases, prosecutors also have attempted to undermine the permanency of a life without parole sentence by stressing the law's mutability.[95] This conduct gravely injures jurors' clarity with respect to current law.

Because Texas trial courts retain broad discretion to disallow parole practices testimony proffered by the defense, Texas does not comply with the second requirement of Recommendation #4. In addition, permitting the prosecution to use parole practices testimony in

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[86] Renteria v. State, No. AP-74829, 2011 WL 1734067, at *44 (Tex. Crim. App. May 4, 2011) (internal quotations omitted).

[87] *Id.* at *42 (internal quotations omitted).

[88] *Id.* at *46.

[89] *Id.* at *45.

[90] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(2)(B) (2013).

[91] *See* Ruiz v. State, No. AP-75968, 2011 WL 1168414, at *6–8 (Tex. Crim. App. Mar. 2, 2011) (recounting a colloquy, between the prosecution and its witness, pertaining to parole practices); Estrada v. State, 313 S.W.3d 274, 286 (Tex. Crim. App. 2010).

[92] *See Renteria*, 2011 WL 1734067, at *46 (citing Shuffield v. State, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006)).

[93] *Ruiz*, 2011 WL 1168414, at *8 n.42 (emphasis in original).

[94] *See* Jonathan R. Sorensen & Robert D. Wrinkle, *No Hope for Parole: Disciplinary Infractions Among Death-Sentenced and Life-Without-Parole Inmates*, 23 CRIM. JUST. & BEHAV. 542 (1996). *See also* James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC'Y REV. 449, 466 (1989).

[95] *See, e.g.*, *Ruiz*, 2011 WL 1168414, at *6–8. *See also Roberts*, 220 S.W.3d at 533 (recounting a similar argument made by the prosecution when, in lieu of a death sentence, a capital defendant could receive a life sentence but be eligible for parole after serving forty years); Robles v. State, No. AP-74726, 2006 WL 1096971, at *9–10 (Tex. Crim. App. Apr. 26, 2006) (same).

the manner described above may contribute to—rather than alleviate—juror misunderstanding of alternative sentences in death penalty cases.

Accordingly, the State of Texas only partially complies with Recommendation #4.

E. Recommendation #5

Trial courts should not place limits on a juror's ability to give full consideration to any evidence that might serve as a basis for a sentence less than death.

Several aspects of Texas's capital case procedures effectively diminish the jury's understanding of, and ability to give effect to, mitigating circumstances—that is, evidence that might serve as a basis for a sentence less than death.[96] Among these aspects are (1) the central role of the "future dangerousness" special issue in determining a capital defendant's sentence; (2) the process by which a death-qualified jury is selected; and (3) the approach taken by trial courts with respect to sentencing-phase instructions.

Future Dangerousness

A Texas capital case proceeds in marked contrast to capital cases in other jurisdictions.[97] In most states, jurors must weigh aggravating and mitigating circumstances to determine whether a defendant convicted of capital murder should receive the death penalty. In Texas, jurors are first asked to determine if the defendant represents a future danger to society; only after deciding unanimously that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" will the jury consider whether any evidence in mitigation supports a sentence less than death.[98] As a result of this structure, the defendant's alleged future dangerousness is placed "at the center of the jury's punishment decision."[99]

Among the first states to rewrite its capital sentencing laws in the wake of the U.S. Supreme Court's 1972 decision in *Furman v. Georgia*, Texas revised its penal code in 1973 to include, during the sentencing phase of a capital trial, the "future dangerousness" special issue.[100] Based on the recollection of lawmakers, as well as independent research into the history of the Sixty-Third Texas Legislature, it is apparent that the revision received little scrutiny: the conference committee report that included, for the first time, the "future dangerousness" special issue

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[96] *See* Tennard v. Dretke, 542 U.S. 274, 278 (2004) ("'It is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing the sentence.' Penry [v. Lynaugh, 492 U.S. 302, 319 (1989)] . . . .").

[97] Of the thirty-three states with the death penalty, Oregon is the only jurisdiction to employ a capital punishment sentencing procedure like the Texas model. *See* Stephen Kanter, *Confronting Capital Punishment: A Fresh Perspective on the Constitutionality of the Death Penalty Statutes in Oregon*, 36 Willamette L. Rev. 313, 316-318 (2000). As of May 2013, the Governor of Oregon has maintained a moratorium on executions in the state. Peter Wong, *Haugen to Return to Court*, STATESMAN J. (Salem, Or.), July 22, 2012, at A1, *available at* 2012 WLNR 15482882.

[98] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)–(e) (2013).

[99] Vartkessian, *supra* note 66, at 239–40.

[100] *See* Act of June 14, 1973, ch. 426, art. 3, § 1, 1973 Tex. Reg. Sess. Law Serv. 1122, 1125 (West) (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 37.071 (2013)).

quickly passed the Texas Senate and House of Representatives, and in neither body was the new "future dangerousness" language discussed.[101]

The "future dangerousness" special issue is problematic in several respects. For example, there is no specific explanation of the meaning of "probability,"[102] "criminal acts of violence" or "society," resulting in jurors broadly applying the future dangerousness special issue to a wide range of facts and circumstances.[103] However, the remainder of this analysis will focus principally on two concerns regarding the "future dangerousness" special issue: the unreliability of the underlying science and the undue persuasive effect of questionable expert testimony.

The Unreliability of the Underlying Science

Deciding whether to impose a death sentence on a prediction regarding the defendant's future dangerousness rests on the assumption that an individual's future dangerousness *can* be predicted. This assumption is belied by a wealth of social scientific research.[104] The American Psychiatric Association (APA), for example, has maintained, as far back as 1983, that "psychiatric testimony on future dangerousness impermissibly distorts the fact-finding process in capital cases" because "[t]he forecast of future violent conduct on the part of a defendant in a capital case is, at bottom, a lay determination, not an expert psychiatric determination."[105]

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[101] *See* Kathy Walt, *Debate over Death Penalty Is Renewed; Predicting Future Threats Raises Question of Flaws*, HOUS. CHRON., July 9, 2000, at B1 (recounting how, according to state representative Craig Washington's recollection, the "future dangerousness" special issue was added to the legislation reinstituting the death penalty in Texas "'on the spur of the moment in conference committee'"); Eric F. Citron, Note, *Sudden Death: The Legislative History of Future Dangerousness*, 25 YALE L. & PUB. POL'Y REV. 143, 173–74 (2006). For an in-depth review of this history, see *id.* at 162–74.

[102] As one commentator has observed while discussing Oregon's identically-worded "future dangerousness" special issue, *compare* OR. REV. STAT. § 163.150(1)(b)(B) (2013), *with* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (2013), "[t]here is, in fact, an inherent contradiction in proving a probability beyond a reasonable doubt." Kanter, *supra* note 97, at 318 (internal quotations omitted); *see also* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(c) (requiring the state to prove the "future dangerousness" special issue "beyond a reasonable doubt"). Specifically, the special issue's compound burden of proof—that is, proving a probability beyond a reasonable doubt—"leads to an overall standard of proof requiring less than a fifty percent certainty of future violence," as one multiples these two confidence levels together to derive the more coherent, single confidence level demanded by the special issue. Kanter, *supra* note 97, at 318. Thus, assuming "beyond a reasonable doubt" means a 90% confidence level and "probability" means a 50.1% confidence level, the overall standard of proof actually would be an approximated 45%. *Id.*; *see also id.* (generally cautioning against reducing legal burdens of proof to exact probabilities).

[103] *See* Vartkessian, *supra* note 66, at 260–62 (recounting how some prosecutors' questioning and elucidation during voir dire "suggests to jurors that they should interpret the [future dangerousness] special issue as whether the defendant is more likely than not to kick in a door, verbally threaten a guard, knock out a window to gain entry to a home, or set a fire in a prison cell"). *See also supra* notes 69–70 and accompanying text.

[104] *See, e.g.*, Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 ALB. L. REV. 845, 848–50 (1990) (using data from Texas to show that "dangerousness is vastly over-predicted, and that predictions of nondangerousness are far more accurate than are predictions of dangerousness"); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984); Thomas J. Reidy, Mark D. Cunningham & Jonathan R. Sorensen, *From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana*, 28 CRIM. JUST. & BEHAV. 62 (2001).

[105] Brief for Am. Psychiatric Ass'n as Amicus Curiae Supporting Petitioner at 3, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080) (on file with author). *See also* Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 162–63 nn. 70–77 (2008) (citing contemporary research).

Perhaps recognizing that predictions of future dangerousness are speculative and unreliable, only two states—Texas and Oregon—require jurors to consider future dangerousness during sentencing,[106] and, of the remaining thirty-one states that impose the death penalty, only four reference future dangerousness as an optional, statutory aggravating factor.[107]

A 2000 study examining the records of more than 6,390 convicted murderers in the Texas prison system supports this skepticism.[108] Researchers Jonathen R. Sorensen and Rocky L. Pilgrim determined that the vast majority of murderers in prison do not have disciplinary records of serious institutional violence.[109] Specifically, after an average of 4.55 years in prison, "one in one thousand inmates had committed a homicide" and "[o]ne-half of one percent of the incarcerated murderers were responsible for [a total of thirty-three aggravated] assaults."[110] Likewise, a 2004 review conducted by the Texas Defender Service found that "state-paid expert predictions [regarding defendants' propensity to commit criminal acts of violence] were inaccurate 95% of the time."[111]

Notably, the Texas Court of Criminal Appeals recently issued an opinion in *Coble v. State* which rejected the testimony of Dr. Richard Coons, a forensic psychiatrist who testified to the defendant's future dangerousness at both the defendant's 1990 capital trial and his 2008 retrial.[112] Testifying to the various factors he considers in making a determination of future dangerousness—for example, a person's "history of violence" or his/her "attitude toward violence"—Dr. Coons acknowledged that he "knows of no book or article that discusses these factors or their overlap."[113] As further cause for concern, the Texas Court of Criminal Appeals noted that "Dr. Coons has never gone back and obtained records to try to check the accuracy of the 'future dangerousness' predictions he has made in the past. He cannot tell what his accuracy rate is."[114]

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[106] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (2013); OR. REV. STAT. § 163.150(1)(b)(B) (2013).

[107] IDAHO CODE § 19-2515(9)(i) (2013); 21 OKLA. STAT. § 701.12(7) (2013); VA. CODE §§ 19.2-264.2, 264.4(c) (2013); WYO. STAT. § 6-2-102(h)(xi) (2013).

[108] *See* Jonathen R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251 (2000).

[109] *Id.* at 1256.

[110] *Id.* at 1261–62.

[111] TEX. DEFENDER SERV., DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 34 (2004). The Texas Defender Service (TDS) used archival records to identify 155 inmates in the Texas Department of Criminal Justice who, since the reinstatement of the death penalty in 1976, "(1) were the subject of state expert testimony at trial declaring them a 'continuing threat to society' and, (2) received a death sentence at the time of their trial." *Id.* at 21. The disciplinary records of these inmates revealed that eight inmates (5%) "engaged in assaultive behavior requiring treatment beyond first aid," thirty-one inmates (20%) "ha[d] no record[] reflecting disciplinary violations," and the remaining 116 inmates (75%) "committed disciplinary infractions involving conduct not amounting to serious assaults." *Id.* at 23.

[112] Coble v. State, 330 S.W.3d 253, 264 (Tex. Crim. App. 2010). Although the defendant "did not have a single disciplinary report for the eighteen years that he had been on death row," Dr. Coons "explained this discrepancy by stating that all those on death row have an incentive to behave because their convictions are on appeal, and thus they are less violent than they would be in the general prison population." *Id.* As the Court noted, however, "Dr. Coons stated that there is no objective way of proving that proposition and he knows of no studies that support that theory." *Id.* at 272 n.31.

[113] *Coble*, 330 S.W.3d at 271–72.

[114] *Coble*, 330 S.W.3d at 272. Dr. Coons also "read from a legal brief containing the names and titles of some articles on future dangerousness that had been filed in a different case," and he admitted to being unfamiliar with all of the articles mentioned. *Id.*

Despite Dr. Coons' questionable and unverified methodology, the trial court found him to be a qualified expert and permitted him to testify before the jury concerning the defendant's future dangerousness.[115] Although it reaffirmed that "[forensic psychiatric] expert testimony may, in a particular case, be admissible under [Texas Rule of Evidence] 702," the Texas Court of Criminal Appeals ultimately determined that "the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coons's methodology for predicting future dangerousness by clear and convincing evidence" and, therefore, that "the trial judge [] abused his discretion in admitting Dr. Coons's testimony before the jury."[116]

Notwithstanding the *Coble* holding, expert testimony concerning future dangerousness remains admissible in Texas capital cases.[117] The issue of whether such testimony should continue to influence juror decision-making is well-summarized by Judge Paul Womack of the Texas Court of Criminal Appeals:

> The fact that there seems to be no evidence at all, anywhere, of the reliability of these predictions of future dangerousness should be dispositive. . . . Before we accept an opinion that a capital murderer will be dangerous even in prison, there should be some research to show that this behavior can be predicted.[118]

The Undue Persuasive Effect of Questionable Expert Testimony

In addition to the Texas Assessment Team's concerns as to the scientific reliability of expert testimony regarding a defendant's future dangerousness, the Assessment Team is further troubled by the undue persuasive effect of such testimony on a jury's answer to the special issue. Sharing both of these concerns, Justice Blackmun wrote, in his *Barefoot v. Estelle* dissent, that

> [t]he Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result—even in a capital case—because, it is said, the testimony is subject to cross-examination and impeachment. In the present state of psychiatric knowledge, this is too much for me.[119]

He added: "In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself."[120] The dubious yet highly compelling testimony at issue in *Barefoot* was that of

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[115] *Coble*, 330 S.W.3d at 272.

[116] *Coble*, 330 S.W.3d at 275–80. The Court also conceded, in a lengthy footnote, that practitioners of forensic psychiatry have argued, over the course of several decades and in many peer-reviewed publications, that predictions of future dangerousness want for accuracy. *See id.* at 275 n.53.

[117] *Coble*, 330 S.W.3d at 275 ("We affirm that [psychiatric assessments of future dangerousness] may, in a particular case, be admissible under Rule 702 and helpful to the jury in a capital murder trial."); *see also* Devoe v. State, 354 S.W.3d 457, 476 (Tex. Crim. App. 2011).

[118] Espada v. State, AP-75219, 2008 WL 4809235, at *20 (Tex. Crim. App. Nov. 5, 2008) (Womack, J., dissenting).

[119] Barefoot v. Estelle, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting).

[120] *Id.*

Drs. James Grigson and John Holbrook, neither of whom had examined the defendant or requested the opportunity to examine him, yet both of whom testified "within reasonable psychiatric certainty" that the defendant constituted a continuing threat to society.[121]

In the history of Texas capital cases, such testimony is more the rule than the exception. Indeed, as Presiding Judge Keller noted in her *Coble* concurrence, prior to *Coble* Dr. Coons had participated as an expert witness in approximately fifty cases.[122] In several of these cases, as in *Coble*, he had reached a determination as to the defendant's propensity for violence without having examined the defendant himself.[123] Likewise, Dr. Clay Griffith testified "unequivocally" that Miguel Flores would be a future danger based only "on the facts of the offense and Flores's conduct during the trial."[124] As federal Judge Emilio M. Garza summarized, "[T]he truly troubling facet of this case is the sole evidence upon which the jury found Flores to be a future danger: the testimony of a doctor who had never met the defendant."[125]

Moreover, Dr. Grigson, the Texas forensic psychiatrist who testified in *Barefoot*, participated in hundreds of death penalty cases throughout the 1980s and early 1990s—often as a witness for the prosecution arguing that the defendant posed a future danger to society—using "the same subjective methodology as Dr. Coons [in *Coble*]."[126] As recounted in the *Houston Chronicle* following Dr. Grigson's death in 2004

> Grigson's eagerness to make absolute judgments earned him the praise of prosecutors and the scorn of professional psychiatric organizations. He was twice reprimanded by the American Psychiatric Association [(APA)], once for using the results of a competency examination against a defendant during the punishment phase of his trial, the other time for claiming 100 percent accuracy in predicting how dangerous a defendant he had never examined would be in future years.[127]

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[121] *Id.* at 917–19.

[122] *Coble*, 330 S.W.3d at 299 (Keller, P.J., concurring).

[123] *See, e.g.*, Ramey v. State, No. AP-75678, 2009 WL 335276, at *14 (Tex. Crim. App. Feb. 11, 2009) (unpublished).

[124] Flores v. Johnson, 210 F.3d 456, 458 (Garza, J., specially concurring). *See also* Flores v. State, 871 S.W.2d 174 (Tex. Crim. App. 1993).

[125] *Flores*, 210 F.3d at 458. Echoing Justice Blackmun's *Barefoot* dissent seventeen years later, Judge Garza continued:

> The scientific community virtually unanimously agrees that psychiatric testimony on future dangerousness is, to put it bluntly, unreliable and unscientific. It is as true today as it was in 1983 that neither the Court nor the State of Texas has cited a single reputable scientific source contradicting the unanimous conclusion of professionals in this field that psychiatric predictions of long-term future violence are wrong more often than they are right. As those in the field have often noted, nothing within the training of a psychiatrist makes him or her particularly able to predict whether a particular individual will be a continuing threat to society.

Id. at 463–64 (internal quotations and citations omitted). In fact, the Texas Court of Criminal Appeals has stated explicitly that "the [Texas] Rules [of Evidence] do not require an expert to complete personal interviews in order to make [a] determination [regarding future dangerousness]." *Ramey v. State*, No. AP-75678, 2009 WL 335276, at *14 (Tex. Crim. App. Feb. 11, 2009) (unpublished).

[126] Mike Tolson, *Doctor's Effect on Justice Lingers*, HOUS. CHRON., June 17, 2004, at A27, *available at* 2004 WLNR 20904944; *Coble*, 330 S.W.3d at 283.

[127] Mike Tolson, *Doctor's Effect on Justice Lingers*, HOUS. CHRON., June 17, 2004, at A27, *available at* 2004 WLNR 20904944.

Ultimately, Dr. Grigson was expelled from the Texas Society of Psychiatric Physicians and the APA, yet the vast majority of death sentences his testimony helped to secure remained in effect.[128]

In at least two cases, however, the defendants against whom Dr. Grigson testified eventually left death row, released after evidence of their innocence surfaced. Randall Dale Adams, convicted and sentenced to death for the 1976 murder of a police officer in Dallas, had been described by Dr. Grigson as "at the very extreme, worse or severe end of the scale."[129] Upon the Texas Court of Criminal Appeals' identifying numerous constitutional infirmities in the prosecution's case against Adams, Adams—whose only criminal record at the time of his capital trial was for driving while intoxicated[130]—was freed.[131] Likewise, Dr. Grigson stated of Kerry Max Cook, charged with the 1977 rape and murder of Linda Jo Edwards: "It would not matter where he might be, whether he was free in the free world or whether he was institutionalized. He would present a real threat to people that found themselves in that same setting with him, whether it is prisoner guards or rather free people."[132] Twenty years later, Cook was vindicated after compelling evidence of his innocence was uncovered and DNA evidence implicating someone else was revealed.[133]

Jury Selection

The structure of a Texas capital trial also necessarily affects the process by which a jury is selected. While a legitimate aim of this process is to empanel a jury that will apply the law faithfully—which includes issuing a sentence of death if warranted—the form and substance of capital-case jury selection improperly *increases* a prospective juror's inclination to sentence the defendant to death. Current jury selection practices decrease jurors' understanding of, and ability to give effect to, mitigating circumstances and unduly diminish a jurors' capacity to impose a sentence less than death.

Explanation of Special Issues

As the U.S. Supreme Court recognized in *Boyde v. California*, trial court participation during jury selection is especially persuasive:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.[134]

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[128] *Id.*; *see also* Patricia Kilday Hart, *Where's the Justice in the Execution Process?*, HOUS. CHRON., Sept. 12, 2011, at B1, available at 2011 WLNR 18023280.

[129] Brief of Pet'r-Appellant at 1410, Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979) (No. 60037).

[130] Adams v. State, 577 S.W.2d 717, 731 (Tex. Crim. App. 1979), *rev'd* Adams v. Texas, 448 U.S. 38, 51 (1980).

[131] *See Ex parte* Adams, 768 S.W.2d 281 (Tex. Crim. App. 1989). *See also* Richard L. Fricker, *Crime and Punishment in Dallas*, 75 A.B.A. J. 52, 53 (July 1989).

[132] Cook v. State, 821 S.W.2d 600, 602 (Tex. Crim. App. 1991).

[133] Cook v. State, 940 S.W.2d 623, 627 (Tex. Crim. App. 1996).

[134] Boyde v. California, 494 U.S. 370, 384 (1990).

Accordingly, one researcher discovered, upon reviewing the trial transcripts of jury selection from eight capital cases in Texas, "noticeable differences between the remarks made by the judges presiding on cases which resulted in [life without possibility of parole] and those which resulted in death."[135] Specifically, during the questioning of jurors in those cases in which the defendant later received a death sentence, the trial court provided an expansive description "of the terms related to the future dangerousness question."[136] In one case, the trial court elaborated on possible conduct that could constitute a future danger, stating:

> "[I]t can be a criminal act of violence against a person. [But] [i]t need not be a person; it could be a criminal act of violence against property. . . . [T]he law is also clear that you don't have to hear that the person has a long, extensive history of prior criminal history in order to find that there is a probability of him committing criminal acts of violence. The law says that the offense itself is enough for you to decide whether or not you believe based on the offense for which you now found him guilty, remember, that that is enough to make you believe beyond a reasonable doubt that he indeed would have a probability to commit acts of violence against person or property in society."[137]

Similarly, the researcher found that, when prosecutors interviewed prospective jurors, they provided a "spectrum of examples" of acts of violence to constitute future dangerousness.[138] Such conduct cited by the State included "the use of profanity towards a prison guard, causing property damage to a prison cell, using a bat to strike a car or house window, and setting a fire."[139]

By contrast, in those same cases in which the defendant later received a death sentence, judges offered prospective jurors a far narrower explanation of what could constitute mitigating evidence.[140] Their explanations were often limited to "culpability-related mitigation," i.e., mitigation "singularly focused on the crime," and unrelated to the defendant's background.[141] Furthermore, when hypothetical examples of mitigating evidence related to the defendant's background were provided to jurors, it was unrelated to evidence likely to be presented to the

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[135] Vartkessian, *supra* note 66, at 251.

[136] *Id.* at 251–52. "[W]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" is the first special issue put to a jury during their deliberations at sentencing. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (2013).

[137] *Id.* at 251–52.

[138] *Id.* at 260.

[139] *Id.* at 260–61.

[140] If the jury unanimously answers "yes" to the future dangerousness issue, it must resolve a final issue: "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013).

[141] Vartkessian, *supra* note 66, at 253–54. By contrast, judges in those cases which resulted in life without possibility of parole "refrained from explaining the [mitigation] question and instead allowed the prosecutor and defense attorneys to say a few words about the statute." *Id.* This approach may have provided less clarity to the jury regarding the meaning of "mitigating evidence," yet it also avoided unduly limiting the meaning on account of the court's especially influential description.

jury in the case—for example, that the defendant had "won a Congressional medal of honor,… was a war hero and was working in an orphanage."[142]

The prosecution, which interviews prospective jurors after the trial court, also may suggest to jurors ways to diminish or reinterpret mitigating evidence, effectively informing the prospective jurors that they may disregard evidence that favors a sentence less than death. Through one of these techniques, called "flipping," the prosecutor informs prospective jurors that evidence put forth in mitigation could also be considered by the jury as aggravation.[143] As the U.S. Supreme Court recognized, this is of special concern in Texas given the state's special issue sentencing scheme: evidence presented to support a sentence less than death, such as a defendant's mental retardation, also could be relevant to the future dangerousness special issue.[144] Furthermore, the prosecution may describe how mitigating evidence could be dismissed by the jury "as irrelevant to the sentencing decision"[145] or that mitigation is limited to evidence on the defendant's role in the offense.[146] The prosecution also may describe examples of mitigation for prospective jurors completely unrelated to the evidence likely to be presented during the penalty phase.[147]

Expanding jurors' views of conduct that it should consider in determining that the defendant poses a future danger, while limiting those jurors' understanding of evidence that constitutes mitigation, is likely to produce a jury inclined to sentence a defendant to death. Trial courts must be especially vigilant in ensuring that selected jurors understand and can give effect to mitigating evidence. Given the emphasis on future dangerousness in the Texas capital sentencing phase, trial courts must take corrective action during jury selection against tactics likely to lead to a jury unable or unwilling to consider a sentence less than death.

Rehabilitation of Biased Prospective Jurors

The U.S. Supreme Court has held that jurors who are not willing to consider imposing a death sentence under any circumstances, as well as jurors who would always vote for a death sentence upon conviction of capital murder regardless of the circumstances, are not qualified to serve on a capital jury.[148] One study, however, describes the process of "rehabilitating" prospective jurors in which the trial court or prosecution attempts to gain assurances that a juror will be fair and

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[142] *Id.* at 255. In this case, the defendant presented mitigating evidence during the penalty phase showing "a tortured childhood and familial sexual abuse." *Id.*

[143] *Id.* at 265–66.

[144] Penry v. Lynaugh, 492 U.S. 302, 323 (1989). *Penry* was decided before *Atkins v. Virginia*, 536 U.S. 304 (2002), in which the Supreme Court held that the execution of people with mental retardation was unconstitutional.

[145] Vartkessian, *supra* note 66, at 267 (describing the prosecutor's statements to a prospective juror explaining that the defendant may "put out there that the defendant was abused as a child . . . and that should lessen his blame. The State may argue about that exact same piece of evidence, that doesn't lessen his blame. There are tons of people in this world who have had atrocious things happen to them as children, way worse than this guy, and they have turned out to be upstanding[,] law-abiding citizens").

[146] *Id.* at 268 (describing a prosecutor's explanation of mitigation as, "How responsible is he for the crime? An example I might give is if it was capital murder where someone was killed during a bank robbery. You have two people involved in the robbery and murder; but one pulls the trigger and on just demands the money.").

[147] *Id.* at 271 (describing a prosecutor's explanation of mitigation as, "[T]he defendant was an altar boy, was a straight-A student, served with distinction in the military, was the pillar of his society . . . .").

[148] Witherspoon v. Illinois, 391 U.S. 510 (1968); Morgan v. Illinois, 504 U.S. 719 (1992).

impartial despite their confessed bias.[149] Because "jurors who conscientiously oppose the death penalty rarely retreat from their position . . . [whereas] jurors who initially say they would vote for the death penalty for anyone convicted of murder can often be easily rehabilitated by prosecutors soliciting assurances that they can be fair and follow the law, regardless of their beliefs," rehabilitation often results in capital juries less likely to consider sentences less than death.[150]

Sentencing Phase Instructions

At the close of the penalty phase in a capital case, the trial court must instruct the jury on the applicable law relative to sentencing. In so doing, trial courts place limits on a juror's ability to give full consideration to mitigating evidence.

Failure to Clarify the "Mitigation" Special Issue

As mentioned in the factual discussion, if the jury unanimously finds that the defendant represents a future danger, it then must answer the "mitigation" special issue:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.[151]

Jurors often lack clarity with respect to this special issue, leading to misunderstanding of what constitutes mitigation and the significant role mitigation plays in their decision-making.[152] Their confusion may be attributed to the vague definition of "mitigating evidence" provided in the court's charge—i.e., "evidence that a juror might regard as reducing the defendant's moral blameworthiness." By contrast, many other capital jurisdictions delineate various circumstances to be considered by the jury as mitigating, if there is some evidence to support the circumstance, including a "catch-all" mitigation circumstance, described, for example, as "any other facts or circumstances which [the jury] find from the evidence in mitigation of punishment."[153]

The structure of the Texas capital sentencing phase also engenders confusion: jurors first determine whether the defendant poses a future danger before deciding whether mitigating circumstances warrant a sentence less than death, a structure that enables the prosecution to

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[149] *See* Vartkessian, *supra* note 66, at 255–56 (describing the trial court's attempt to rehabilitate a juror who had "expressed her inability to consider any mitigation whatsoever" by describing extraordinarily "good deeds" that could have been committed by the defendant).

[150] Richard S. Jaffe, *Capital Cases: Ten Principles for Individualized Voir Dire on the Death Penalty*, 25 CHAMPION 35, 36 (2001).

[151] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013).

[152] *See supra* notes 42–44 and accompanying test (recounting the Capital Jury Project's findings that 72.9% of interviewed Texas capital jurors failed to realize that they did not have to be unanimous on findings of mitigation; 66.0% incorrectly thought that they had to be convinced beyond a reasonable doubt on findings of mitigation; and 39.6% failed to appreciate that they could consider any evidence as mitigating).

[153] *See, e.g.*, Mo. Approved Instructions—Criminal (MAI-CR), 314.44.

"flip" or "convert" mitigating evidence. Because jurors remain free "to view any evidence offered by the defense as aggravating, mitigating, or irrelevant to the sentencing decision," a prosecutor can successfully argue an interpretation of mitigating evidence that negates or even recasts it as evidence in *aggravation* of punishment.[154]

Nevertheless, the Texas Court of Criminal Appeals maintains that there is "no constitutional requirement that the jury be charged concerning any particular circumstance alleged to be mitigating."[155] Accordingly, trial courts are not required to instruct jurors on individual non-statutory mitigating circumstances that are requested by defense counsel and supported by the evidence. The Court has further insisted that, "the mitigation issue [being] in reality a normative determination left to the subjective conscience of each juror," trial courts are not to place the burden of proof on one side or the other by way of a standard-of-proof charge or instruction.[156] Yet, as the defendant in *Howard v. State* argued, this lack of guidance from the court may lead the jury to erroneously assume that the *defendant* has to prove the existence of mitigation beyond a reasonable doubt,[157] a concern for which the Capital Jury Project's findings offer support: sixty-six percent of interviewed Texas capital jurors "erroneously assumed" that "the defendant [had] to prove mitigation beyond a reasonable doubt."[158]

Finally, the explicit requirements of the Texas Code of Criminal Procedure may mislead capital jurors with respect to each juror's individual capacity to impose a sentence of life without possibility of parole. First, the trial court must instruct the jury that, with respect to future dangerousness, it "may not answer the issue 'no' unless 10 or more jurors agree"; with respect to mitigation, the trial court must instruct the jury that it "may not answer the issue 'yes' unless 10 or more jurors agree."[159] Either of these answers would, in effect, result in a sentence of life without possibility of parole, but so too would a lone vote along the same lines. The Code, however, bars all parties from "inform[ing] a juror or a prospective juror of the effect of a failure of [the] jury to agree on [the special] issues."[160] Put more starkly, the Code of Criminal Procedure actively conceals from capital jurors their individual license to impose a sentence less than death.[161]

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[154] Vartkessian, *supra* note 66, at 247, 265–66 (discussing prosecutorial methods for recasting mitigating evidence as neutral or aggravating and providing specific examples). *See also* Penry v. Lynaugh, 492 U.S. 302, 324 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002).

[155] Williams v. State, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996) (citing Penry v. State, 903 S.W.2d 715, 766 (1995)). *See also* Raby v. State, 970 S.W.2d 1, 3 (Tex. Crim. App. 1998) ("[T]he law does not require a juror to consider any particular piece of evidence as mitigating; all the law requires is that a defendant be allowed to present relevant mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating.").

[156] Howard v. State, 941 S.W.2d 102, 119–20 (Tex. Crim. App. 1996).

[157] *Id.* at 119.

[158] Bowers & Foglia, *supra* note 40, at 68–69.

[159] TEX. CODE CRIM. PROC. ANN. art. 37.071, §§ 2(d)(2), 2(f)(2) (2013).

[160] TEX. CODE CRIM. PROC. ANN. art. 37.071, §§ 2(a) (2013).

[161] At least one commentator has gone so far as to argue that this scheme "is inherently violative of the eighth and fourteenth amendments [to the U.S. Constitution]." Robert J. Clary, *Voting for Death: Lingering Doubts About the Constitutionality of Texas' Capital Sentencing Procedure*, 19 ST. MARY'S L.J. 353, 355 (1987).

Failure to Instruct on Residual Doubt

Under federal and state law a defendant has "no constitutional right to have jurors' residual doubts about the defendant's guilt be considered as a mitigating factor during deliberations in a capital murder case."[162] Residual doubt, however, clearly offers a basis for a sentence less than death and, moreover, is known to be among "the most powerful 'mitigating' [factors]" in the view of actual capital-case jurors.[163]

In the past, trial courts have permitted the defendant to argue residual doubt before the jury during the capital sentencing phase.[164] The defendant's "opportunity to argue his 'residual doubt' claim to the jury," the Texas Court of Criminal Appeals observed in *Blue v. State*, "could have given mitigating effect to any 'residual doubt' in answering the special issues."[165] In a more recent case, however, the Court indicated that residual doubt may be precluded as a basis for a sentence less than death.

In *Fratta v. State*, a prospective juror was removed for cause after stating, during jury selection, "[U]nless I was 100 percent certain that person did it, then I would answer 'yes' [to the mitigation issue]."[166] The Court, in upholding the trial court's decision to grant the prosecution's for-cause challenge, remarked:

> When defense counsel attempted to rehabilitate [the venireperson], [he] stated several times that he could not answer the mitigation special issue in such a way that the death penalty would be imposed unless he was 100-percent certain of the defendant's guilt. *One-hundred-percent certainty of guilt is a factor not prescribed by law*.[167]

Thus, in addition to there being no right to have residual doubt considered during the sentencing phase, it also appears—according to the Court's pronouncement in *Fratta*—that it would be *illegitimate* for a juror even to consider residual doubt. Were a trial court to grant a defendant's request to instruct on residual doubt, then, it is doubtful that the Texas Court of Criminal Appeals would regard that decision as within the trial court's discretion, especially in light of Article 36.14's requirement that trial courts supply juries with "written charge[s] distinctly setting forth the law applicable to the case."[168] Ultimately, a trial court's refusal to provide an instruction mentioning residual doubt might well limit the weight the jury gives to this factor, a factor that could serve as a basis for a sentence less than death.

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[162] Gallo v. State, 239 S.W.3d 757, 779 (Tex. Crim. App. 2007) (citing Franklin v. Lynaugh, 487 U.S. 164, 174 (1988); Blue v. State, 125 S.W.3d 491, 502 (Tex. Crim. App. 2003)). "Residual doubt" alternatively has been described as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Franklin*, 487 U.S. at 188 (O'Connor, J., concurring).

[163] *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998) (finding, from Capital Jury Project interviews with South Carolina jurors who had served in capital trials, that "'[r]esidual doubt' over the defendant's guilt [wa]s the most powerful 'mitigating' fact").

[164] *Blue*, 125 S.W.3d at 502–03.

[165] *Id.*

[166] Fratta v. State, No. AP-76188, 2011 WL 4582498, at *17–18 (Tex. Crim. App. Oct. 5, 2011) (alteration in original).

[167] *Fratta*, 2011 WL 4582498, at *18 (emphasis added).

[168] TEX. CODE CRIM. PROC. ANN. art. 36.14 (2013).

Instructions Inhibiting the Consideration of Mercy

Although Texas statutory law does not prohibit jurors from allowing their sympathies with a capital defendant to factor into their sentencing-phase decision-making, state courts routinely administer the following instruction: "[you are] not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all of the evidence before you and in answering [the "mitigation" special issue]."[169]

In defending the use of this instruction, the Texas Court of Criminal Appeals has stated that "anti-sympathy charges are appropriate in that they properly focus the jury's attention on those factors relating to the moral culpability of the defendant."[170] However, as recently as 2010, that same Court agreed that "[t]he mitigation special issue 'confers upon the jury the ability to dispense mercy, even after it has found a defendant eligible for the death penalty.'"[171]

The language of the instruction also may undermine jurors' proper consideration of evidence that supports a sentence less than death. Although parts of the instruction are laudable—for example, the prohibitions against "passion, prejudice, public opinion or public feeling"—forbidding jurors from considering "sentiment" or "sympathy" will tend to extinguish those jurors' legitimate inclinations toward mercy. In so doing, such an instruction necessarily limits a juror's ability to give full consideration to evidence that might serve as a basis for a sentence less than death.[172]

Conclusion

Because Texas places considerable limits on jurors' ability to give full consideration to evidence in support of a sentence less than death, the State of Texas does not comply with Recommendation #5.

Recommendation

First, it is clear that Texas jurors possess an "elevated level of misunderstanding" that future dangerousness is a sufficient condition for imposing the death penalty, instead of future dangerousness serving as a preliminary finding that must be agreed upon before the jury may

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[169] Tong v. State, 25 S.W.3d 707, 710 n.4 (Tex. Crim. App. 2000) (internal quotations omitted).

[170] *Id.* at 711. (citing McFarland v. State, 928 S.W.2d 482, 522 (Tex. Crim. App. 1996)).

[171] Sparks v. State, AP-76099, 2010 WL 4132769, at *26 (Tex. Crim. App. Oct. 10, 2010) (unpublished) (quoting Mosley v. State, 983 S.W.2d 249, 264 (Tex. Crim. App. 1998)).

[172] While finding an anti-sympathy instruction permissible under Texas law, the Texas Court of Criminal Appeals has refused to permit execution-impact testimony from being offered during the sentencing phase of a capital case. Gallo v. State, 239 S.W.3d 757, 778–79 (Tex. Crim. App. 2007) (citing Fuller v. State 827 S.W.2d 919, 935–36 (Tex. Crim. App. 1992)). "This type of evidence is objectionable," the Court reasoned, "because it does not pertain to appellant's background, character, or record, or the circumstances of the offense." *Id.* Yet on the other hand, the Court has held that "[b]oth victim impact and victim character evidence are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence," Mosley v. State, 983 S.W.2d 249, 262 (Tex. Crim. App. 1998). *See also* Jackson v. State, 33 S.W.3d 828, 833 (Tex. Crim. App. 2000) (permitting, in consideration of the "future dangerousness" issue, victim impact evidence known to the defendant at the time of his/her offense).

determine if the defendant should be sentenced to death.[173] This confusion is partly attributable to the faulty premises on which the "future dangerousness" special issue rests: (1) that a defendant's propensity to commit criminal acts of violence can be reliably predicted and (2) that experts in the field of human psychology are able to offer such reliable predictions.[174] Furthermore, life without possibility of parole now is the only capital sentencing alternative to death in the State of Texas, which ensures that all defendants convicted of capital murder will die in prison, posing no threat to free society.

Accordingly, the Assessment Team recommends that the State of Texas restructure its capital sentencing procedures to abandon altogether the use of the "future dangerousness" special issue. Short of this restructuring, Texas should undertake a series of measures to limit the problems that result from the current application of the "future dangerousness" special issue. Specifically,

- State-sponsored research must be conducted to compare Texas jurors' comprehension of state capital sentencing standards with that of their counterparts in other death penalty jurisdictions;
- Article 37.071 of the Texas Code of Criminal Procedure must be amended to narrow and clarify the definition of "future dangerousness";
- Expert testimony as to a defendant's propensity to commit criminal acts of violence must be prohibited, whether by statute or by rule; and
- Jurors must be explicitly informed that, notwithstanding a finding of future dangerousness, and/or a finding of insufficient mitigating evidence, jurors never are required or compelled to sentence a defendant to death.

Second, the Assessment Team recommends that the "mitigation" special issue be revised extensively so that the legal relevance of mitigation in capital cases will not be lost on jurors. Trial courts should more broadly instruct capital juries on the various forms of mitigation and the significant legal import of "mitigating circumstances." By offering these clarifying instructions on mitigation, trial courts will ensure better-informed decision-making in death penalty cases. Also with regard to the "mitigation" special issue, Texas should instruct on residual doubt to permit jurors to consider this, as well as any factor, that may warrant a sentence less than death. Furthermore, Texas courts should not provide any instructions that tend to place limits on jurors' consideration of a sentence less than death, such as informing jurors not to be swayed by "sentiment" or "sympathy."

Finally, Texas should remove from the Texas Code of Criminal Procedure the provision that misleads jurors about their individual capacity to affect capital sentencing decisions. Jurors

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[173] Bowers & Foglia, *supra* note 40, at 74. *See also id.* at 74 n.93 ("A 1991 change in the Texas statute made the consideration of mitigating circumstances an explicit component of the decision process. A comparison of cases tried before and after this change gives no indication that the change improved jurors' understanding of the requirement that a finding of dangerousness did not mandate the death penalty; 67.3% of 98 interviewed jurors whose cases were tried prior to the change said the law required death if the evidence proved that the defendant would be dangerous in the future compared to 73.7% of the 19 interviewed jurors whose cases were tried under the revised statute.").

[174] Barefoot v. Estelle, 463 U.S. 880, 926–28 (1983) (Blackmun, J., dissenting) (quoting Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1237 (1980)).

should be explicitly informed that, in the event that they are not able to come to a unanimous decision with respect to the special issues, the defendant will be sentenced to life without parole.

F. Recommendation #6

> **Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.**

Texas has been described as a "directed" jurisdiction as the jury must answer specific questions presented during the sentencing phase in order for a death sentence to be imposed: first, whether the defendant poses a future danger, then, if that question is answered in the affirmative, whether sufficient mitigation exists to warrant a sentence less than death.[175] This "directed" approach is in contrast with that taken in "threshold" and "balancing" jurisdictions. In "threshold" jurisdictions, to impose a death sentence jurors must find at least one aggravating factor and must consider mitigating evidence; thereafter, they are "free to decide whether a death sentence is warranted without further guidance."[176] In "balancing" jurisdictions, jurors explicitly are called upon to weigh the aggravating factors against the mitigating factors to determine whether to sentence a defendant to death.[177]

Although Texas's approach to capital sentencing differs markedly from most other jurisdictions,[178] mitigating and aggravating factors are considered by the jury during the sentencing phase. For example, for a jury to impose a death sentence, it must unanimously answer "yes" to the first special issue, which pertains to the likelihood that the defendant "would commit criminal acts of violence that would constitute a continuing threat to society,"[179] and the State's burden of proof with respect to this special issue is "beyond a reasonable doubt."[180] As a practical matter, therefore, the "future dangerousness" special issue functions as an aggravating factor under Texas law—albeit the Texas code does not specifically reference "aggravating" circumstances.

Likewise, jurors in capital cases also must answer a separate special issue regarding mitigation. That special issue reads:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating

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[175] Bowers & Foglia, *supra* note 2, at 67. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (2013).

[176] Bowers & Foglia, *supra* note 40, at 67. *See, e.g.*, KY. REV. STAT. ANN. § 532.025(3) (2013) ("The jury, if its verdict be a recommendation of death . . . , shall designate in writing . . . the aggravating circumstance or circumstances which it found beyond a reasonable doubt.").

[177] Bowers & Foglia, *supra* note 40, at 67. *See, e.g.*, CAL. PENAL CODE § 190.3(k) (2013) ("[T]he trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.").

[178] *See* Recommendation #7, *infra*.

[179] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (2013).

[180] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(c) (2013).

> circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.[181]

While this special issue specifically references only "mitigating . . . circumstances," information that would tend to *support* the imposition of a death sentence—i.e. evidence in aggravation of punishment—also may be considered.[182] For example, in *Mosley v. State*, the Texas Court of Criminal Appeals held that "[b]oth victim impact and victim character evidence are admissible, in the context of the mitigation special issue, to show the uniqueness of the victim, the harm caused by the defendant, and as rebuttal to the defendant's mitigating evidence."[183] "Victim-related evidence," the *Mosley* Court explained, "is relevant to show that the mitigating circumstances are not 'sufficient' to warrant imposing a life sentence."[184] One year after *Mosley*, the Court extended its holding to encompass "other aggravating circumstances—including extraneous offenses" such as "unadjudicated offenses or bad acts"[185]—for it found these circumstances "relevant to determine whether the mitigating circumstances offered by the defendant [were] sufficient to warrant a life sentence."[186]

Accordingly, while Texas law does not require a capital jury to find the presence of statutorily enumerated aggravating factors as contemplated by Recommendation #6, the sentencing-phase procedures established by the Texas Code and clarified through judicial opinions indicate that, during the sentencing phase of a capital trial, Texas jurors do assess both aggravating and mitigating circumstances to arrive at their sentencing decision.

Texas capital jurors are not instructed that they may return a life sentence in the absence of any mitigating factor. In fact, the "mitigation" special issue impliedly denies the jury this option as it asks the jury "[w]hether . . . there is *a sufficient mitigating circumstance or circumstances* to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed."[187] In contrast to this approach, other capital jurisdictions provide greater clarification to jurors that, even if the jury does not find sufficient evidence in mitigation, it may return a sentence less than death.[188]

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[181] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013).

[182] *But see* Mosley v. State, 983 S.W.2d 249, 268–73 (Meyers, J., dissenting) (arguing otherwise).

[183] *Mosley*, 983 S.W.2d at 262, *overruling* Eldridge v. State, 940 S.W.2d 646, 651 (Tex. Crim. App. 1996). *See also* Jackson v. State, 33 S.W.3d 828, 833 (Tex. Crim. App. 2000) (permitting, in consideration of the "future dangerousness" issue, victim impact evidence known to the defendant at the time of his/her offense).

[184] Mosley v. State, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998) (quoting TEX. CODE CRIM. PROC. art. 37.071, § 2(e) (1995)). *See also id.* at 263–64 n.18 (explaining that, "[i]n determining whether to dispense mercy to a defendant after it has already found the eligibility factors in the State's favor, the jury is not, and should not be, required to look at mitigating evidence in a vacuum").

[185] *Jackson*, 992 S.W.2d at 478.

[186] *Id.* (citing Mosley v. State, 983 S.W.2d 249, 263–64 n.18 (Tex. Crim. App. 1998)). *See also* Burks v. State, 876 S.W.2d 877, 911 (Tex. Crim. App. 1994) (holding that, "[w]here the charge to the jury properly requires the State to prove each of the special punishment issues beyond a reasonable doubt, no burden of proof instruction concerning extraneous offenses is required" (citing Lewis v. State, 815 S.W.2d 560, 567 (Tex. Crim. App. 1991); Boyd v. State, 811 S.W.2d 105, 123–24 (Tex. Crim. App. 1991)).

[187] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013) (emphasis added).

[188] *See, e.g.*, Stynchcombe v. Floyd, 311 S.E.2d 828, 830 (Ga. 1984); Romine v. State, 305 S.E.2d 93, 100 (Ga. 1983); Spraggins v. State, 243 S.E.2d 20, 23 (Ga. 1978); Fleming v. State, 240 S.E.2d 37, 40–41 (Ga. 1977); Hawes v. State, 240 S.E.2d 833, 839 (Ga. 1977) (requiring all judges to "make clear" to the jury that it could recommend life imprisonment even if it found the existence of a statutory aggravating circumstance); McPherson v. State, 553

As the Assessment Team is unaware of any trial court specifically instructing a capital jury that it may impose a sentence less than death irrespective of the sentencing-phase evidence and findings, the State of Texas does not comply with Recommendation #6.

G. Recommendation #7

> **In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.**

Because Texas, as described above, is not a "balancing" jurisdiction, in which jurors must weigh the aggravating factors against the mitigating factors to determine whether to sentence a defendant to death,[189] this Recommendation is not applicable to Texas's capital sentencing scheme.

S.E.2d 569, 578 (Ga. 2001); GEORGIA SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. II (CRIMINAL CASES) § 2.04.50, at 72 (3d ed. 2003) (permitting judges to instruct jurors that they are authorized to impose life imprisonment for any reason or without any reason); MISSOURI APPROVED INSTRUCTIONS (CRIMINAL) § 314.46 ("You are not compelled to fix death as the punishment even if you do not find the existence of facts and circumstances in mitigation of punishment sufficient to outweigh the facts and circumstances in aggravation of punishment. You must consider all the evidence in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.").

[189] Bowers & Foglia, *supra* note 40, at 67. *See, e.g.*, CAL. PENAL CODE § 190.3(k) (2013) ("[T]he trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances.").

CHAPTER ELEVEN

JUDICIAL INDEPENDENCE AND VIGILANCE

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Our criminal justice system relies on the independence of the judicial branch to ensure that judges decide cases to the best of their abilities without bias—political or otherwise—and notwithstanding official and public pressure. At least as importantly, legitimacy in the administration of criminal justice hinges on widespread *perception* of judicial independence, and public confidence that judges are not beholden to any party appearing before them and have not prejudged a legal question over which they preside. The actual and perceived impartiality of the judiciary is threatened by a number of features of our justice system and broader political culture, including judicial elections, appointments, and confirmation proceedings that may be affected by nominees' or candidates' purported views on controversial issues, including the death penalty.

During judicial election campaigns, voters often expect candidates to assure them that they will be "tough on crime," that they will impose the death penalty whenever possible, and, if they are seeking an appellate judgeship, that they will uphold death sentences. In retention campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of their unpopular decisions, regardless of whether these decisions are reasonable or binding applications of the law or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this scrutiny occurs, the discourse is not about the constitutional doctrine in a case but rather about the specifics of the crime.

All of this increases the risk—or, at least, the perception—that judges will decide cases not on the basis of their best understanding of the law, but on the basis of how their decisions might affect their careers. These circumstances also may make it less likely that judges will be viewed by the public as vigilant guardians of the adversarial process, protecting against both prosecutorial overreach and incompetent representation by defense counsel. Ultimately, judges must remain cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence, and to prevent such harms from occurring in the future.

I. FACTUAL DISCUSSION: TEXAS OVERVIEW

Texas judges play a central role in administering justice in capital cases. Texas trial courts oversee jury selection, rule on evidentiary issues, and issue jury instructions in death penalty cases. Trial judges often are also responsible for appointing defense counsel to represent indigent capital defendants and for authorizing funding for these services. Furthermore, appellate judges necessarily must rule on the myriad of legal issues presented in these complex, high-stakes cases. Thus, whether capital cases are fairly and impartially administered will depend in large measure on the enormous discretion vested in the state judiciary.

The Texas Constitution vests judicial power in several courts, notably the Texas Supreme Court, Texas Court of Criminal Appeals, fourteen state courts of appeals, and hundreds of state district courts.[1] Criminal cases are appealed from the district courts to the courts of appeals, and then to the Texas Court of Criminal Appeals,[2] except that "[t]he appeal of all cases in which the death penalty has been assessed shall be to the Court of Criminal Appeals."[3] In Texas's relatively unique system, the Court of Criminal Appeals serves as the court of last resort in criminal cases, rather than the Texas Supreme Court.[4]

Texas capital trials take place in the district courts.[5] At least one judge serves each of Texas's over 400 district courts,[6] a number which may expand or contract at the discretion of the Texas Legislature.[7] Under the Texas Constitution, the Texas Supreme Court's membership is fixed at eight justices and one chief justice and the Texas Court of Criminal Appeals' membership is fixed at eight judges and one presiding judge.[8]

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[1] TEX. CONST. art. V, § 1; TEX. GOV'T CODE ANN. § 22.201(a) (2013) (establishing fourteen courts of appeals).

[2] TEX. CONST. art. V, § 5(a)–(b). Although it has important rule-making authority, the Texas Supreme Court's appellate jurisdiction is limited to civil cases. *See* TEX. CONST. art. V, § 3(a); TEX. GOV'T CODE ANN. § 22.001 (2013). The Texas Court of Criminal Appeals also possesses rule-making authority with respect to "post[-]trial, appellate, and review procedure in criminal cases." TEX. GOV'T CODE ANN. § 22.108(a) (2013).

[3] TEX. CONST. art. V, § 5(b); TEX. CODE CRIM. PROC. ANN. § 4.01 (2013).

[4] *See* TEX. CONST. art. V, § 3(a); TEX. GOV'T CODE ANN. §§ 22.001 (2013) (stating that the Texas Supreme Court has appellate jurisdiction, except in criminal law matters), 22.102 (2013) (mandate of Texas Court of Criminal Appeals).

[5] TEX. CONST. art. V, § 8; TEX. GOV'T CODE ANN. § 24.007(a) (2013). Consistent with its broad power to "establish such other courts as it may deem necessary," TEX. CONST. art. V, § 1, the Texas Legislature also has established criminal district courts, *see* TEX. GOV'T CODE ANN. §§ 24.901–24.920 (2013), which "hear criminal cases exclusively." *Court Structure of Texas: Descriptive Outline*, TEX. OFFICE OF CT. ADMIN. (Sept. 1, 1997), *available at* http://www.courts.state.tx.us/pubs/ar97/crtstr97.htm.

[6] *Court Structure of Texas*, TEX. OFFICE OF CT. ADMIN. (Sept. 1, 2008) (noting that, as of the date of publication, there were 444 district courts and 444 judges); *Trial Courts and Jurisdiction by County*, TEX. OFFICE OF CT. ADMIN., *available at* http://www.courts.state.tx.us/pubs/AR2010/jud_branch/3-trial-courts-and-jurisdiction-by-co.pdf (listing judgeships and their enacting statute). Multiple judges may serve a single district court, but no district court currently is served by more than one judge. *See* TEX. CONST. art. V, § 7 (providing that "[t]he State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution . . . ."). *See also* TEX. GOV'T CODE ANN. § 22.216(a)–(n) (2013) (establishing eighty courts of appeals judgeships).

[7] TEX. CONST. art. V, § 7 ("The State shall be divided into judicial districts, with each district having one or more Judges as may be provided by law or by this Constitution . . . ."). *See also* TEX. CONST. art. V, § 7a (establishing a Judicial Districts Board to reapportion the judicial districts authorized by the Texas Constitution).

[8] TEX. CONST. art. V, §§ 4(a), 2(a).

A. Appointment and Election of Judges

All justices and judges of the Texas Supreme Court, Texas Court of Criminal Appeals, courts of appeals, and district courts are elected, except that vacancies are "filled by the Governor until the next succeeding General Election for state officers," at which point "the voters shall fill the vacancy for the unexpired term."[9] In Texas, judges run with partisan designations.[10] Justices of the Supreme Court and judges of the Court of Criminal Appeals are elected to six-year, overlapping terms; justices of the courts of appeals are elected to six-year terms; and judges of the district courts are elected to four-year terms.[11]

B. Conduct Requirements for Judicial Candidates and Sitting Judges

1. General Provisions

All Texas judges who play a role in adjudicating capital cases must adhere to the Texas Code of Judicial Conduct, which sets out five substantive canons governing judicial conduct.[12] These five canons address (1) upholding the integrity and independence of the judiciary; (2) avoiding impropriety and the appearance of impropriety; (3) performing the duties of judicial office impartially and diligently; (4) conducting extrajudicial activities in a manner that minimizes the risk of conflict with judicial obligations; and (5) refraining from inappropriate political activity.[13] Candidates for judicial office are also bound by the standards of Canon 5.[14]

2. Impartiality and Political Activity of Judicial Candidates and Sitting Judges

Non-incumbent candidates for judicial official are subject to Canon 5 of the Code of Judicial Conduct.[15] These candidates also may receive "appropriate disciplinary action," initiated "by the

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[9] TEX. CONST. art. V, § 28(a). The Governor must make this appointment "with the advice and consent of two-thirds of the [Texas] Senate present." TEX. CONST. art. IV, § 12; White v. Sturns, 651 S.W.2d 372, 376 (Tex. App. 1983).

[10] *See Court Structure of Texas*, TEX. OFFICE OF CT. ADMIN. (Sept. 1, 1997), *available at* http://www.courts.state.tx.us/pubs/ar97/crtstr97.htm; TEX. ELEC. CODE ANN. § 172.0024(a)(2), (7)–(10) (2013) (specifying the filing fees for a place on the general primary election ballot for candidates for statewide offices, the offices of court of appeals chief justice and justice, and the offices of district court and criminal district court judge). *Cf.* TEX. ELEC. CODE ANN. § 172.021(g) (2013) (imposing additional requirements on candidates for the office of chief justice or justice of the Texas Supreme Court and presiding judge or judge of the Texas Court of Criminal Appeals when those candidates "choose[] to pay the filing fee" for a place on the general primary election ballot).

[11] *See* TEX. CONST. art. V, §§ 2(c), 4(a), 6(b), 7.

[12] TEX. CODE JUD. CONDUCT, Canon 6A (requiring "active, full-time justice[s] [and] judge[s]" of the Texas Supreme Court, Texas Court of Criminal Appeals, courts of appeals, district courts, and criminal district courts to "comply with all provisions of [the] Code of Judicial Conduct").

[13] *See* TEX. CODE JUD. CONDUCT, Canons 1–5.

[14] *See* TEX. CODE JUD. CONDUCT, Canon 6G(1).

[15] TEX. GOV'T CODE ANN. § 34.001(a) (2013). In actuality, the statute refers to Canon 7 of the Code of Judicial Conduct, not Canon 5. *Id.* However, an amendment to the Code of Judicial Conduct in 1994 renumbered the Code's canons, such that Canon 7 now is (with some textual changes) Canon 5. *See Adoption of Amendments to the Texas Code of Judicial Conduct*, Misc. Docket No. 94-9020 (Tex. Sup. Ct. Jan. 24, 1994), *available at* http://www.supreme.courts.state.tx.us/miscdocket/94/94-9020.pdf.

attorney general or the local district attorney," for violating "any other relevant provision of that code."[16]

Canon 5 pertains to inappropriate political activity and prohibits "[a] judge or judicial candidate" from

> (1) mak[ing] pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge;
> (2) knowingly or recklessly misrepresent[ing] the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or
> (3) mak[ing] a statement that would violate Canon 3B(10)[, which prohibits a judge from commenting publicly and improperly about pending or impending proceedings that may come before his/her court].[17]

Judges and judicial candidates also may not "authorize the public use of [their] name[s] endorsing another candidate for any public office," but they "may indicate support for a political party."[18]

3. Rules for Recusal

While the Texas Constitution and Code of Criminal Procedure set out the general bases for disqualification of a judge, the Texas Rules of Civil Procedure provide the grounds for recusal for trial court judges in civil and criminal cases alike.[19] Specifically, Rule 18b requires judges to recuse themselves in any proceeding in which "the judge's impartiality might reasonably be questioned" or "the judge has a personal bias or prejudice concerning the subject matter or a party."[20] A ground for recusal may be waived by the parties, but only after it is fully disclosed on the record.[21]

In making a judicial recusal determination, the Texas Court of Criminal Appeals has stated that "a judge's impartiality might reasonably be questioned 'only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when

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[16] TEX. GOV'T CODE ANN. § 34.004 (2013). In addition, "[a] candidate who is an attorney and who violates Canon [5], Code of Judicial Conduct, or any other relevant provision of that code is subject to sanctions by the state bar." *Id.* at § 34.003.

[17] TEX. CODE JUD. CONDUCT, Canon 5(1).

[18] TEX. CODE JUD. CONDUCT, Canon 5(2).

[19] TEX. CONST. art. V, § 11; TEX. CODE CRIM. PROC. ANN. art. 4.01 (2013); TEX. R. CIV. P. 18a–b; Arnold v. State, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993).

[20] TEX. R. CIV. P. 18b(b)(1)–(2). In addition, Texas judges are bound by the Code of Judicial Conduct and may be disciplined for violating that Code pursuant to the Texas Constitution. *See* TEX. CONST. art. V, § 1-a(6).

[21] TEX. R. CIV. P. 18b(e).

judging the dispute.'"[22] If the motion to recuse is denied, then an appellate court will review that decision under an abuse of discretion standard.[23]

C. Complaints and Disciplinary Actions Against Judicial Candidates and Sitting Judges

1. Non-incumbent Judicial Candidates

The Texas Code of Judicial Conduct specifies that "[a]ny lawyer who is a candidate seeking judicial office who violates Canon 5 or other relevant provisions of this Code is subject to disciplinary action by the State Bar of Texas."[24] The State Bar's standards and procedures for disciplining lawyers are delineated in the Texas Disciplinary Rules of Professional Conduct and the Texas Rules of Disciplinary Procedures.

2. Sitting Judges

The Texas Code of Judicial Conduct specifies that "[a]ny judge who violates this Code is subject to sanctions by the State Commission on Judicial Conduct."[25] The Texas Constitution established the Commission[26] as well as its procedures,[27] which have been augmented by the Texas Legislature and by the Texas Supreme Court through its rule-making authority.[28]

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[22] Gaal v. State, 332 S.W.3d 448, 453 (Tex. Crim. App. 2011) (quoting Liteky v. United States, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring)).
[23] TEX. R. CIV. P. 18a(j)(1)(A); *Gaal*, 332 S.W.3d at 456.
[24] TEX. CODE JUD. CONDUCT, Canon G(3).
[25] TEX. CODE JUD. CONDUCT, Canon G(2).
[26] TEX. CONST. art. V, § 1-a(2).
[27] TEX. CONST. art. V, § 1-a(6)–(10).
[28] *See generally* TEX. GOV'T CODE ANN. § 33.001 (2013); TEX. JUD. ADMIN. R. 12.

II. ANALYSIS

A. Recommendation #1

States should examine the fairness of their processes for the appointment and election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.

Examining the Fairness of the Appointment and Election Processes

In the last decade, the State of Texas has not taken any significant steps to examine the fairness of its judicial selection and election processes, despite prominent voices that have called for reform. For example, in his 2011 State of the Judiciary address, the Chief Justice of the Texas Supreme Court lamented Texas's system of "elect[ing] judges on a partisan basis" and "urge[d] the Legislature to send the people a constitutional amendment that would allow judges to be selected on their merit."[29] Retired U.S. Supreme Court Associate Justice Sandra Day O'Connor likewise has warned against an elected judiciary.[30] The most persistent criticisms of Texas's election processes, however, have focused on the need of sitting judges to raise funds for oftentimes expensive campaigns.[31] The results from one survey of Texas judges—a survey conducted by the State Bar of Texas's Committee on Legal Services to the Poor in Criminal Matters in the late 1990's—suggests that there is merit to these concerns: in assigning attorneys to represent indigent defendants, 35.1% of judges responding to the survey "sometimes consider[ed] whether the attorney is a political supporter," and 30.3% of the responding judges considered whether an attorney "ha[d] contributed to their campaign."[32]

To a limited extent, however, the State of Texas has examined this system for choosing judges. In 1998, the Texas Office of Court Administration (OCA) published *Public Trust and Confidence in the Courts and the Legal Profession in Texas*.[33] This joint effort by OCA, the Texas Supreme Court, and the State Bar of Texas—supported by a technical assistance grant from the federal State Justice Institute—involved administering a telephone survey "to a

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[29] Wallace B. Jefferson, *State of the Judiciary* 6, presented to the 82nd Legis. Sess. (Feb. 23, 201). *See also* Anthony Champagne & Kyle Cheek, *The Cycle of Judicial Elections: Texas as a Case Study*, 29 FORDHAM URB. L.J. 907, 932 (2001) (noting that then-Chief Justice of the Texas Supreme Court, Tom Phillips, has "advocate[d] [for] replacing partisan judicial elections with a merit appointment-type system").

[30] *See* Scott Horton, *Justice O'Connor Crusades Against Judicial Elections, and Texas Again Provides Exhibit A*, HARPER'S MAG., Sept. 17, 2009.

[31] Shelley Kofler, *Texas Judges: Out of Order—Part 3*, KERA NEWS, Aug. 24, 2012; Paul D. Carrington, *Big Money in Texas Judicial Elections: The Sickness and Its Remedies*, 54 SMU L. Rev. 263 (2000); TEXANS FOR PUBLIC JUSTICE, PAYOLA JUSTICE: HOW TEXAS SUPREME COURT JUSTICES RAISE MONEY FROM COURT LITIGANTS (1998). *See also* Anthony Champagne & Kyle Cheek, *supra* note 29.

[32] ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERV. TO THE POOR IN CRIMINAL MATTERS, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 13 (2000), *available at* http://www.uta.edu/pols/moore/indigent/last.pdf. The response rate to the survey, which was "mailed to every judge having criminal jurisdiction," was 494 out of 846 (58.4%). *Id.* at 5.

[33] *See* TEX. OFFICE OF CT. ADMIN. ET AL, PUBLIC TRUST AND CONFIDENCE IN THE COURTS AND THE LEGAL PROFESSION IN TEXAS (1998), *available at* http://www.courts.state.tx.us/pubs/publictrust/index.htm#purpose.

stratified, random sample of 1,215 Texas adults" to study "how Texans view the courts and the legal profession in their state."[34]

Although a majority of respondents either strongly or somewhat agreed that "they would be treated fairly if they had a case pending in Texas courts," the study also found that 83% of Texas adults felt that campaign contributions to judges have a "very significant" (43%) or "somewhat significant" (40%) influence on a judge's decision-making.[35] In a companion study published in 1999, 80% of interviewed lawyers agreed that campaign contributions have at least some influence on judges.[36] The study also found, however, that 70% of the Texas adults surveyed supported Texas's existing system of electing judges.[37]

Also in the late 1990's, the Supreme Court of Texas's Judicial Campaign Finance Study Committee examined aspects of Texas's judicial election system and made several recommendations for reform, among these suggestions changes to judicial campaign disclosure requirements and heightened standards for recusal.[38] In total, the Committee suggested fifteen proposals, which were grouped into the following six broadly-stated recommendations: (1) Enhance public access to information concerning both judicial campaign contributions and direct expenditures; (2) promulgate rules extending and strengthening the contribution limits of Texas's Judicial Campaign Fairness Act; (3) promulgate rules to limit the aggregation of campaign "war chests"; (4) limit the ability of political organizations to use judges as fund-raising tools; (5) limit judicial appointments of excessive campaign contributors and repetitious appointments; and (6) encourage the State Bar of Texas and Secretary of State to continue efforts to develop and disseminate voter guides to judicial elections.[39]

Few of the Committee's recommendations were later adopted.[40] A majority of the Committee also urged the Texas Legislature "to revisit whether Texas' current elective system of judicial selection should be changed."[41]

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[34] *Id*. "The State Justice Institute (SJI) was established by Federal law in 1984 to award grants to improve the quality of justice in State courts, facilitate better coordination between State and Federal courts, and foster innovative, efficient solutions to common issues faced by all courts." *About SJI*, STATE JUST. INST., www.sji.gov/about.php (last visited Aug. 20, 2013).

[35] TEX. OFFICE OF CT. ADMIN., PUBLIC TRUST AND CONFIDENCE IN THE COURTS AND THE LEGAL PROFESSION IN TEXAS (1998), *available at* http://www.courts.state.tx.us/pubs/publictrust/index.htm#purpose.

[36] TEX. OFFICE OF CT. ADMIN. ET AL, THE COURTS AND THE LEGAL PROFESSION IN TEXAS: THE INSIDER'S PERSPECTIVE: A SURVEY OF JUDGES, COURT PERSONNEL, AND ATTORNEYS 5 (1999).

[37] TEX. OFFICE OF CT. ADMIN., PUBLIC TRUST AND CONFIDENCE IN THE COURTS AND THE LEGAL PROFESSION IN TEXAS (1998), *available at* http://www.courts.state.tx.us/pubs/publictrust/index.htm#purpose. Only 20% of respondents favored "hav[ing] judges appointed by the Governor and subject to retention elections." *Id.* Texas legislators recently have filed bills and resolutions proposing changes to this process, including a bill to modify the laws of Texas to make judicial elections nonpartisan, *see* H.B. 1999, 82nd Tex. Leg., Reg. Sess. (filed Mar. 1, 2011), and a resolution to amend the state constitution to do away with judicial elections altogether, *see* H.J.R. 138, 81st Tex. Leg., Reg. Sess. (filed Apr. 27, 2009). These measures were not voted out of committee.

[38] *See* JUD. CAMPAIGN FIN. STUDY COMM., TEX. SUP. CT., REPORT AND RECOMMENDATIONS (1999). As explained in the report, "[a]ny change in the judicial selection system that could be implemented only through a constitutional amendment is beyond the scope of the Committee's charge." *Id.* at 3–4 (internal quotations omitted).

[39] *Id.* at 15–39.

[40] *See, e.g.*, TEX. CODE JUD. CONDUCT, Canon 5(4) (codifying part of the Committee's eighth proposal to amend Canon 5 of the Code of Judicial Conduct to track Texas's Judicial Campaign Fairness Act).

[41] *See* JUD. CAMPAIGN FIN. STUDY COMM., TEX. SUP. CT., REPORT AND RECOMMENDATIONS 7 (1999)

Educating the Public about the Importance of Judicial Independence

In its most recent, statutorily-required strategic plan,[42] the State Bar of Texas notes that one of its purposes is to "educat[e] the public about the Rule of Law and the role of judges, lawyers, and the public in the justice system."[43] To that end, the State Bar adopted the following goal:

> Through education, the dissemination of information and outreach, increase the public's knowledge and understanding of:
>
> - the rule of law;
> - the judicial system; [and]
> - selection and compensation of members of the judiciary[.]

To the Assessment Team's knowledge, however, the State Bar has not taken action to implement these goals.

Finally, the Texas Secretary of State is authorized under law to "compile information on [judicial] candidates for election in the form of a voter information guide" and to "make the guide available to the public on the Internet."[44] The Texas Election Code specifies the content of that guide, which includes each candidate's current occupation, educational and occupational background; biographical information; and previous experience serving in government.[45] The authorization for these voter guides accords with a 1999 recommendation of the Texas Supreme Court's Judicial Campaign Finance Study Committee to use such pamphlets and guides "to combat the problem of uninformed or apathetic voters in judicial elections."[46] The extent to which the public makes use of these guides, however, is unknown.

Conclusion

The State of Texas partially complies with Recommendation #1.

Recommendation

A judicial selection process that involves the popular election of judges presents unique challenges for ensuring the impartiality of the judiciary.[47] Like any candidate in a contested election, Texas judicial candidates—including sitting judges—must actively campaign and raise funds to win that election. In Texas, it is not unusual for judicial candidates to accept contributions from lawyers who likely will appear before them.

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[42] TEX. GOV. CODE ANN. § 81.0215 (2013)

[43] STATE BAR OF TEX., *State Bar of Texas Strategic Plan: FY2012 & FY2013*, at 3 (2012).

[44] TEX. ELEC. CODE ANN. § 278.002 (2013).

[45] TEX. ELEC. CODE ANN. § 278.004 (2013).

[46] *See* JUD. CAMPAIGN FIN. STUDY COMM., TEX. SUP. CT., REPORT AND RECOMMENDATIONS 39 (1999).

[47] *See, e.g.*, Republican Party of Minnesota v. White, 536 U.S. 765, 790–92 (2002) (O'Connor, J., concurring) (noting that, as of 2002, thirty-nine states employed "some form of judicial elections" and that the problem of judicial impartiality in such a jurisdiction "is largely one the State brought upon itself by continuing the practice of popularly electing judges").

While judicial elections pose challenges to ensuring the impartiality of the judiciary in many contexts, death penalty cases in particular raise special concerns. These cases are often surrounded by a great amount of public attention and reaction, making it all the more important to ensure the independence and impartiality of judges in death penalty cases.

Although government officials and state agencies have made some effort to illuminate the problems presented by Texas's process for selecting its judiciary, it is critical that a more thorough examination of this process be undertaken to determine whether, and to what extent, its current shortcomings affect the actual and perceived fairness of the criminal justice system. The Assessment Team recommends that the State Bar of Texas, in partnership with the judges of the civil and criminal court systems, be tasked with conducting this comprehensive and systemic review.

Understanding some of the problems inherent in election of judges—and the difficulty elected judges face—particularly in death penalty cases—the Assessment Team recognizes that the partisan election of state judges is likely to continue for the foreseeable future. Thus, immediate steps must be taken to educate the public about the importance of judicial independence to the fair administration of justice.

First, the independence of the judiciary—in addition to the public's understanding of the *importance* of an independent judiciary—can be improved through lasting partnerships between the State Bar and Texas's nine schools of law.[48] Students at these institutions, many of whom build their legal careers in the state, should be well-educated on the importance of an impartial court system, the contemporary threats to that impartiality, and how they as students and practitioners can support and maintain the system's impartiality in the face of these threats. In addition, law schools should support the independence and impartiality of the judiciary on an institutional level through, for example, support of conferences and events that provide a space to continually revisit and address concerns on judicial independence in Texas.

Second, in order to determine how best to design voter education materials or other efforts, the State Bar of Texas and local bar associations should work with experts in the fields of communication, psychology, and business in development of public education materials concerning the importance of judicial independence. The State Bar also should improve its "bar polls" of judicial candidates so that these polls offer a more meaningful tool for assessing judicial candidates' suitability for office.[49] Results from a more robust bar poll should be made widely available to the public prior to any popular local, regional, or statewide judicial election.
Finally, the State Bar of Texas and the criminal court system should enhance the judiciary's ability to remain independent and to be vigilant in adjudicating capital cases. Training on the

[48] For a list of Texas's nine law schools, *see Law Schools and Location*, LSAC, https://officialguide.lsac.org/Release/SchoolsABAData/SchoolsAndLocation.aspx?schoolinfo=schoolsandlocation&alphabeticalrange=allschools&geographicsearch=TX (last visited Aug. 20, 2013). A tenth Texas law school is scheduled to open in the Fall of 2014. *About*, UNT DALLAS COLL. OF LAW, http://lawschool.untsystem.edu/about (last visited Aug. 27, 2013).

[49] A bar poll could solicit information related to judicial candidates' legal knowledge and abilities, experience, professional achievements, and continuing legal education, judicial temperament—including qualities related to fairness, decisiveness, dignity, decorum, and the treatment of litigants—as well as candidates' ability to effectively manage the court.

unique complexities and special demands of these often high-profile cases should, for example, be mandatory for all judges who may preside over them.

B. Recommendation #2

> **A judge who has made any promise—public or private—regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.**

Canon 5 of the Texas Code of Judicial Conduct explicitly prohibits judges and judicial candidates from making "pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge."[50] Once elected, members of the judiciary are bound, more generally, by Canon 3B, which provides that "[a] judge shall perform judicial duties without bias or prejudice."[51] Furthermore, the Code of Judicial Conduct generally limits judges "from public[ly] comment[ing] about a pending or impending proceeding."[52]

A sitting judge who makes promises regarding his/her prospective decisions in capital cases contravenes the plain meaning of these canons and may be subject to a misconduct investigation.[53] Similarly, a non-incumbent judicial candidate who offered such promises would be subject to a misconduct investigation pursuant to Texas Rules of Disciplinary Procedure.[54]

In its review of Texas cases from the past several decades, the Assessment Team could find no instance in which the Texas Court of Criminal Appeals addressed the issue of judicial recusal on

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[50] TEX. CODE JUD. CONDUCT, Canon 5(1)(i). *See also* Smith v. Phillips, No. CIV.A.A-02CV111JRN, 2002 WL 1870038, at *1 (W.D. Tex. Aug. 6, 2002) (finding unconstitutional a prior version of Canon 5(1) which prohibited judges and judicial candidate from "mak[ing] statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held" (citing Republican Party of Minnesota v. Kelly, 536 U.S. 765 (2002))). In fact, the sole comment to Canon 5 explicitly states that "[a] statement made during a campaign for judicial office, whether or not prohibited by this Canon, may cause a judge's impartiality to be reasonably questioned in the context of a particular case and may result in recusal." TEX. CODE JUD. CONDUCT, Canon 5, cmt.

[51] TEX. CODE JUD. CONDUCT, Canon 3(B)(5).

[52] TEX. CODE JUD. CONDUCT, Canon 3(B)(10).

[53] *See* TEX. CONST. art. V, § 1-a(6) (2012) ("[Texas judges] may . . . be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section."), § 1-a(7) (empowering the Commission to "make [] preliminary investigations"), 1-a(8) (empowering the Commission to admonish, warn, or reprimand judges or to institute formal proceedings against judges) (2012).

[54] *See* TEX. R. DISCIPLINARY PRO., Rule 1.06(V) (defining "Professional Misconduct"); TEX. DISCIPLINARY R. OF PROF'L CONDUCT, Rule 8.02(b) ("A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Texas Code of Judicial Conduct.").

account of a judge's having made public or private commitments that amount to prejudgment.[55] However, the State Commission on Judicial Conduct did issue a public warning to a Texas Court of Criminal Appeals Judge for campaign materials he distributed during the 2000 election for presiding judge of the Texas Court of Criminal Appeals.[56] The relevant materials stated: "I'm very tough on crimes where there are victims who have been physically harmed. In such cases, I do not believe in leniency. I have no feelings for the criminal. All my feelings lie with the victim."[57] The Commission deemed these remarks inappropriate for their indication of bias.[58] The judge continues to serve on the Court and participate in review of capital cases in which leniency may properly play a role.[59] It remains unclear, however, whether defendants have sought recusal and how those requests have been handled by the Texas Court of Criminal Appeals. As the Court routinely declines to publish an opinion in capital cases—as documented elsewhere in this Report[60]—the Assessment Team cannot conclude, from this absence of evidence, that the issue has not been raised and that it has been appropriately adjudicated. As with other Recommendations in this Report, this practice by the Court of Criminal Appeals makes it difficult to determine Texas's responsiveness to the concerns raised under Recommendation #2.

Further impeding analysis regarding possible censure of or sanctions imposed on judicial candidates is the lack of transparency regarding the State Commission on Judicial Conduct's proceedings. For example, the Commission was analyzed closely by the Sunset Advisory Commission in 2012.[61] The Sunset Advisory Commission was created in 1977 by the Texas Legislature "to identify and eliminate waste, duplication, and inefficiency in government agencies."[62] Its 2012 report concluded that the State Commission on Judicial Conduct's "largely closed process makes it difficult for the public to know if the Commission is appropriately responding to citizen complaints against judges."[63] Furthermore, "as a judicial branch agency,

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[55] As described in other parts of this Report—particularly Chapter Eight on State Post-conviction Proceedings—the Texas Court of Criminal Appeals typically does not address explicitly the issues of fact and law raised by state habeas petitioners in its capital case orders.

[56] *Warning Issued to Judge for Campaign Materials*, HOUSTON CHRON., Jan. 31, 2001, at A20.

[57] *Id*. (international quotations omitted).

[58] *Id*.

[59] *See, e.g.*, Hernandez v. State, No. AP-76,275, 2012 WL 5869393 (Tex. Crim. App. Nov. 21, 2012). *See also Warning Issued to Judge for Campaign Materials*, HOUSTON CHRON., Jan. 31, 2001, at A20 (noting that the Commission "pointed out that the appeals court consistently deals with leniency cases, including cases in which appellants ask it to review a sentence or whether their constitutional rights were violated").

[60] For a discussion of the Texas Court of Criminal Appeals' treatment of state habeas petitions in capital cases, see Chapter Eight on State Post-conviction Proceedings.

[61] SUNSET STAFF REPORT WITH COMM'N RECOMMENDATIONS, STATE COMMISSION ON JUDICIAL CONDUCT 15, June 2012, *available at* http://www.sunset.state.tx.us/83rd/jc/jc_dec.pdf. Members of the 2012 Sunset Commission are Representative Dennis Bonnen, Chair; Senator Robert Nichols, Vice Chair; Representative Rafael Anchia; Senator Brian Birdwell; Representative Byron Cook; Senator Joan Huffman; Representative Harold V. Dutton, Jr.; Senator Dan Patrick; Representative Four Price; and Senator John Whitmire. *Id.* at intro.

[62] SUNSET ADVISORY COMM'N, http://www.sunset.state.tx.us/ (last visited Aug. 20, 2013).

[63] For example, the Report noted that "in fiscal year 2011, only seven of the Commission's 34 disciplinary actions involved a public sanction. That same year, the Commission met six times to hear cases of alleged judicial misconduct, but held no meetings open to the public. In fact, over the last ten years, the Commission has held a formal proceeding, which is open to the public, only 12 times." *See* SUNSET STAFF REPORT WITH COMMISSION RECOMMENDATIONS, *supra* note 61, at 16.

the [Judicial Conduct] Commission is not subject to the Open Meetings, Administrative Procedure, or Public Information acts."[64]

Accordingly, the Assessment Team cannot determine whether Texas complies with Recommendation #2.

Given the closed nature of proceedings before the Judicial Conduct Commission, and the few sanctions available to the Commission to adequately address allegations of misconduct, the Assessment Team endorses the Sunset Commission's recommendations with respect to improving the range of sanctions available to the Judicial Conduct Commission in conducting its work. Presently, the Texas Constitution limits the remedies available to the Judicial Conduct Commission in addressing allegations of misconduct. As the Sunset Advisory Commission observed

> The [Judicial Conduct] Commission investigates complaints against judges and conducts either informal or formal proceedings to decide whether or not to take action against a judge. Once the Commission institutes a formal proceeding, it can only dismiss the complaint, issue a censure, or make a recommendation on removal or retirement. The Commission may not issue any of the lesser, more remedial sanctions it has available following an informal proceeding . . . the Commission's limited range of penalties available following a formal proceeding could deter it from pursuing cases of public import in open proceedings.[65]

The Sunset Commission proposed that the Texas Constitution be amended in order to permit the Judicial Conduct Commission to "issue any of its lesser sanctions—in addition to a public censure or recommendation for removal or retirement" in order to "equip the Commission with all the necessary tools it needs and remove any disincentive to taking a case to an open, formal proceeding when warranted."[66] The Assessment Team supports this proposal in order enable, where appropriate, the reprimand or censorship of a judge for his/her conduct in a capital case to be made known to the public, thereby increasing the likelihood of proper recusal when such instances are identified.

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[64] STAFF REPORT WITH COMMISSION RECOMMENDATIONS, *supra* note 61, at 15. *See also* Eric Dexheimer, *Texas Judges' Misdeeds Often Kept Secret by Oversight Commission*, AM-STATESMAN (Austin, Tex.), Apr. 17, 2012, *available at* http://www.statesman.com/news/news/special-reports/texas-judges-misdeeds-often-kept-secret-by-overs-1/nRm2Z ("[M]ost of the reprimands meted out by the commission in a given year[. . .] are kept private, with only the rough outlines of the case made public. No identifying information about the judge or his or her jurisdiction is released, and the penalty has no real impact beyond a notation in the commission's records and the judge's conscience.").

[65] *Id.* at 2.

[66] *Id.*

C. Recommendation #3

Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak for themselves.

a. Bar associations should educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not "technicalities" and that judges and lawyers are bound to protect those rights of all defendants.
b. Bar associations and community leaders publicly should oppose any questions of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they upheld the death penalty.
c. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.

Texas judges presiding over capital cases must run for election in partisan contests. This increases the likelihood that those judges' personal views on the death penalty and past rulings in specific cases will be raised for political purposes—whether in favor of or in opposition to a particular candidate. As a result, fair-minded judges may be perceived as biased simply due to the dictates of electoral politics. While this Chapter recounts specific instances in which, during the course of a campaign, the death penalty became a subject of contention between two candidates for judicial office, it remains the view of the Assessment Team that such rhetoric alone should not be taken as conclusive proof that a judge is incapable of impartially carrying out his/her constitutional duties in capital cases.

Due to the nature of a capital offense and its effect on the community, death penalty cases are more likely than other types of cases to play an outsize role in judicial elections. The contentiousness of past campaigns illustrates this problem and raises concerns that the public will become misinformed as to which qualities are essential to and representative of a fair-minded judge. In the 1994 election for two seats on the Court of Criminal Appeals, for example, both candidates—Sharon Keller and Stephen Mansfield—made an issue of the Court's "reputation for reversing convictions on technicalities."[67] Specifically, Ms. Keller "campaigned as a tough-on-crime district attorney who would bring 'the perspective of a prosecutor' to the court and not let criminals off on minor procedural violations."[68] As for Mr. Mansfield, he campaigned against Judge Charles Campbell "on promises of the death penalty for killers, greater use of the harmless-error doctrine, and sanctions for attorneys who file 'frivolous appeals especially in death penalty cases.'"[69]

Furthermore, and in that same election, then-Presiding Judge Michael McCormick responded to an electoral challenge from his colleague, Judge Charles Baird, by citing five capital cases in which Judge Baird had not voted to affirm a death sentence, remarking that Judge Baird "acts

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[67] Michael Hall, *And Justice for Some*, 32 TEX. MONTHLY 154 (2004).
[68] *Id.*
[69] Stephen B. Bright & Patrick J. Kennan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 762 (1995) (citing Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 32).

more like a defense lawyer for the criminal than a judge."[70] Prosecutors and victims organizations also weighed in on the contest, "say[ing] voters face a clear choice between a judge who generally is pro-prosecution [Presiding Judge McCormick] and one who is frequently pro-defendant [Judge Baird]."[71] Judge Baird's challenge to Presiding Judge McCormick would prove unsuccessful, as would his bid for re-election to the Court of Criminal Appeals in 1998, an election in which he touted his record of "vot[ing] to affirm death penalty cases 90 percent of the time."[72]

Instances in which capital punishment becomes a campaign issue are not exclusive to the high-profile races for seats on the Texas Court of Criminal Appeals. For example, in a 1992 race for a district court judgeship, Judge Norman Lanford, who recently had supported setting aside a death sentence due to prosecutorial misconduct, was defeated in the "bitterly contested Republican primary"[73] by former prosecutor Caprice Cosper, whose campaign emphasized her support for the death penalty.[74]

On all of these occasions, it does not appear that bar association or community leaders spoke out in defense of the judges who were criticized for their decisions in capital cases—a defense that may have helped clarify for the public whether the criticism was accurate or misguided. Accordingly, the State of Texas does not comply with the terms of Recommendation #3.

In light of Texas's process for selecting its state judiciary, criticisms of judges' rulings in capital cases may be inevitable. Moreover, the State Bar of Texas may be limited in its capacity to intervene in these partisan contests, for both logistical and prudential reasons. The limitations on the State Bar, however, should not prevent respected members of the state's legal community from rebutting any egregiously unfair characterizations of a judge's work. Moreover, the State Bar and local bar associations can and should educate the public about the purpose of an independent judiciary and the role of an impartial judge to blunt the impact of such characterizations altogether.

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[70] Bruce Nichols, *Criminal Appeals Court Races Prove Eventful*, DALLAS MORNING NEWS, Mar. 6, 1994, at 7Q (internal quotations omitted).

[71] *Id.*

[72] Bruce Davidson, Editorial, *Important Races Get Overlooked*, SAN ANONTIO EXPRESS–NEWS, Aug. 6, 1998, at B5.

[73] Geoff Davidian, *Election '92: Harris County/Incumbents Hold Leads in District Court Races/Harmon Survives Northcutt Challenge*, HOUSTON CHRON., Nov. 4, 1992, at A31.

[74] *Id.*; *'Half-truths' Upset Judge*, HOUSTON CHRON., Mar. 12, 1992, at A16.

D. Recommendation #4

A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.

Recommendation #5

A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.

Generally, Canon 3D(2) of the Texas Code of Judicial Conduct requires "judge[s] who receive[] information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct [to] take appropriate action."[75] If a lawyer's violation of the Texas Disciplinary Rules of Professional Conduct "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," then a judge having knowledge of that violation "shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action."[76]

Broadly, the Texas Disciplinary Rules of Professional Conduct impose upon lawyers a duty of competency: "A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence[.]"[77] The rules define competence as "possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client,"[78] and the commentary to Rule 1.01 clarifies that "[c]ompetent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client."[79]

Judges also must consider the special responsibilities and obligations imposed on prosecutors by the Texas Disciplinary Rules of Professional Conduct. Rule 3.09 specifies these responsibilities, including, for example, the "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and

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[75] TEX. CODE JUD. CONDUCT, Canon 3D(2).

[76] *Id.*

[77] TEX. DISCIPLINARY R. OF PROF'L CONDUCT, Rule 1.01(a). *See also* TEX. DISCIPLINARY R. OF PROF'L CONDUCT, Preamble, ¶ 3 ("In all professional functions, a lawyer should zealously pursue client's interests within the bounds of the law. In doing so, a lawyer should be competent, prompt and diligent.").

[78] TEX. DISCIPLINARY R. OF PROF'L CONDUCT, at Terminology.

[79] TEX. DISCIPLINARY R. OF PROF'L CONDUCT, Rule 1.01 cmt., ¶ 1. The commentary to this Rule further identifies "relevant factors" for determining competence, such as "the relative complexity and specialized nature of the matter, the lawyer's general experience in the field in question, [and] the preparation and study the lawyer will be able to give the matter . . . ." *Id.* at ¶ 2. Regarding capital litigation, this commentary also cautions that "[t]he required attention and preparation are determined in part by what is at stake; major litigation . . . ordinarily require[s] more elaborate treatment than matters of lesser consequences." *Id.*

. . . [the] disclos[ure] to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor . . . ."[80]

State judges become familiar with their obligations under the Texas Code of Judicial Conduct, as well as with the responsibilities of defense counsel and prosecutors, through a variety of required and voluntary judicial education programs.[81] The Court of Criminal Appeals has promulgated rules of judicial education that require all district court judges to "complete before taking office, or within one year after taking office, at least 30 hours of instruction in the administrative duties of office and substantive, procedural and evidentiary laws."[82] Additionally, the Court of Criminal Appeals administers grants to various entities seeking to offer continuing legal education programs to court personnel.[83] Judges must satisfy a continuing education requirement each fiscal year of "at least 16 hours of instruction in substantive, procedural and evidentiary laws and court administration."[84]

To assist judges in fulfilling these training requirements, the Texas Center for the Judiciary annually hosts a College for New Judges, a week-long program that covers the role of a judge, judicial ethics, courtroom management, and other subjects.[85] In addition, the Center also has hosted, as recently as 2012, a "Criminal Justice" conference that included a session on "Recognizing Ethical Violations by Attorneys," as well as an "Actual Innocence" conference promoted as "offer[ing] insight into ensuring an innocent person is not convicted in [the participant's] court."[86] Notably, however, while Texas law imposes requirements on counsel who seek appointment to death penalty cases, there is no provision of law requiring that judges in front of whom counsel will appear be trained to handle the unique and complex issues raised in a death penalty case.

In spite of these rules and trial court judges' unique position for enforcing them, defendants in Texas death penalty trials have been subject to unfair conduct by prosecutors, as well as ineffective assistance of defense counsel.[87] While judges are appropriately cautious about injecting themselves into the proceedings on the side of one party or another, a trial court

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[80] TEX. DISCIPLINARY R. OF PROF'L CONDUCT, Rule 3.09. The Texas Disciplinary Rules of Professional Conduct establish minimum performance standards for prosecutors and defense counsel, but Recommendations #4 and #5 are not limited to misconduct or ineffectiveness proscribed by these Rules.

[81] *See* TEX. GOV'T CODE ANN. § 56.006(a) (2013).

[82] TEX. R. JUD. EDUC., Rule 2(a)(1); TEX. GOV'T CODE ANN. § 56.006(a) (2013).

[83] *See* TEX. GOV'T CODE ANN. §§ 56.001–56.007 (establishing the judicial and court personnel training fund), 74.025 (2013).

[84] TEX. R. JUD. EDUC., Rule 2(a)(2).

[85] *See College for New Judges: Conference Schedule*, TEX. CTR. FOR THE JUDICIARY, http://www.yourhonor.com/single-conference/60#schedule (last visited Jan. 4, 2013).

[86] TEX. CTR. FOR THE JUDICIARY, *Criminal Justice Conference Brochure* (2012); TEX. CTR. FOR THE JUDICIARY, *Actual Innocence Conference Brochure* (2012), *available at* https://www.yourhonor.com/myprofile/assets/ActualInnocenceConferenceBrochure_(3).pdf. The course description for the "Actual Innocence" conference further specifies that "[the participant] will delve into questions of police and prosecution tunnel vision, effective representation by the defense, [and] prosecutorial misconduct . . . . The goal of this session is to make you aware of the weaknesses in the criminal justice system and identify how, sometimes, [the participant] ha[s] the power to save an innocent person from being a casualty of those weaknesses." *Id.*

[87] *See also* Chapter Five on Prosecution and Chapter Six on Defense Services.

ultimately must serve as a backstop to the adversarial system, thus ensuring that the rights of all parties are protected—especially in cases where a defendant's life is at stake.

A review conducted by the *Texas Tribune* determined that, from 1989 through 2011, state and federal courts have "ruled that prosecutorial error contributed to a wrongful conviction" in at least fourteen Texas murder cases.[88] Because the *Texas Tribune* based its review on data from the National Registry of Exonerations, these fourteen cases do not include every capital case known to have been influenced by prosecutorial misconduct.[89] Defendants successfully retried or released without being cleared of all the charges against them, as well as defendants who plead guilty after their conviction was vacated, would not, for instance, have been part of the *Texas Tribune*'s analysis.[90] The review also excludes cases in which the defendant's claim of prosecutorial misconduct was deemed procedurally defaulted or "harmless error."[91]

In addition, the Innocence Project reviewed "the published trial and appellate court decisions addressing allegations of prosecutorial misconduct [in Texas] between 2004 and 2008"[92] and found ninety-one cases in which a Texas court concluded that prosecutorial misconduct had occurred. In seventy-two of the ninety-one cases, however, the courts found that the misconduct constituted harmless error and upheld the conviction.[93] In some of these cases, greater vigilance on the part of the trial court could have prevented the errors from occurring altogether.[94]

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[88] *See* Ryan Murphy, *Interactive: Texas Wrongful Conviction Explorer*, TEX. TRIB., July 5, 2012, *available at* http://www.texastribune.org/library/data/texas-wrongful-conviction-explorer. Of the fourteen defendants, six—Randall Adams, Clarence Brandley, Anthony Graves, Ricardo Aldape Guerra, Michael Toney, and Ernest Ray Willis—had received a death sentence; seven—Joyce Ann Brown, Debbie Loveless, John Miller, Michael Morton, Fredda Susie Mowbray, Michael Scott, and James Lee Woodard—had received a life sentence, and one—Hicks Elliff—had received a sentence of fifty-five years' imprisonment. *Id.*

[89] *About the Registry*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx (last visited Aug. 20, 2013). The National Registry of Exonerations defines "exoneree" as "a person [who] was wrongly convicted of a crime and later cleared of all the charges." *Id.*

[90] *See, e.g.*, Cook v. State, 940 S.W.2d 623, 627 (Tex. Crim. App. 1996) (reversing defendant's death sentence, which was secured on retrial after a previous death sentence had been reversed, and remarking that "[p]rosecutorial and police misconduct has tainted this entire matter from the outset").

[91] *See, e.g.*, Green v. State, No. AP-76458, 2012 WL 4673756, at *23–24 (Tex. Crim. App. Oct. 3, 2012) (in a capital case, finding a complaint of improper argument untimely because defendant "objected only after the State had made several similar remarks to the jury regarding what may have been going through the minds of the victims during the murders").

[92] Barry Scheck, Editorial, *Errant Prosecutors Seldom Held to Account*, AM.-STATESMAN (Austin, Tex.), May 6, 2012.

[93] *Id.* As Scheck parenthetically explains: "The distinction between harmless and harmful does not differentiate between the seriousness of the misconduct. Rather, it is the court's determination that the misconduct wouldn't have changed the outcome." *Id.* *See also* Mosley v. State, 983 S.W.2d 249, 259–60 (Tex. Crim. App. 1998) (describing harm analysis as applied under Texas law). *But see* TEX. DIST. & CNTY. ATT'YS ASS'N, SETTING THE RECORD STRAIGHT ON PROSECUTORIAL MISCONDUCT (2012) (disputing the findings of the Innocence Project's review).

[94] *See, e.g.*, Abdygapparova v. State, 243 S.W.3d 191, 210 (Tex. App. 2007) (in a murder case, finding it improper for the trial court to have "engag[ed] in written communications with the State regarding potential jurors, defense counsel's voir dire questions and presentation of argument, all in the presence of potential jurors"); Hall v. State, 161 S.W.3d 142, 153 (Tex. App. 2005) (in a cocaine possession case, finding the prosecution's mention of defendant's alleged, extraneous offenses "clearly objectionable and inadmissible," of "no probative value regarding the charged offense," and "prejudicial").

To be sure, one judge's error should not to be ascribed to the judiciary as a whole, just as not every instance of error is owed to a presiding judge's inattention. In *State v. Masonheimer*, for example, "[t]he trial court ordered the State to disclose to the defense any evidence that was 'clearly exculpatory' and to turn over to the court for an *in camera* inspection 'anything borderline that the State has any doubts about at all about whether or not it's exculpatory evidence.'"[95] Although the prosecution in *Masonheimer* failed to comply with this order,[96] that failure should not be ascribed to the presiding judge.

In contrast to the court's vigilance in *Masonheimer*, however, the trial judge in *Wilson v. State*, which is also a capital case, overruled an objection to the prosecutor's assertion that defense counsel "has no such oath [to see that justice is done], and what he wishes is that you [the jury] turn a guilty man free."[97] Finding reversible error, the Texas Court of Criminal Appeals reiterated the Court's admonishment in *Bray v. State*: "'Trial courts should assume the responsibility of preventing this type of argument. A rebuke by the trial court in the presence of the jury may do more to end the practice of intemperate and improper argument than repeated admonitions or even reversals by this court.'"[98] Trial judges likewise have failed to sustain objections when prosecutors have, in their closing arguments, referred to inadmissible evidence[99] or, as in *Freeman v. State*, erroneously described the acts of the defendant.[100]

Recommendation #4 is not limited to *reversible* instances of prosecutorial error, and it is important to recall a judge's authority to curb improper argument and other forms of misconduct even in the absence of a formal objection. To this point, and even as Judge Keith P. Ellison affirmed Peter Anthony Cantu's conviction and death sentence during federal habeas proceedings, Judge Ellison also remarked that "the prosecutor's comments [during closing argument] were undeniably harsh, *and this Court likely would not have allowed them*."[101] Likewise, the prosecutor's description of the capital defendant in *State v. Willis* as a "rat," "animal," "thing," "monster from a horror film," and "satanic demon" who had "committed his soul to the devil" was—in the words of U.S. District Court Judge W. Royal Furgeson, Jr.—"beyond poor taste and shameful."[102] Texas's judges must exercise their discretion to effectively address improper prosecutorial argument and other misconduct, thereby better ensuring that capital cases in their courtrooms are properly prosecuted and that outcomes reached in these grave cases are both fair and just.

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[95] *Ex parte* Masonheimer, 220 S.W.3d 494, 496 n.2 (Tex. Crim. App. 2007).

[96] *Id.* at 496 n.1 ("This opinion . . . assumes without deciding that the undisclosed evidence meets *Brady*. We do note that the defense, the State, the trial court and the Court of Appeals all seem to agree that the undisclosed evidence meets *Brady*.").

[97] Wilson v. State, 938 S.W.2d 57, 58–59 (Tex. Crim. App. 1996) (emphasis omitted), *abrogated on other grounds by* Motilla v. State, 78 S.W.3d 352 (Tex. Crim. App. 2002).

[98] *Wilson*, 938 S.W.2d at 58–59 (quoting Bray v. State, 478 S.W.2d 89, 90 (Tex. Crim. App. 1972)).

[99] *See, e.g.*, Bullard v. State, No. 2-06-099-CR, 2007 WL 2891381, at *6 (Tex. App. Oct. 4, 2007) (finding the prosecution's references to inadmissible evidence improper but harmless).

[100] Freeman v. State, 340 S.W.3d 717, 728 (Tex. Crim. App. 2011) (internal quotations omitted) (finding it improper but harmless for the prosecution to have described the defendant as "tr[ying] with all he could to massacre seven officers, to commit the worst criminal act on law enforcement ever in the United States' history").

[101] Cantu v. Quarterman, No. H-07-CV-3016, 2009 WL 275172, at *26 (S.D. Tex. Feb. 4, 2009).

[102] Willis v. Cockrell, No. P-01-CA-20, 2004 WL 1812698, at *31 (W.D. Tex. Aug. 9, 2004) (declining to find, as an unreasonable application of federal law, the Texas Court of Criminal Appeals' determination that defense counsel's failure to object to these comments nevertheless constituted effective representation).

Other cases raise concerns regarding trial courts' attentiveness with respect to defense counsel assistance. Commentators have observed that, in Texas, "nearly one in four death row inmates was represented by a lawyer who had been reprimanded, placed on probation, suspended, or banned from practicing law by the state bar of Texas."[103] Other studies have identified poor performance by state habeas appointed counsel, finding widespread deficiencies in the petitions filed by those attorneys on behalf of death-sentenced inmates.[104] In fact, one lawyer was deemed "qualified" by Texas Court of Criminal Appeals to represent a death-sentenced inmate during state habeas review even though the lawyer presently was serving two probated suspensions at the time of appointment.[105] Notably, a 2003 report to the State Bar of Texas stated that, in response to a survey sent to every prosecutor in the State of Texas, several respondents indicated that, even when they bring to a judge's attention ineffective assistance by opposing counsel, no correction is made.[106]

At the trial level, ineffective lawyering by defense counsel that should have been plain to the presiding judge has gone either unnoticed or uncorrected. During Calvin Burdine's capital trial, for example, his appointed counsel repeatedly fell asleep—napping noticed by three jurors and the clerk of the court but overlooked by the presiding judge and prosecutor.[107] By contrast, the presiding judge repeatedly admonished defense counsel in the capital trial of George McFarland for sleeping "during 'critical stages' of his trial" and, "[a]fter one of these incidents, . . . asked [McFarland] if he wanted a different lead counsel appointed."[108]

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[103] DAVID R. DOW, EXECUTED ON A TECHNICALITY: LETHAL INJUSTICE ON AMERICA'S DEATH ROW 83 (2005) (citing Diane Jennings et al., *Defense Called Lacking for Death Row Indigents, But System Supporters Say Most Attorneys Effective*, DALLAS MORNING NEWS, Sept. 10, 2000, at 1A; James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2103 n.178 (2000)). Although the *Dallas Morning News* article qualifies that, "[i]n about half of those instances, the misconduct occurred before the attorney was appointed to handle the capital case," the article also notes that "[e]ven some attorneys with clean disciplinary records put forth only minimal effort—rarely meeting with their clients, failing to investigate, spending only a few hours preparing for the trial, missing court deadlines and even dozing off during trials." Diane Jennings et al., *Defense Called Lacking for Death Row Indigents, But System Supporters Say Most Attorneys Effective*, DALLAS MORNING NEWS, Sept. 10, 2000, at 1A.

[104] *See* TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS, at x (2002) (among the state habeas petitions filed on behalf of death-sentenced inmates from 1995 to 2001, 28% raised claims based solely on the trial record and 39% contained no extra-record materials to support the claims).

[105] *Id.* at xi.

[106] *See* ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERV. TO THE POOR IN CRIMINAL MATTERS, MUTING GIDEON'S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 13 (2000), *available at* http://www.uta.edu/pols/moore/indigent/last.pdf.

[107] Burdine v. Johnson, 262 F.3d 336, 339 (5th Cir. 2001) (en banc). Burdine's due process rights eventually were vindicated by the U.S. Court of Appeals for the Fifth Circuit, which granted federal habeas relief and vacated his capital muder conviction. *Id.* at 350.

[108] *Ex parte* McFarland, 163 S.W.3d 743, 751, 752 (Tex. Crim. App. 2005); Janet Elliott, *New Trial Is Denied to Man Whose Lawyer Slept in Court*, HOUSTON CHRON., May 19, 2005, at B5. The Texas Court of Criminal Appeals ultimately denied McFarland a retrial "because his co-counsel was an awake and zealous advocate." *McFarland*, 163 S.W.3d at 751, 753. *See also* United States v. Fields, 483 F.3d 313, 360 (5th Cir. 2007) (in a capital case in which the prosecutor referred to the defendant as a "psychopath," noting that the federal district court judge "instructed the jury that it must decide the case based on the evidence and that 'statements . . . or arguments made by the lawyers are not evidence' and are 'not binding upon you'").

Finally, with respect to jury selection practices, it also appears that judges are not always exercising their discretion to determine whether peremptory jury strikes are made on legally sufficient grounds and that prospective jurors are not removed due to their race, ethnicity, or gender. An investigation of jury selection practices conducted by the *Dallas Morning News* in 2005 found, for example, that of the Dallas judges interviewed on their practices in oversight of jury selection, only one judge tracked "the number of minority jurors struck and asks lawyers on the record if they have a Batson challenge."[109] The *Dallas Morning News* found that "[m]ost judges rarely object – or even notice – when prosecutors reject disproportionate numbers of blacks from juries and defense lawyers of the same with whites."[110]

Conclusion

Texas's trial courts must take special measures to ensure that capital defendants receive an effective defense and a fair trial. The occurrences of ineffective lawyering and unfair prosecutorial conduct in capital cases raise questions, however, as to whether judges take enough precautions to ensure the fairness of the proceedings. However, given the inherent difficulty in assessing judicial vigilance in every courtroom and across all cases, the Assessment Team possesses insufficient information to determine the State of Texas's compliance with Recommendations #4 and #5.

Recommendation

While judges are appropriately cautious about injecting themselves into the proceedings on the side of one party or another, a trial court ultimately must serve as a backstop to the adversarial system, thus ensuring that the rights of all parties are protected—especially in cases where a defendant's life is at stake. The Assessment Team therefore recommends that routine training be required of any trial judge who may handle capital cases to address the particular legal issues incident to such cases. Facilitated by the Texas Center for the Judiciary and comparable educational institutions, this training should emphasize to participating judges the corrective action the trial court must take whenever it observes ineffective lawyering or unfair prosecutorial conduct.

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[109] Holly Becka, et al., *Judges rarely detect jury selection bias: Most don't push the issue unless lawyers raise it first*, DALLAS MORNING NEWS, Aug. 23, 2005.

[110] *Id.* This is in contrast to the fact that the U.S. Supreme Court held in *Miller-El v. Dretke*, 545 U.S. 231 (2005) that courts may consider side-by-side comparisons of jurors as well as historic discrimination practices when evaluating a potential *Batson* violation.

E. Recommendation #6

Judges should do all within their power to ensure that defendants are provided with full discovery in all capital cases. Trial courts should conduct, at a reasonable time prior to a criminal trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under the applicable discovery rules, statutes, ethical standards, and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations.

Pursuant to the Michael Morton Act—which goes into effect on January 1, 2014—Texas permits wider discovery than previously authorized under state law.[111] Specifically, the Act's revisions to Article 39.14 require the prosecution, "as soon as practicable after receiving a timely request from the defendant," to disclose to the defense "any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report."[112]

The prosecution also must disclose "any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state."[113] "[W]ritten communications between the state and an agent, representative, or employee of the state" are exempted from disclosure requirements under the statute.[114] While the previous version of Article 39.14 required the defendant to show "good cause" for his/her request followed by a court order to the prosecution before these materials discoverable,[115] the revised statute requires only a "timely request from the defendant."[116]

However, existing case law indicates that, irrespective of the provisions of Texas law governing discovery, trial courts may not order pretrial discovery beyond what is authorized by the Code of Criminal Procedure.[117] It is unclear whether the 2013 revisions to the statute authorize courts to order broader discovery than currently permitted under state law.[118]

With respect to pre-trial conferences, judges are empowered the Texas Code of Criminal Procedure to "direct the defendant and his attorney . . . and the State's attorney to appear before the court . . . for a [pre-trial] conference and hearing,"[119] at which point several "matters" may be

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[111] Chuck Lindell, *Perry Signs Morton Act into Law*, AM.-STATESMAN (Austin, Tex.), May 17, 2013.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (2013).
[116] S.B. 1611, 83d Leg. Reg. Sess. (Tex. 2013).
[117] *See In re* Tharp, No. 03-12-00400-CV, 2012 WL 3238812, at *1–2 (Tex. App. Aug. 9, 2012); Vanwinkle v. State, No. 02-09-00200-CR, 2010 WL 4261603, *6–7 (Tex. App. Oct. 28, 2010); Martin v. Darnell, 960 S.W.2d 838, 842 (Tex. App. 1997); State *ex rel*. Wade v. Stephens, 724 S.W.2d 141, 144 (Tex. App. 1987). *But see* State *ex rel*. Holmes v. Lanford, 764 S.W.2d 593, 594 (Tex. App. 1989) ("This court recognizes circumstances may arise under which a trial court could properly order discovery beyond that outlined in article 39.14.").
[118] S.B. 1611, 83d Leg., Reg. Sess. (Tex. 2013).
[119] TEX. CODE CRIM. PROC. ANN. art. 28.01, § 1 (2013).

discussed, among these "[d]iscovery" issues.[120] The Texas Court of Criminal Appeals has emphasized the discretionary nature of conferences and hearings conducted pursuant to this section of the Code, describing the provision as one "directed to the court's discretion."[121] It also has stated that "[t]he purpose of the pre-trial hearing is to enable the judge to dispose of certain matters prior to trial and thus avoid delays during the trial," a purpose likewise served by the conferences sanctioned under the article.[122]

Accordingly, Texas law permits, but does not require, trial judges to conduct at their initiative a pre-trial conference with the parties to a capital case to ensure that the prosecution and defense are fully aware of their respective disclosure obligations, as well as to offer the court's assistance in resolving disputes over these obligations.[123] The Assessment Team was unable to determine, however, whether and to what extent such pre-trial conferences occur in Texas capital cases.

If the prosecution fails to comply fully with court-ordered discovery, however, relief on the basis of that noncompliance will be warranted only if "the prosecutor acted with the specific intent to willfully disobey the discovery [order]."[124] The Texas Court of Criminal Appeals has made clear that this is a high bar to clear: "The prosecutor may have been extremely negligent or even reckless with respect to the result of his actions."[125] Accordingly, in the capital case of *State v. LaRue*, the Court of Criminal Appeals declined to find the prosecutor's "continuing failure to comply with the discovery order" as such willful disobedience warranting relief.[126] In *LaRue*, the trial court ordered the prosecution, in January 2002, to disclose to the defense the results of its DNA testing that had been obtained in September 2000 and April 2002. Despite this order, the prosecutor did not reveal the results to the defense until January and February of 2003, and it waited until two weeks before jury selection began to turn over "the bulk of the ordered discovery."[127] Even then, DNA test results continued to be withheld.[128]

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[120] *Id.* at § 1(8). *Cf.* Thornton v. State, 37 S.W.3d 490, 492 (Tex. App. 2000) ("The trial court may order a pretrial hearing at which it can determine, among other things, discovery requirements."). "Article 28.01 is not an exhaustive enumeration of the issues that a court may determine prior to trial." State v. Rosenbaum, 910 S.W.2d 934, 941 n.10 (Tex. Crim. App. 1994).

[121] Calloway v. State, 743 S.W.2d 645, 649 (Tex. Crim. App. 1988). *See also* Ford v. State, 305 S.W.3d 530, 537 n.26 (Tex. Crim. App. 2009).

[122] Johnson v. State, 803 S.W.2d 272, 283 (Tex. Crim. App. 1990), *overruled on other grounds by* Heitman v. State, 815 S.W.2d 681 (Tex. Crim. App. 1991).

[123] Counsel might be reminded, for example, of their obligations under Rule 3.04(a) of the Texas Disciplinary Rules of Professional Conduct: "[A lawyer shall not] unlawfully obstruct another party's access to evidence; in anticipation of a dispute unlawfully alter, destroy or conceal a document or other material that a competent lawyer would believe has potential or actual evidentiary value; or counsel or assist another person to do any such act." TEX. DISCIPLINARY R. OF PROF'L CONDUCT, Rule 3.04(a).

[124] Oprean v. State, 201 S.W.3d 724, 727 (Tex. Crim. App. 2006). *See also* Brandi Grissom, *Courts Found DA Error in Nearly 25% of Reversed Cases*, TEX. TRIB., July 5, 2012 (examining eighty-six cases in which a Texas defendant had his/her conviction overturned, and noting that, "[i]n 17 of the 21 Texas cases where courts found prosecutorial error, the judges ruled that prosecutors failed to give defense lawyers exculpatory evidence").

[125] State v. LaRue, 152 S.W.3d 95, 97 (Tex. Crim. App. 2004).

[126] *Id.* at 101 (Johnson, J., dissenting).

[127] *Id.*

[128] *Id.* ("On February 13, 2003, the day the case was called for trial, the prosecutor tendered, for the first time, DNA test results from April 17, 2002, for tests performed on fingernail and hair samples. The results from DNA tests from 1993 were apparently never tendered.").

As no rule compels Texas's trial judges to conduct pretrial conferences in capital cases to ensure that counsel are aware of their respective disclosure obligations, and in light of past failures by counsel to uphold their disclosure obligations without the later imposition of remedial measures, the State of Texas only partially complies with Recommendation #6.

Recommendation

Ultimately, the Assessment Team recommends that the State of Texas adopt a procedure whereby a criminal trial court shall conduct, at a reasonable time prior to a capital trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under applicable discovery rules, statutes, ethical standards, and the federal and state constitutions. A further purpose for this conference would be to offer the court's assistance in resolving disputes over disclosure obligations.[129] This type of pretrial conference will permit the court to monitor the status of discovery in a capital case to ensure proper and timely disclosure, just as it also may ease the burden on post-conviction courts seeking to determine whether the prosecution had knowledge of the existence of discoverable or *Brady* material yet failed to disclose it.

Under the new law, a great deal of discretion remains with the prosecutor in determining what material should be disclosed. Accordingly, in capital cases the trial court should also be permitted to conduct *in camera* inspection of the prosecutor's file to ensure that all *Brady* and other discoverable material has been disclosed.

Such procedures will enable more just and accurate outcomes will be reached, the risk of wrongful convictions minimized, and the public's confidence in judicial independence and vigilance in Texas's criminal system improved.[130]

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[129] *See* ABA, RECOMMENDATION 102D, 2010 Midyear Mtg. (adopted Feb. 8–9, 2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/midyear/docs/select_committee_report.doc.

[130] Minimizing the risk of wrongful convictions also would spare the State of Texas the substantial cost of compensating exonerees. *See* Mike Ward, *Tab for Wrongful Convictions in Texas: $65 Million and Counting*, AM.-STATESMAN (Austin, Tex.), Feb. 11, 2013 ("In all, the state has paid more than $65 million to 89 wrongfully convicted people since 1992, according to updated state figures.").

CHAPTER TWELVE

RACIAL AND ETHNIC MINORITIES[1]

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is too often a major explanatory factor. Nationwide, most of the studies have found that, after controlling for other factors, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is black. Studies also have found that the death penalty has been sought and imposed more frequently in cases involving black defendants than in cases involving white defendants and that the death penalty is most likely to be imposed in cases in which the victim is white and the perpetrator is black.

In 1987, the United States Supreme Court held in *McCleskey v. Kemp*[2] that even if statistical evidence revealed systemic racial disparity in capital cases, this showing would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there is systemic racial disparity in the death penalty's implementation.

The pattern of racial disparity reflected in *McCleskey* persists today in many jurisdictions, in part because courts may tolerate actions by prosecutors, defense lawyers, trial judges, and juries that may improperly inject race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty, ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims, and discriminatory use of peremptory challenges to obtain all-white or largely-white juries.

There is no dispute about the need to eliminate race and ethnicity as a factor in the administration of the death penalty.[3] To accomplish this goal, however, society must identify the various ways in which race affects the administration of the death penalty and devise solutions to eliminate discriminatory practices.

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[1] The Texas Assessment Team notes that, in 2011, the U.S. Census Bureau found that Texas had become one of five states with a "majority-minority" population, as 55.2% of Texans identified as members of a racial or ethnic minority. *See Most Children Younger Than Age 1 Are Minorities*, U.S. CENSUS BUREAU, http://www.census.gov/newsroom/releases/archives/population/cb12-90.html (last visited Apr. 26, 2013).

[2] McCleskey v. Kemp, 481 U.S. 279 (1987).

[3] In the interest of simplifying the language of this Chapter, the Assessment Team will use the phrase "racial discrimination" interchangeably with the phrase "racial and ethnic discrimination." The Assessment Team recognizes, however, that the concepts of race and ethnicity are distinct. *See* CYNDI BANKS, CRIMINAL JUSTICE ETHICS 79 (2d ed. 2008) (describing the distinction between the concepts of race and ethnicity).

I. FACTUAL DISCUSSION: TEXAS OVERVIEW

Prior to the U.S. Supreme Court's reinstitution of the death penalty in 1976, which began the modern death penalty era, the Court had found the application of the death penalty unconstitutional in 1972 due, in part, to the disparate application of the death penalty on minorities.[4] In the modern death penalty era, the issue of racial and ethnic discrimination in the administration of capital punishment was brought to the forefront by the U.S. Supreme Court's decision in *McCleskey v. Kemp*.[5] Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodworth, McCleskey challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner.[6] Specifically, after controlling for 230 variables, the Baldus study showed that blacks convicted of killing whites faced the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.[7] The Court rejected McCleskey's claims, finding that the data showing racial discrepancies in the administration of the death penalty did not prove the existence of intentional racial discrimination in McCleskey's case.[8]

The *McCleskey* decision invited legislatures to develop remedies for eliminating race from the capital sentencing process.[9] With respect to those remedies, Texas lawmakers have introduced, but not enacted, legislation that would provide capital defendants with an opportunity to assert, at a pretrial hearing, claims that the decision by the state to seek the death penalty was based in significant part on the race of the defendant or the victim of the alleged offense.[10]

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[4] Furman v. Georgia, 408 U.S. 238, 364 (1972) (Marshall, J., concurring) (noting that, from 1930 to 1972, of the 3,859 persons executed 2,066 were black, and that of the 455 persons executed for non-homicide rape 405 were black). *See also id.* at 256–57 (Douglas, J., concurring) (stating that "these discretionary statutes . . . are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments").

[5] McCleskey v. Kemp, 481 U.S. 279 (1987).

[6] *Id.* at 286.

[7] *Id.* at 286–87, 291–92. In its 1990 review of twenty-eight studies conducted at the national, state, and local levels as to whether race was a factor influencing death penalty sentencing, the U.S. General Accounting Office relied on studies conducted, at least in part, in Texas. *See* U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES app. I (1990) (citing Sheldon Ekland-Olson, *Structured Discretion, Racial Bias and the Death Penalty: The First Decade After* Furman *in Texas*, 69 SOC. SCI. Q. 853 (1988); William Bowers & Glenn Pierce, *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 CRIM. & DELINQ. 563 (1980)).

[8] *McCleskey*, 481 U.S. at 297–98. Notably, the author of the five-to-four majority opinion in *McCleskey*, Justice Lewis F. Powell, Jr., was later asked in retirement whether, given the chance, he would change his vote in any case. Justice Powell replied: "'Yes, *McCleskey v. Kemp*.'" JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL: A BIOGRAPHY 451 (2d ed. 2001).

[9] *McCleskey*, 481 U.S. at 319 ("McCleskey's arguments are best presented to the legislative bodies.").

[10] *See, e.g.*, H.B. 892, 1999 Gen. Assemb., Reg. Sess. § 1(b) (Tex. 1999). Specifically, House Bill 892 would have permitted a capital defendant to present, at a pre-trial hearing,

> statistical evidence or any other evidence showing that in the state as a whole or in the county in which the defendant is to be tried, certain persons are disproportionately subjected to prosecution seeking the death penalty, either because of the race of the defendant or the race of the alleged victim.

Id. at § 1(b). The State then would have been "entitled to admit relevant evidence rebutting [the] allegation made by [the] defendant." *Id.* "If the court finds that by clear and convincing evidence the defendant has proven that the decision of the state to seek the death penalty in the defendant's case was made in significant part because of

Relatedly, in 2001 the Texas Legislature amended the Code of Criminal Procedure to prohibit the State from introducing evidence at the sentencing phase "to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct."[11] Prior to this amendment, an expert witness had testified in several capital cases that a defendant's race or ethnicity provided a basis for predicting the defendant's future dangerousness—a necessary condition for imposing the death penalty in the State of Texas.[12] Finally, with respect to data collection, several state agencies compile statistics relevant to an examination of how race or ethnicity may influence capital case outcomes.

First, the Texas Department of Public Safety operates its Uniform Crime Reporting Program (UCR Program), which tracks—by way of voluntarily-submitted Supplemental Homicide Reports (SHRs)—the annual number of murders committed in Texas, as well as the race and ethnicity of those persons arrested for murder.[13] SHRs also may specify the circumstances of each homicide (e.g., weapon used and offender-victim relationship).[14]

Second, the Texas Department of Criminal Justice (TDCJ) maintains and publishes statistics on the demographics of its prison population,[15] including demographic information specific to those individuals assigned to death row.[16] TDCJ also makes publicly available the race and ethnicity of executed offenders,[17] as well as the race, ethnicity, and gender of death-sentenced inmates' victim(s).[18]

Third, the Office of Court Administration (OCA), a state agency under the direction and supervision of the Texas Supreme Court,[19] is required under Texas law to "annually collect and publish a report of information regarding cases involving the trial of a capital offense," including

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race, the court shall order the attorney representing the state to not proceed with the prosecution of the case as a death penalty case." *Id.*

[11] *See* Act of June 11, 2001, ch. 585, 2001 Tex. Sess. Law (codified as amended at TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(2) (2013)).

[12] *See* Brandi Grissom, *Texas Ends Deal with Psychologist over Race Testimony*, TEX. TRIB., Oct. 31, 2011 (noting that in six capital cases Dr. Walter Quijano had "explained [to jurors] that African American and Hispanic men were more likely to be violent again"). *See also* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1), (g) (2013). In addition to amending the Code to bar such testimony, the State of Texas also confessed error before the U.S. Supreme Court in *Saldaño v. State*, acknowledging that such testimony had "seriously undermined the fairness, integrity or public reputation of the judicial process." John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 393 (2006).

[13] *See, e.g.*, TEX. DEP'T PUB. SAFETY, 2009 CRIME IN TEXAS 16 (2010). The Uniform Crime Reporting Section—located within the Crime Records Service of the Department of Public Safety—is responsible for "collect[ing], validat[ing], and tabulat[ing] UCR reports from all reporting jurisdictions in Texas." *Id.* at 3.

[14] *See* TEX. DEP'T PUB. SAFETY, *Supplementary Homicide Report*, UCR-8 (Rev. 10/86), *available at* http://www.txdps.state.tx.us/internetforms/Forms/UCR-8.pdf.

[15] *See, e.g.*, TEX. DEP'T CRIM. JUSTICE, FISCAL YEAR 2011 STATISTICAL REPORT 1 (2011) (noting the racial composition of Texas's prison population as of August 31, 2011).

[16] *See Gender and Racial Statistics of Death Row Offenders*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_gender_racial_stats.html (last visited Apr. 26, 2013).

[17] *See Executed Offenders*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_executed_offenders.html (last visited Apr. 26, 2013).

[18] *See Offenders on Death Row*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_offenders_on_dr.html (last visited Apr. 26, 2013); *Executed Offenders*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_executed_offenders.html (last visited Apr. 26, 2013).

[19] TEX. GOV'T CODE ANN. § 72.011(a) (2013).

"(1) the contents of the trial court's charge to the jury; and (2) the sentence issued in each case."[20] These reports, available on OCA's website, are limited to cases in which a capitally-charged defendant faced a jury trial and, therefore, exclude those cases in which a plea agreement was reached with prosecutors.[21] OCA also operates an online Court Activity Reporting and Directory System, which allows the public to run reports and conduct ad hoc searches of two decades' worth of data regarding Texas's criminal justice system.[22]

More generally, Texas also has adopted a law that explicitly prohibits law enforcement from engaging in racial profiling in any case.[23] The law requires each law enforcement agency to adopt a written policy that "define[s] acts constituting racial profiling," prohibit officers from engaging in racial profiling, establish procedures for handling complaints of racial profiling, and explain the corrective action the agency will take when an officer is found to have engaged in proscribed conduct.[24]

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[20] TEX. GOV'T CODE ANN. § 72.087 (2013).

[21] *Jury Charges and Sentences in Capital Cases*, TEX. OFFICE CT. ADMIN., http://www.txcourts.gov/oca/jurycharges.asp (last visited Apr. 26, 2013).

[22] *Court Activity Reporting and Directory System*, TEX. OFFICE CT. ADMIN., http://card.txcourts.gov/secure/login.aspx?ReturnUrl=default.aspx (last visited Apr. 26, 2013).

[23] TEX. CODE CRIM. PROC. ANN. art. 2.132(b)(1)–(5) (2013).

[24] *Id*.

II. ANALYSIS

A. Recommendation #1

Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.

The Assessment Team acknowledges that jurisdictions and independent researchers confront considerable difficulty in isolating race of the defendant or victim from other variables that may affect outcomes in death penalty cases. As a general matter, investigations and evaluations into the impact of racial discrimination in a criminal justice system vary in scope, specificity, and reliability. These investigations may, for example, study statewide data or may confine their focus to particular jurisdictions within a state (e.g., more populous counties and cities).[25] The range of cases examined may encompass several decades or only a handful of years.[26] Moreover, the explanatory power of a study depends in large measure on the depth of statistical analysis. In their more basic forms, such studies might merely compare the percentages of capitally-convicted persons assigned death sentences across racial categories. Alternatively, they might control for a wide variety of non-racial factors that could explain variances in capital case outcomes in an effort to isolate the effect of racial factors.[27]

Notwithstanding the difficulty in obtaining accurate, reliable data on the effect of race on capital cases, determining whether racial discrimination affects the criminal justice system—and death penalty cases in particular—is essential to determining whether Texas's system provides due process and ensures equal protection under the law. The variety of approaches to studying the impact of racial discrimination also underscores the importance of the Texas undertaking an objective and thorough evaluation of whether patterns of racial discrimination exist in any aspect of the criminal justice system.

The Assessment Team, however, is unaware of any effort by the state to investigate whether racial discrimination influences capital case outcomes and, if so, to what extent.[28] Furthermore,

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[25] *Compare* Thomas J. Keil & Gennaro F. Vito, *Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post*-Gregg *Outcomes*, 7 JUST. Q. 189, 194 (1990) (analyzing a statewide dataset of capital cases), *with* Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 808 (2008) (examining a countywide dataset of capital cases).

[26] *Compare* Michael Lenza et al., *The Prevailing Injustices in the Application of the Missouri Death Penalty (1978 to 1996)*, 32 SOC. JUST. 151, 151 (2005) (examining eighteen years' worth of capital sentencing data), *with* William J. Bowers & Glenn L. Pierce *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980), *reprinted in* WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982, at 231, 225 (1984); *see also id.* at 266–67 (examining four years' worth of capital sentencing data).

[27] *Compare* JOHN F. GALLIHER & DAVID KEYS, REPORT TO THE OFFICE OF THE MISSOURI PUBLIC DEFENDER ON PROPORTIONALITY IN SENTENCING IN DEATH ELIGIBLE CASES 130–55 (1994) (comparing capital case outcomes for black and white defendants), *with* David C. Baldus, Charles Pulaski, and George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); DAVID C. BALDUS, CHARLES PULASKI & GEORGE WOODWORTH, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) (using multiple-regression statistical analysis to isolate the presence of racial discrimination in capital cases).

[28] *See* Email from Alicia Frezia Nash, Open Records Act Coordinator, Tex. Dep't Crim. Justice, to Ryan Kent, Staff Att'y (June 14, 2012) (on file with author) ("The Texas Department of Criminal Justice (TDCJ) has not

and in contrast to other jurisdictions with far fewer capital cases and executions, Texas has not received as much scrutiny by independent researchers investigating the presence of racial discrimination in the application of the death penalty—at least not in accordance with the "rigorous" research methods undertaken in non-Texas studies.[29] The Assessment Team also is unaware of any effort by the State of Texas to examine more broadly how its criminal justice institutions treat racial and ethnic minorities.[30]

Independent Studies of Racial Discrimination in Texas Capital Cases

There have been several independent studies on the impact of racial discrimination on Texas's system of capital punishment. Although the questions presented and methodologies used in these studies differ, their various findings support the conclusion that Texas's capital punishment system is not free from the influence of race and that racial considerations may play a role in determining outcomes in capital cases. The Assessment Team notes, however, that most of the studies discussed below are either dated or incomplete. Consequently, a contemporary investigation must be undertaken to determine whether racial discrimination currently affects Texas's criminal justice system and—if it does—which strategies may be pursued to eliminate it.

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undertaken any studies on racial discrimination and sentencing outcomes, nor has TDCJ collected or reviewed independent studies regarding racial discrimination in the criminal justice system.").

[29] *See* Phillips, *supra* note 25, at 808 ("Ironically, the most rigorous research on race and capital punishment has not been conducted in the jurisdictions that execute the most offenders.").

[30] Other capital jurisdictions, by contrast, have sponsored examinations of the treatment of racial and ethnic minorities in their criminal justice systems. For example, Florida has undertaken three initiatives to explore the impact of racial discrimination in its criminal justice system. *See* FLA. SUP. CT. RACIAL & ETHNIC BIAS COMM'N, EXECUTIVE SUMMARY: REPORTS AND RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS COMMISSION (Deborah Hardin ed., 1990–91), *available at* http://www.floridasupremecourt.org/pub_info/documents/ racial.pdf; FRANK P. SCRUGGS, II ET AL., PRELIMINARY ASSESSMENT: A FIRST LOOK AT REPORTING ON IMPLEMENTATION PROGRESS AND IDENTIFYING ISSUES THAT REQUIRE ADDITIONAL ACTIOn (2000), *available at* http://www.flcourts.org/gen_ public/family/diversity/bin/bias_study2.pdf. The third initiative was the Governor's Task Force on Capital Cases, established to "study evidence of discrimination, if any, in the sentencing of defendants in capital cases, including consideration of race, ethnicity, gender." *See* Fla. Exec. Order No. 2000-1 (2000); *see also* Sydney P. Freedberg & William Yardley, *Lethal Injection Approved*, ST. PETERSBURG TIMES, Jan. 7, 2000. In addition, Tennessee has sponsored at least two initiatives to investigate and evaluate the impact of racial discrimination in its criminal justice system and to strive to eliminate any such discrimination. *See* TENN. COMM'N ON RACIAL & ETHNIC FAIRNESS, FINAL REPORT OF THE TENNESSEE COMMISSION ON RACIAL AND ETHNIC FAIRNESS TO THE SUPREME COURT OF TENNESSEE (1997), *available at* http://www.tsc.state.tn.us/sites/default/files/docs/report_from_commission_on_racial__ethnic_ fairness.pdf; TENN. COMM. TO IMPLEMENT THE RECOMMENDATIONS OF THE RACIAL & ETHNIC FAIRNESS COMM'N AND THE GENDER FAIRNESS COMM'N, IMPLEMENTING FAIRNESS: THE REPORT OF THE COMMITTEE TO IMPLEMENT THE RECOMMENDATIONS OF THE RACIAL AND ETHNIC FAIRNESS COMMISSION AND THE GENDER FAIRNESS COMMISSION (2000), *available at* http://www.tsc.state.tn.us/sites/default/files/docs/report_of_committee_to_implement_racia_ethnic__gender_fairness.pdf.

Study of Harris County, Texas: 1992–1999

Among the more recent Texas-specific independent studies is a 2008 article by Professor Scott Phillips that examined the influence of race in Harris County capital cases.[31] Professor Phillips opted to focus on Harris County because

> if Harris County were a state it would rank second in executions after Texas; [] Harris County has executed more offenders than all the other major urban counties in Texas, combined; and [] Harris County has executed more than twice as many offenders as the top death jurisdiction that has been subject to "reasonably well-controlled" research on race and capital punishment.[32]

Using the Harris County Justice Information Management System as well as "archival documents" provided by the Harris County District Attorney's Office, Professor Phillips compiled a database of 504 "adult defendants indicted for capital murder in Harris County from 1992 to 1999."[33] The study then used logistic regression analysis to estimate the impact of race on (1) the odds of proceeding to a capital trial, and (2) the odds of a defendant receiving a death sentence.[34] In both cases, Professor Phillips also controlled for "potential confounders," such as "the social characteristics of the defendant, the social characteristics of the victim, and the legal dimensions of the case."[35]

With respect to the odds of proceeding to a capital trial, Professor Phillips found that, after controlling for potential confounders, a black defendant's race increased these odds by 75%.[36] By contrast, a Hispanic defendant's ethnic identification did not reveal disparate treatment.[37] The study therefore found that black defendants who committed crimes *less* likely to lead to a death trial tended to face a capital trial *more* frequently than their white and Hispanic

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[31] Phillips, *supra* note 25, at 809.

[32] Phillips, *supra* note 25, at 809. As of Feb. 26, 2013, Harris County accounts for 285 of the 1,060 individuals who have been sentenced to death in the state since 1976. *Total Number of Offenders Sentenced to Death from Each County*, TEX. DEP'T OF CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited Apr. 26, 2013).

[33] Phillips, *supra* note 25, at 817.

[34] *Id.* at 827. "In a logistic model, odds ratios represent the effect of a unit change in the independent variable on the odds of the outcome occurring . . . ." *Id.* For example, an odds ratio of 1.5 for a given independent variable suggests that its presence increases the odds of the outcome occurring by 50%. By contrast, an odds ratio between zero and one suggests that the presence of the variable *decreases* the odds of the outcome occurring.

[35] Phillips, *supra* note 25, at 822–27. Social characteristics of the defendant controlled for the defendant's sex, age, and prior violent and nonviolent convictions, as well as his/her form of legal counsel; social characteristics of the victim controlled for the victim's sex, age, and prior violent and nonviolent convictions; legal dimensions of the case controlled for the heinousness of the crime, whether multiple defendants were indicted, the form of capital murder (e.g., murder of a peace officer, murder in the course of committing or attempting to commit aggravated sexual assault), and the method of murder. *Id.* at 822–27.

[36] Phillips, *supra* note 25, at 830, 832 tbl. 5 (listing odds ratio for "black defendant" independent variable as 1.752). Absent controls, no sign of disparate treatment for defendants of different races was detected: "[T]he [Harris County District Attorney] pursued a death trial against 27% of white defendants, 25% of Hispanic defendants, and 25% of black defendants." *Id.* at 829.

[37] Phillips, *supra* note 25, at 830, 832 tbl. 5 (listing odds ratio for "Hispanic defendant" independent variable as 1.043).

counterparts.[38] "The bar," Professor Phillips concluded, "appears to have been set lower for pursuing death against black defendants."[39]

Professor Phillips also determined that "the [Harris County District Attorney] was less likely to pursue death on behalf of black victims than white victims," whether or not confounders were introduced.[40] Once the confounders were introduced, however, the disparate treatment between crimes involving black victims and those that did not became exacerbated.[41] These results bolster the consensus among social science researchers that a victim's race consistently and robustly influences capital case outcomes.[42]

With respect to the odds of a defendant receiving a death sentence, Professor Phillips found that, again after controlling for potential confounders, a black defendant's race increased these odds by 49%.[43] Thus, disparate treatment due to racial factors persists into the sentencing phase of a capital case.[44] Capital juries also maintain the disparity already observed between cases involving black victims versus those involving white victims: The odds of a death sentence in cases involving black victims are 38% lower than in cases involving white victims.[45]

These results indicate that racial factors influence outcomes in Harris County capital cases. For example, if 100 black defendants and 100 white defendants were indicted for capital murder in Harris County, "5 black defendants would be sentenced to the ultimate state sanction because of race."[46] Likewise, if 100 defendants murdered white victims and 100 defendants murdered black victims, "5 defendants would be sentenced to the ultimate state sanction because the victim is white."[47]

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[38] Phillips, *supra* note 25, at 830. "[T]he features of a murder that increase the chance of a death trial at the bivariate level" are (1) the victim was white; (2) the murder was especially heinous; (3) the murder involved a burglary, kidnapping, rape, remuneration, or a victim under the age of six; (4) the murder occurred via beating, stabbing, or asphyxiation; (5) the defendant was an adult; (6) the victim was of a vulnerable age; and (7) the victim was female. *Id.*

[39] Phillips, *supra* note 25, at 834. *But see* Adam Liptak, *A New Look at Race When Death Is Sought*, N.Y. TIMES, Apr. 29, 2008, at A10 (recounting Professor Jonathan Sorensen's critique of Professor Phillips' methodology, as well as Professor Sorensen's contention that "racial disparities, if they exist at all, 'are victim-based only,' as earlier studies have found").

[40] Phillips, *supra* note 25, at 834.

[41] *Id.*, at 834. Specifically, the odds ratio for the "black victim" independent variable fell from 0.75 in the bivariate logistic model to 0.57 in the multivariate logistic model. *Id.* at 834, 832 tbl. 5.

[42] *See* U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5–6 (1990); David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 200–02 (2003).

[43] Phillips, *supra* note 25, at 834. Absent controls, no sign of disparate treatment for defendants of different races was detected: "[A] death sentence was imposed against 21% of white defendants, 19% of Hispanic defendants, and 19% of black defendants." *Id.* at 829–30. As with the odds of proceeding to a capital trial, the odds of a defendant receiving a death sentence were not appreciably different as between white and Hispanic defendants. *Id.* at 834, 835 tbl. 7 (listing odds ratio for "Hispanic defendant" independent variable as 0.966).

[44] *Compare* Phillips, *supra* note 25, at 832 tbl. 5, *with id.* at 835 tbl. 7.

[45] Phillips, *supra* note 25, at 834.

[46] *Id.* at 837.

[47] *Id.*

As Professor Phillips notes, the results of his research into Harris County's capital punishment system "cannot [] be generalized to the rest of Texas."[48] His results, however, compel the conclusion that Texas must fully investigate and evaluate the impact of racial discrimination throughout its criminal justice system, both in Harris County and elsewhere.[49] Anecdotal data from more recent cases support this observation. The Houston Chronicle noted in November, 2011 that "[t]he last white man to join death row from Harris County was a convicted serial killer in 2004," and that, "[s]ince then, 12 of the last 13 men newly condemned to die have been black."[50]

Older Studies of a Broader Scope

Prior to Professor Phillips' Harris County-specific study, other researchers had reached similar, troubling conclusions regarding race and Texas's application of the death penalty. In 1980, Professors William J. Bowers and Glenn L. Pierce estimated, for the period from 1974 through 1977, the number of criminal homicide offenders for each of four offender-victim categories: black kills white, white kills white, black kills black, and white kills black.[51] By comparing these totals against the number of persons from each category who had been sentenced to death, the researchers found that, "[a]mong black offenders, those with white victims [were] eighty-seven times more likely than those with black victims to receive the death penalty; and among the killers of whites, black offenders are six times more likely than white offenders to be sentenced to death."[52]

Moreover, the pattern of discrimination persisted after the dataset was divided between homicides committed in the course of another felony and those that were not.[53] "In effect, the distinction between felony and nonfelony homicides corresponds to the difference between crimes that definitely qualify for capital punishment and those that may or may not so qualify."[54] Professors Bowers and Pierce summarized these findings:

> It appears [] that among the kinds of killings least likely to be punished by death (that is, nonfelony killings), the death sentence is used primarily in response to the most socially condemned form of boundary crossing—a crime against a majority group member by a minority group member. . . . Among felony killings, for which the death penalty is more apt to be used, race of victim is the chief basis of differential treatment.[55]

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[48] Phillips, *supra* note 25, at 838 (citing R.G. Ratcliffe, *Controversial Milestone: 25 Years of Lethal Injection*, TEX. DIST. & CNTY. ATT'YS ASS'N, Dec. 7, 2007, http://www.tdcaa.com/node/1618).

[49] Phillips, *supra* note 25, at 834 (concluding that "to impose equal punishment against unequal crimes is to impose unequal punishment").

[50] Lise Olsen, *Harris Death Penalties Show Racial Pattern*, HOUS. CHRON., Nov. 14, 2011.

[51] Bowers & Pierce, *supra* note 26, at 231, 225; *see also id.* at 266–67. To compile their dataset, Professors Bowers and Pierce relied on Supplemental Homicide Reports (SHR). Because SHRs are voluntarily filed by law enforcement agencies, cross-sectional undercoverage occurs whenever an agency opts not to create or file SHRs. Bowers & Pierce, *supra* note 26, at 266. Furthermore, pre-1976 SHRs did not record offender information. *Id.* For these reasons, Professors Bowers and Pierce had to rely on estimates. *Id.*

[52] *Id.* at 227, 225 tbl. 7-2.

[53] *Id.* at 229–31.

[54] *Id.* at 229.

[55] *Id.* at 231.

While acknowledging these findings as "a useful starting point," Professor Sheldon Ekland-Olson offered a more nuanced—if less conclusive—examination in his 1988 study *Structured Discretion, Racial Bias, and the Death Penalty*.[56] By comparing percentage differences between statewide homicide incidents and those death row cases of the same case characteristics,[57] he found that, in the ten years from 1974 through 1983, "for each of the three major types of felony homicides (robbery, burglary, and rape) cases involving white victims [were] more likely to result in the death penalty than cases involving either Hispanic or black victims."[58]

Twelve years later, in an article analyzing capital-eligible homicide arrests and death sentences in Texas from 1980 through 1996, Professors Deon Brock, Nigel Cohen, and Jonathan Sorensen reached the same conclusion regarding the importance of a victim's race in determining capital case outcomes.[59] After classifying their case data set by level of seriousness and controlling for that variable,[60] the researchers discovered that "disparities based on the race of the victim remain regardless of the level of case seriousness."[61] These results also generally held true for the metropolitan areas scrutinized by the study, which included Dallas, Fort Worth, Houston, and San Antonio.[62]

The three statewide studies discussed above focused on disparities in capital case outcomes among all death-eligible cases and not, as in Professor Phillips' 2008 Harris County-specific

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[56] Sheldon Ekland-Olson, *Structured Discretion, Racial Bias and the Death Penalty: The First Decade After* Furman *in Texas*, 69 SOC. SCI. Q. 853, 855 (1988).

[57] *Id.* at 857. As with Professors Bowers and Pierce, Professor Ekland-Olson had to "estimate[] total homicides over the ten-year period" given limitations in the pre-1980 data. *Id.* at 857 n.5.

[58] *Id.* at 861, 862–63 tbl. 3. Prior to parsing the universe of homicide cases, Professor Ekland-Olson compared the racial composition of homicide cases against the racial composition of death-sentenced cases. His findings confirmed the conclusion of Professors Bowers and Pierce that "cases involving white victims, relative to those involving black or Hispanic victims, are more likely to result in death sentences than we would expect on the basis of statewide estimates." *Id.* at 859, 860 tbl. 2. On the other hand, white offenders were overrepresented on death row, while both black and Hispanic offenders were underrepresented: Although white, black, and Hispanic offenders committed, respectively, 32.5%, 42.6%, and 24.4% of homicides in the ten-year period, white, black, and Hispanic offenders comprised, respectively, 51.0%, 36.4%, and 12.6% of death-sentenced cases. *Id.* at 859, 860 tbl. 2.

[59] Deon Brock, Nigel Cohen & Jonathan Sorensen, *Arbitrariness in the Imposition of the Death Sentences in Texas: An Analysis of Four Counties by Offense Seriousness, Race of Victim, and Race of Offender*, 28 AM. J. CRIM. L. 43, 63 (2000) (describing the methodology for winnowing non-capital-eligible cases from capital-eligible cases and arriving at a data set of 28,286 cases). To compile their data, the researchers principally relied on the Texas Department of Public Safety's Supplemental Homicide Reports (SHR). *Id.* at 62. For a critique of the limitations of SHR data, see Phillips, *supra* note 25, at 815–16.

[60] Brock et al., *supra* note 59, at 65–66. A greater ratio of death sentences-to-arrests occurred as the level of case seriousness increased. *Id.* at 67, tbl. 3.

[61] Brock et al., *supra* note 59, at 69. However, the disparities decreased as the level of seriousness of the crime increased. *Id.* It is not surprising that any disparity attributable to race would be more pronounced in less serious cases, for as Professor Sorensen noted in a separate study, "[i]n cases where the evidence is strong and the facts support a severe sentence, juries can decide solely upon the evidence. However, in less clear-cut cases, jurors are 'liberated' from the evidence of the case to subjectively consider extra-legal factors." Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-*Furman *Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 751 (1990–1991) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 164–67 (1966)).

[62] Brock et al., *supra* note 59, at 69.

study, "discrete stages of the capital charging and sentencing system."[63] One older statewide study does, however, shed some light on the presence of racial discrimination at important decision-making points in Texas capital cases.

In 1991, Professor Sorensen and his co-author, Professor James W. Marquart, examined data for the period from 1980 through 1986 to determine whether discrimination or arbitrariness generally existed (1) in prosecutors' decisions to seek a death sentence, or (2) in juries' decisions to impose a death sentence.[64] Using logistic regression analysis to isolate the effect of extra-legal factors, Professors Sorensen and Marquart determined that, with respect to prosecutorial discretion, "where there is a black victim, there is a significantly lower chance of being convicted," and "[h]omicides involving white victims are prosecuted more aggressively than homicides involving black victims."[65]

With respect to jury decision-making, on the other hand, Professors Sorensen and Marquart's analysis did not reveal a compelling relationship between racial characteristics—either of the offender or of the victim—and the likelihood that a defendant would receive a death sentence.[66] The researchers cautioned, however, that while jury decisions did not appear to be racially biased, "the inability to build a sufficient model from legal variables suggests that the life-death decision was arbitrary."[67]

While perhaps more encouraging than Professor Phillips' more recent findings regarding Harris County, the 1991 study of Professors Sorensen and Marquart nevertheless suggests that Texas ought to investigate thoroughly whether racial discrimination influences capital cases at any stage in the proceedings—even if that influence arises subconsciously.[68]

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[63] David C. Baldus & George Woodworth, *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIM. L. BULL. 194, 194–95 (2003).

[64] Sorensen & Marquart, *supra* note 61, at 743–44. Although Professors Sorensen and Marquart agreed that "a complete picture of prosecutorial discretion" would require an analysis of "all death-eligible offenders from arrest through sentence," this information was unavailable. *Id.* at 758. Instead, the researchers sought "a rough measure of prosecutorial discretion" through a comparison of persons eligible for capital murder to persons convicted of capital murder. *See id.* at 758–61.

[65] Sorensen & Marquart, *supra* note 61, at 767. "All of the racial combinations [were found to] have significant effects on conviction . . . ." *Id.* at 767, 766 tbl. 3.

[66] Sorensen & Marquart, *supra* note 61, at 775, 773 tbl. 9. *See id.* at 761–63 (explaining analytic methods for assessing jury discretion).

[67] Sorensen & Marquart, *supra* note 61, at 775. Only two legal variables—that is, variables that legitimately produce variation in sentencing—significantly influenced sentencing outcomes in Texas: (1) a defendant's prior criminal history; and (2) whether the crime involved multiple victims. *Id.* at 775, 773 tbl. 9. "Beyond these two rather poor predictors, it was impossible to distinguish between the life- and death-sentenced cases." *Id.* at 775.

[68] *See* Sorensen & Marquart, *supra* note 61, at 775 (positing that the discrimination uncovered with respect to prosecutorial decision-making "probably [was] not conscious, but instead result[ed] from a process of case typification, where prosecutors try offenders for capital murder in death-eligible cases considered most likely to result in conviction").

Strategies to Eliminate Racial Discrimination in the Criminal Justice System

Although Texas has not taken steps to study racial discrimination within the state's capital punishment system, it has taken some steps to reduce the influence of racial considerations in the criminal justice system.

With respect to capital cases, for example, the Texas Code of Criminal Procedure prohibits the State from introducing evidence at the sentencing phase "to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct,"[69] an amendment catalyzed by the State's confession of error in *Saldaño v. State*.[70] Apart from this narrow change to Texas's capital case sentencing procedure, the state has not otherwise pursued strategies to study or eliminate the effects of racial discrimination in its application of the death penalty.

In 2001, the Texas Legislature also passed amendments to the Texas Code of Criminal Procedure that generally prohibit law enforcement from "engag[ing] in racial profiling."[71] The Code further requires each law enforcement agency in the state to "adopt a detailed written policy on racial profiling," which must

> (1) clearly define acts constituting racial profiling;
> (2) strictly prohibit peace officers employed by the agency from engaging in racial profiling;
> (3) implement a process by which an individual may file a complaint with the agency if the individual believes that a peace officer employed by the agency has engaged in racial profiling with respect to the individual;
> (4) provide public education relating to the agency's complaint process; [and]
> (5) require appropriate corrective action to be taken against a peace officer employed by the agency who, after an investigation, is shown to have engaged in racial profiling in violation of the agency's policy . . . .[72]

An officer may not, however, be held liable for damages for violating these provisions.[73]

Conclusion

As the State of Texas has not investigated—fully or otherwise—nor evaluated the impact of racial discrimination in its criminal justice system, Texas is not in compliance with Recommendation #1. While the independent studies discussed under this Recommendation have shed some light on the subject, those studies remain dated or incomplete. Nevertheless, the results of these studies raise serious questions as to the influence of race in determining capital

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[69] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(2) (2013).
[70] *See* Monahan, *supra* note 12, at 393; *see also* Recommendation #5, *infra* notes 118–121 and accompanying text.
[71] S.B. 1074, 77th Leg., Reg. Sess. (Tex. 2001) (*codified at* TEX. CODE CRIM. PROC. ANN. arts. 2.131–2.138 (2013)).
[72] TEX. CODE CRIM. PROC. ANN. art. 2.132(b)(1)–(5) (2013).
[73] TEX. CODE CRIM. PROC. ANN. art. 2.136 (2013).

case outcomes. The State of Texas therefore must undertake its own efforts to investigate the impact of racial discrimination in its criminal justice systems.

The Assessment Team recommends that the State of Texas

- Create a searchable, publicly available database on the charging and sentencing of all capital-eligible offenses. The Office of Court Administration, for example, should be tasked with collecting, analyzing, and making publicly available salient facts on all death-eligible cases in Texas, regardless of whether the case was resolved at trial or through a plea negotiation. In designing this database, the Assessment Team further recommends that affected stakeholders and interested parties—for example, prosecutors, capital defense counsel, trial courts, and social science researchers—be consulted; and
- Designate an appropriate government entity to investigate whether race of the defendant or victim explains variances in capital case outcomes.[74] Analysis provided by a state-based, independent entity can provide trusted, relevant data to the political and legal divisions of Texas to inform development of policies to eliminate any identified discriminatory influences.

B. Recommendation #2

Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.

Several Texas agencies collect some—but not all—of the data listed in the Recommendation. First, the Texas Department of Public Safety's Uniform Crime Reporting Program (UCR Program) compiles, by way of Supplemental Homicide Report (SHR) data voluntarily submitted by individual law enforcement agencies, annual statewide statistics on the number of murders committed in Texas and the race and ethnicity of those persons arrested for murder.[75] The

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[74] The Kentucky General Assembly, for example, commissioned an examination of whether race of the defendant or victim influenced capital case outcomes, which led that state to adopt the Kentucky Racial Justice Act in 1998. S.B. 8, 1992 Gen. Assemb., Reg. Sess. (Ky. 1992); *see also* KY. REV. STAT. ANN. §§ 532.300–532.309 (1998) (codifying the Kentucky Racial Justice Act). For a description of other capital jurisdictions that have undertaken a broad examination of the treatment of racial and ethnic minorities in their criminal justice systems, *see supra* note 30 and accompanying text.

[75] *See, e.g.*, TEX. DEP'T PUB. SAFETY, 2009 CRIME IN TEXAS 16 (2010) ("Of the persons arrested for murder, . . . 67 percent were White and 30 percent were Black; 58 percent were not Hispanic; and 42 percent were Hispanic."). The Uniform Crime Reporting Section—located within the Crime Records Service of the Department of Public Safety—is responsible for "collect[ing], validat[ing], and tabulat[ing] UCR reports from all reporting jurisdictions in Texas." *Id.* at 3. *See also* Sorensen & Marquart, *supra* note 61, at 752–53 n.71.

circumstances of each homicide (e.g., weapon used, offender-victim relationship) also may be specified in an SHR.[76]

Participation in the UCR Program is not compulsory.[77] Accordingly, while the program "enjoys a high rate of participation among Texas' law enforcement jurisdictions," Texas must still "estimate the crime totals for non-reporting agencies."[78] The data captured by the SHRs also have been criticized for their limitations in shedding light on Texas's criminal justice system:

> (1) SHR data cannot control for critical confounders such as the defendant's prior criminal record or the heinousness of the crime . . . . (2) SHR data cannot isolate murder defendants who were eligible for capital punishment under Texas law, so the imperfect comparison includes defendants who were not eligible for death or excludes defendants who were eligible for death, or both. (3) If racial disparities emerge, SHR data cannot identify the stage of the process that produced the disparities . . . . [And] (4) SHR data are sometimes problematic due to missing values.[79]

Second, the Texas Department of Criminal Justice (TDCJ) maintains and publishes statistics on the demographics of its prison population.[80] Demographic information also is available with respect to those individuals assigned to death row,[81] and TDCJ also makes publicly available the race and ethnicity of executed offenders.[82] A review of TDCJ's website further indicates that the race and gender of death-sentenced inmates' victim(s) are regularly recorded.[83]

Third, the Office of Court Administration (OCA), a state agency under the direction and supervision of the Texas Supreme Court,[84] is required under Texas law to "annually collect and publish a report of information regarding cases involving the trial of a capital offense," including "(1) the contents of the trial court's charge to the jury; and (2) the sentence issued in each case."[85] These reports, available on OCA's website, are limited to cases in which a capitally-charged defendant received a jury trial and, therefore, exclude cases in which a capitally-charged

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[76] *See* TEX. DEP'T PUB. SAFETY, *Supplementary Homicide Report*, UCR-8 (Rev. 7/06), *available at* http://www.txdps.state.tx.us/internetforms/Forms/UCR-8.pdf.

[77] TEX. DEP'T PUB. SAFETY, 2009 CRIME IN TEXAS 4 (2010).

[78] TEX. DEP'T PUB. SAFETY, 2009 CRIME IN TEXAS 4 (2010).

[79] Phillips, *supra* note 25, at 815–16.

[80] *See, e.g.*, TEX. DEP'T CRIM. JUSTICE, FISCAL YEAR 2011 STATISTICAL REPORT 1 (2011) (noting the racial composition of Texas's prison population as of August 31, 2011). *See also Publications*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/publications/index.html (last visited Apr. 26, 2013).

[81] *See Gender and Racial Statistics of Death Row Offenders*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_gender_racial_stats.html (last visited Apr. 26, 2013).

[82] *See Executed Offenders*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_executed_offenders.html (last visited Apr. 26, 2013). Curiously, for those offenders no longer on death row for reasons other than that their sentence was carried out, TDCJ's website omits mention of race and ethnicity. *See Offenders No Longer on Death Row*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_offenders_no_longer_on_dr.html (last visited Apr. 26, 2013).

[83] *See Offenders on Death Row*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_offenders_on_dr.html(last visited Apr. 26, 2013); *Executed Offenders*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_executed_offenders.html (last visited Apr. 26, 2013).

[84] TEX. GOV'T CODE § 72.011(a) (2013).

[85] TEX. GOV'T CODE § 72.087 (2013).

defendant reached a plea agreement with prosecutors.[86] Furthermore, there are discrepancies between OCA's list of death-sentenced inmates and that of TDCJ.[87] OCA's reports also omit many salient details necessary for a comprehensive report on capital sentencing, such as the race and ethnicity of the offender and/or victim, or evidence presented in aggravation or mitigation during the sentencing phase.

OCA's online Court Activity Reporting and Directory System also allows the public to run reports and conduct ad hoc searches of two decades' worth of data regarding Texas's criminal justice system, including of capital cases (and other criminal cases) for each of the state's 254 counties.[88] Nevertheless, the system offers minimal usefulness for investigating the impact of racial discrimination in the criminal justice system because data only are reported as case totals—that is, individual details of cases cannot be explored—and the report selection criteria remains limited. The OCA System also appears to suffer from inaccuracies in its available data.[89]

Other data collection efforts are undertaken on a county-by-county basis. For example, the Harris County District Clerk maintains the county's Justice Information Management System (JIMS), which contains public information regarding criminal cases occurring in Harris County, Texas.[90]

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[86] *Jury Charges and Sentences in Capital Cases*, TEX. OFFICE CT. ADMIN., http://www.txcourts.gov/oca/jurycharges.asp (last visited Apr. 26, 2013).

[87] For example, TDCJ lists Wesley Lynn Ruiz (*date received:* July 16, 2008), Manuel Velez (*date received:* Nov. 25, 2008), Daniel Lopez (*date received:* Mar. 16, 2010), Cortne Mareese Robinson (*date received:* March 23, 2011), Areli Carbajal Escobar (*date received:* May 26, 2011), and Jean Francois Joseph (*date received:* June 23, 2011) as having been sentenced to death, yet these names are absent from OCA's list. *See Offenders on Death Row*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_offenders_on_dr.html (last visited Apr. 26, 2013). As the earliest date of judgment in OCA's list is July 31, 2007, these five inmates—all received by TDCJ after 2007—presumably should appear in OCA's list. *See also* Interview by Ryan Kent with Brandon Dudley, Chief of Staff, Office of Tex. State Senator Rodney Ellis (June 27, 2012).

[88] *Court Activity Reporting and Directory System*, TEX. OFFICE CT. ADMIN., http://card.txcourts.gov/secure/login.aspx?ReturnUrl=default.aspx (last visited Apr. 26, 2013).

[89] For example, a "Death Sentences and Life Sentences Imposed in Criminal Cases" report for the period January 1, 2007, through December 31, 2009, lists no death sentences for Brazos, Henderson, Randall, Smith, Walker, and Wharton Counties. *See Court Activity Reporting and Directory System*, TEX. OFFICE CT. ADMIN., http://card.txcourts.gov/Secure/login.aspx?ReturnURL=default.aspx (last visited Apr. 26, 2013) (select "Run Reports" under "Old Data"; choose "District Court Data Reports" for "Report Type," choose "Death and Life Sentences" for "Report," and select "Continue"; choose the period from January 2007 to December 2009 and select "Run Report"). By contrast, OCA's "Jury Charges and Sentences in Capital Cases" website indicates that Christian Olsen was sentenced to death in Brazos County on March 3, 2009; Randall Wayne Mays was sentenced to death in Henderson County on May 13, 2008; Brent Ray Brewer was sentenced to death in Randall County on August 14, 2009; Demontrell Miller was sentenced to death in Smith County on November 16, 2009; Jerry Duane Martin was sentenced to death in Walker County on December 3, 2009; and James Garrett Freeman was sentenced to death in Wharton County on November 7, 2008. *Jury Charges and Sentences in Capital Cases*, TEX. OFFICE CT. ADMIN., http://www.txcourts.gov/oca/jurycharges.asp (last visited Apr. 26, 2013). OCA also will continue to rely on reporting entities' manual submission of data, which increases the potential for clerical error. *See* TEX. OFFICE CT ADMIN., STRATEGIC PLAN: FISCAL YEARS 2013–2017, at C-1 (July 6, 2012) ("New reporting rules adopted September 2010 require entities to report electronically unless a waiver is obtained from OCA. However, there are no enforcement mechanisms for the majority of reporting entities (the more than 1,700 justice and municipal courts).").

[90] Phillips, *supra* note 25, at 817, 819.

In light of this patchwork data collection, the State of Texas only partially complies with Recommendation #2. Moreover, the collection efforts undertaken by state agencies largely occur on a volunteer basis, and the data remain incomplete, whether because of inadequate participation or because important case characteristics are not compiled in the first instance.

As described under Recommendation #1, Texas must implement a uniform, statewide system for collecting data on charging, prosecution, and conviction in all capital-eligible cases, including information on the race of defendants and victims, the circumstances of the crime, all aggravating and mitigating circumstances proffered in the case, and other information deemed relevant for collection by actors in the criminal justice system. Absent such a system, Texas cannot determine the extent of racial or geographic bias in its application of the death penalty. These data also could also be made available to the OCA for use in conducting meaningful proportionality review, as well as to district and county attorneys for use in making charging decisions and establishing charging guidelines.[91]

The integrity and reliability of such a statewide system should be bolstered through an enforcement mechanism that requires local jurisdictions to collect and report uniform data to the OCA. This mechanism could be similar to the one that supported the Texas Judicial Council's efforts to "gather judicial statistics and other pertinent information from the several state judges and other court officials of [the] state"—specifically, enforcement via writ of mandamus as well as a legal presumption that a local jurisdiction's failure to supply information within a reasonable time constitutes willful noncompliance.[92]

C. Recommendation #3

> **Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.**

To the Assessment Team's knowledge, Texas has not collected and reviewed those studies that examine the impact of racial discrimination on capital case outcomes.[93] The State of Texas therefore is not in compliance with Recommendation #3.

The Assessment Team notes, however, that at least one existing state agency is equipped to collect and review such studies, and may even be in a position to conduct additional studies. The

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[91] Notably, the Texas Code of Criminal Procedure already specifies data compilation and analysis procedures to give effect to the Code's prohibition on racial profiling. *See* TEX. CODE CRIM. PROC. ANN. art. 2.133–2.134 (2013).

[92] *See* TEX. GOV'T CODE ANN. § 71.035 (2013).

[93] *See* Email to Ryan Kent from Sandra Mabbett, Judicial Information Analyst, Tex. Office of Ct. Admin. (Aug. 15, 2012) (on file with author) ("In regards to the information we publish on the website on capital murder cases, this is the only information we have or receive. We do not receive or gather any other information regarding race. We also do not do any studies or reviews of that information."); Email to Ryan Kent from Alicia Frezia Nash, Open Records Act Coordinator, Tex. Dep't Crim. Justice (June 14, 2012) (on file with author) ("The Texas Department of Criminal Justice (TDCJ) has not undertaken any studies on racial discrimination and sentencing outcomes, nor has TDCJ collected or reviewed independent studies regarding racial discrimination in the criminal justice system.").

Criminal Justice Policy Council is authorized under Texas law to "develop means to promote a more effective and cohesive state criminal justice system."[94] To accomplish these ends, the Council may "conduct an in-depth analysis of the criminal justice system; . . . identify critical problems in the criminal justice system and recommend strategies to solve those problems; . . . [and] advise and assist the legislature in developing plans, programs, and proposed legislation for improving the effectiveness of the criminal justice system."[95] Since 2003, however, the Governor of Texas has declined to fund the Council.[96]

D. Recommendation #4

> **Where patterns of racial discrimination are found in any phase of the death penalty's administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.**

To the Assessment Team's knowledge, Texas has not collaborated with legal scholars, experts, and practitioners to develop remedial and preventative strategies to address racial discrimination previously found in the administration of the death penalty.[97]

Data on Executions by Race of Offender and Victim

Evidence of racial discrimination within Texas's criminal justice system is not, however, confined to the scholarship discussed under Recommendation #1. In particular, Texas-specific data on the race and ethnicity of executed offenders and the current death row population also suggest patterns of discrimination. Since reinstating the death penalty through April 26, 2013, Texas has carried out 495 executions.[98] Of those 495 executions, only three were of white offenders convicted of killing a black victim; by contrast, 104 black offenders have been executed for killing a white victim:

Table 1—Texas Executions by Race of Offender/Race of Victim (as of April 25, 2013)[99]

		Race of Victim					
		White	Black	Hispanic	Asian	Other	**Total**
Race of Executed Offender	White	204	3	12	2	2	**223**
	Black	107	57	17	8	1	**190**
	Hispanic	36	2	45	2	1	**86**
	Asian	–	–	–	2	–	**2**
	Other	2	–	–	–	–	**2**
	Total	**349**	**62**	**74**	**14**	**4**	**503**

[94] TEX. GOV'T CODE ANN. § 413.008 (2013).
[95] TEX. GOV'T CODE ANN. § 413.009(a) (2013).
[96] Clay Robison, *Texas Governor Cuts $81 Million Before Signing Budget; University Research Hit*, HOUS. CHRON., June 23, 2003.
[97] *See* Recommendation #1, *supra* notes 28–30 and accompanying text.
[98] *Executed Offenders*, TEX. DEP'T OF CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited Apr. 26, 2013).
[99] *Id.*, CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE & EDUC. FUND, DEATH ROW U.S.A. FALL 2012, 5, *available at* http://www.naacpldf.org/files/publications/DRUSA_Fall_2012.pdf (last visited Apr. 26, 2013).

These data signal that race of the offender and/or victim may affect capital case outcomes, particularly considering that black victims typically constitute a larger percentage of homicide victims than do white victims.[100]

Furthermore, approximately 71% of Texas's 300 death row inmates are non-white offenders.[101] Of the thirty-five capital punishment jurisdictions—including the federal government and U.S. military—this constitutes the fifth largest percentage of minorities among a death row population:

Table 2—Top Five Capital Punishment Jurisdictions by Percentage of Minorities on Death Row (as of January 1, 2013)[102]

		Race of Death Row Inmate					
Rank	**Jurisdiction**	**White**	**Black**	**Hispanic**	**Other**	**Total Death Row Population**	**Percentage Minority**
1	Colorado	–	3	1	–	4	100%
2	New Hampshire	–	1	–	–	1	100%
3	Maryland	1	4	–	–	5	80%
4	Delaware	4	11	3	–	18	78%
5	**Texas**	**87**	**121**	**88**	**4**	**300**	**71%**

According to 2010 census data, blacks are overrepresented among Texas's death row inmates. Although only 11.8% of Texas's population, blacks constitute 40.3% of the state's death row population.[103]

Jury Selection

Despite pervasive evidence that Texas prosecutors had discriminated against minorities in exercising their discretion during jury selection,[104] by 2001, fifteen years after the U.S. Supreme Court's decision in *Batson v. Kentucky*, "[o]nly one capital case [had] been overturned by the Texas Court of Criminal Appeals on Batson grounds."[105] In *Miller-El v. Dretke*, the U.S. Supreme Court determined that racial discrimination had influenced a Dallas prosecutor's use of

[100] *See* TEX. DEP'T PUB. SAFETY, 2010 CRIME IN TEXAS 16 (2011) ("Of the victims whose race was known, 63 percent were White, 35 percent were Black and the remaining 2% were Asian/Pacific Islander. . . . Of the murder victims whose ethnicity was known, 65 percent were not Hispanic and 35 percent were Hispanic."). The Department of Public Safety confirms that the vast majority of victims whose ethnicity is Hispanic are classified by race as white. Telephone Interview by Ryan Kent with Jenadine Aquino, Uniform Crime Reporting Bureau, Tex. Dep't of Pub. Safety (Oct. 2012) (on file with author).

[101] *National Statistics on the Death Penalty and Race*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#defend (last visited Aug. 23, 2013).

[102] *Id.*

[103] *The Black Population: 2010*, U.S. CENSUS BUREAU, http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf (last visited Oct. 10, 2012). Non-Hispanic whites account for 44.8% of Texas's population and 28.9% of Texas's death row; Hispanics account for 38.1% of Texas's population and 29.2% of Texas's death row. *State & County QuickFacts: Texas*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/48000.html (last visited Apr. 26, 2013).

[104] *See* TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 52–58 (2001) (recounting evidence of discriminatory jury selection on the part of prosecutors serving under the district attorneys of Bowie, Dallas, Harris, and Montgomery Counties).

[105] *Id.* at 58.

peremptory challenges to exclude ten out of eleven qualified black venirepersons.[106] Although the prosecutors' conduct during jury selection sufficed to establish discriminatory intent,[107] the Court noted that "[t]he prosecutors took their cues from a 20-year-old manual of tips on jury selection," which included an article "outlining the reasoning for excluding minorities from jury service."[108]

In 2005, a subsequent inquiry by the *Dallas Morning News* revealed that "[p]rosecutors excluded eligible blacks from juries at more than twice the rate they rejected eligible whites" and that "being black was the most important personal trait affecting which jurors prosecutors rejected."[109] While prosecutors may not engage in intentional discrimination during jury selection, the result of Dallas County prosecutors' use of peremptory strikes results in disproportionate exclusion of minorities from the jury. The *Dallas Morning News* found that, "[i]n the 108 trials examined . . . 101 had four or fewer black members," "[t]en juries contained no black members," and "[o]nly one jury had a majority of black members," this despite the fact that "[b]lacks made up 56 percent of the defendants."[110]

A culture of discriminatory use of peremptory challenges also has been identified in Texas's most active capital-case jurisdiction, Harris County.[111] In *Rosales v. Quarterman*, a federal judge of the Southern District of Texas reviewed several factors indicating that the prosecution in a 1985 Harris County capital case had "struck prospective jurors because of their race."[112] At the 2008 evidentiary hearing on the defendant's claim of discrimination, one member of the prosecution testified that:

> I think that's probably general knowledge—not only around the [Harris County] District Attorney's office, but anywhere—that blacks tend to be more sympathetic toward blacks, just as anybody in any group tends to be more sympathetic to people within that group; doesn't matter what kind of group it is . . . . [I]t's just one more factor to be considered with an individual juror.[113]

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[106] Miller-El v. Dretke, 545 U.S. 231, 265–66 (2005).

[107] *See id.* at 266 (after recounting the prosecutors' conduct at length, remarking that, "[i]f anything more is needed for an undeniable explanation of what was going on, history supplies it"). That conduct included markedly different questioning of white and black venirepersons; the use of a more graphic script when describing an execution to black venirepersons; and resort to jury shuffles that made "no sense except as efforts to delay consideration of black jury panelists." *Id.* at 241–61. The Court found plausible the defendant's theory that the more graphic script was intended "to prompt some expression of hesitation to consider the death penalty and thus to elicit plausibly neutral grounds for a peremptory strike of a potential juror subjected to it, if not a strike for cause." *Id.* at 255.

[108] *Id.* at 264, 266.

[109] Steve McGonigle et al., *A Process of Juror Elimination*, DALLAS MORNING NEWS, Aug. 21, 2005 (using logistic regression analysis to examine 108 non-capital felony cases tried in 2002, interviewing prosecutors, and reviewing "more than 6,500 juror information cards [as well as] transcripts of juror questioning").

[110] *Id.*

[111] *See Total Number of Offenders Sentenced to Death from Each County*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited Apr. 26, 2013).

[112] Rosales v. Quarterman, No. H-03-1016, at 14–21 (S.D. Tex. Dec. 12, 2008) (on file with author). Rosales' direct appeal became final in 1988. *See* Rosales v. State, 748 S.W.2d 451 (Tex. Crim. App. 1987), *cert. denied*, 487 U.S. 1241 (1988).

[113] *Id.* at 16 (second alteration in original).

Furthermore, at an evidentiary hearing regarding another capital case Ms. Davenport had prosecuted, *State v. Tompkins*, testimony "revealed that prosecutors were 'wary' and 'cautious' of minority jurors and that 'everybody' in the Harris County District Attorney's Office talked about 'the undesirability of minorities on juries.'"[114] The testimony of judges and counsel who had served and practiced in the district courts of Harris County likewise bolstered the federal court's finding that "racism played a part in jury selection" in *State v. Rosales*.[115]

Recently, concerns have also been raised about the lack of racial and ethnic diversity in the composition of grand and petit juries in Tarrant County. The Austin-American Statesman found that since 2009, "[w]hites made up about 62 percent of grand juries, while the county's non-Hispanic white population is about 51 percent"; that "African Americans, who make up about 9 percent of the county population, accounted for 18 percent of the grand juries"; and that "Hispanics made up 16 percent of all grand juries, while the county population is about 34 percent Hispanic."[116]

In view of this history revealing episodes of racial discrimination and the fact that Texas has not adopted remedial strategies to address it, the State of Texas is not in compliance with Recommendation #4.

E. Recommendation #5

> **Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce such a law, jurisdictions should permit defendants and inmates to establish prima facie cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a prima facie case is established, the State should have the burden of rebutting it by substantial evidence.**

Texas has not enacted legislation stating explicitly that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or race of the victim. Although in 1999 an effort was made to amend the Code of Criminal Procedure to provide capital defendants with an opportunity to assert at a pretrial hearing that "the decision by the state to seek the death penalty was based in significant part on the race of the defendant or the victim of the alleged offense," that legislation received neither a committee nor a floor vote.[117]

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[114] *Id.* at 19.

[115] *Id.* at 17–19, 20 (quoting Harris v. Texas, 467 U.S. 1261, 1263 (1984) (Marshall, J., dissenting from the denial of certiorari), which recounts the testimony of Judges Joseph Guarino and Miron Love, "lawyers who had served under the county's District Attorney," and private attorney Craig Washington regarding the use of peremptory challenges by Harris County prosecutors).

[116] Steven Kreytak & Tony Plohetski, *Judges' Efforts to Pick Diverse Grand Juries Often Fall Short in Travis County*, AUSTIN AM.-STATESMAN, Apr. 1, 2012.

[117] H.B. 892, 1999 Gen. Assemb., Reg. Sess. § 1(b) (Tex. 1999). Specifically, House Bill 892 would have permitted a capital defendant to present, at a pretrial hearing,

> statistical evidence or any other evidence showing that in the state as a whole or in the county in which the defendant is to be tried, certain persons are disproportionately subjected to prosecution

The Texas Code of Criminal Procedure does now prohibit the State from introducing evidence at the sentencing phase "to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct."[118] Historically, expert witnesses had testified in capital cases that race—specifically being African American or Latino—rendered a defendant more likely to be dangerous in the future. A finding of future dangerousness is a prerequisite for a death sentence under Texas law. Dr. Walter Quijano, for example, testified in at least seven cases that a black or Hispanic defendant's race made the defendant more prone to violence.[119] Ultimately, the State of Texas confessed error before the U.S. Supreme Court in *Saldaño v. State* that such testimony had "seriously undermined the fairness, integrity or public reputation of the judicial process."[120] Although federal appeals courts subsequently "ordered new punishment hearings for five of [the inmates]," in addition to Mr. Saldaño, given Dr. Quijano's "inappropriate assertions about race," a seventh inmate—Duane Buck—has yet to receive a new hearing.[121]

Ultimately, the State of Texas does not comply with Recommendation #5.

Evidence already compiled indicates that racial factors may affect capital case charging and sentencing decisions.[122] Accordingly, the Assessment Team recommends that Texas adopt legislation stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim.[123] To ensure that such a law provides an effective remedy for racial discrimination in death penalty cases, Texas should permit a capital defendant or death row inmate to establish a prima facie case of discrimination based upon proof that their case is part of established racially discriminatory patterns, whether those patterns exist at the statewide, regional, or countywide level. Such legislation would not only better ensure that death sentences sought by prosecutors and imposed by juries are, in the aggregate, free from the undue influence of racial considerations but would also improve the actual and perceived fairness of Texas's death penalty.

To give effect to this law, however, Texas must—as described elsewhere in this Chapter—collect and examine relevant data to determine whether racially discriminatory patterns exist in any phase of capital charging or sentencing.

> seeking the death penalty, either because of the race of the defendant or the race of the alleged victim.

Id. at § 1(b). The State then would have been "entitled to admit relevant evidence rebutting [the] allegation made by [the] defendant." *Id.* If by clear and convincing evidence the court found the defendant had succeeded in making his/her showing, the State would have been barred from "proceed[ing] with the prosecution of the case as a death penalty case." *Id.*

[118] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(a)(2) (2013).

[119] *See* James Kimberly, *Judge Overturns Killer's Sentence*, HOUS. CHRON., Sept. 29, 2000, at A31.

[120] John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 393 (2006); Grissom, *supra* note 12.

[121] Allan Turner, *Houston Killer Should Be Spared, Prosecutor Says*, HOUS. CHRON., Sept. 13, 2011.

[122] *See* Recommendation # 1, *supra* notes 31–68, and accompanying text.

[123] Kentucky and North Carolina have enacted legislation to prohibit discrimination in capital charging and sentencing. *See* KY. REV. STAT. ANN. § 532.300 (2013) (prohibiting charging and sentencing decisions "on the basis of race" and authorizing the use of statistical evidence to support claims based thereon); N.C. GEN. STAT. § 15A-2011 (2013) (prohibiting charging and sentencing decisions in which "race was a significant factor" and authorizing the use of statistical evidence to support claims based thereon).

F. Recommendation #6

> **Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of the death penalty's administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.**

The principal actors in the criminal justice system are law enforcement officers, prosecutors, defense counsel, and judges. The first part of Recommendation #6 requires that these actors be educated on the inappropriate consideration of race in administering the death penalty. The second part pertains to the sanctions actors face for carrying out his/her duties on the basis of racial considerations.

Educational Programs

Law Enforcement

Peace officers in the State of Texas—whether employed by the State, a county or municipal police department, or a sheriff's or constable's office—must satisfy both statutory certification requirements as well as the training and ethical standards promulgated by the Commission on Law Enforcement Officer Standards and Education (Commission).[124] Among the components within the Commission's "basic peace officer course(s)" is a unit on multiculturalism and human relations.[125] This component stresses that "[t]he role of the peace officer includes enforcing laws in an impartial manner and supporting the concept that all persons . . . are equally subject to the law and will be treated equally by it."[126]

Licensed peace officers also must complete at least forty hours of continuing education "recognize[d], prepare[d], or administer[ed]" by the Commission every two years.[127] Texas statutory law further specifies that, "for an officer holding only a basic proficiency certificate," this training must include "curricula incorporating the learning objectives developed by the commission" on the subject of "civil rights, racial sensitivity, and cultural diversity."[128] The Commission also may require, as a continuing requirement, "education and training in civil rights, racial sensitivity, and cultural diversity at least once every 48 months."[129]
In light of these requirements, it appears that Texas law enforcement is educated on the inappropriateness of considering race in the administration of justice.

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[124] TEX. OCC. CODE ANN. § 1701.151 (2013) ("The commission may . . . establish minimum standards relating to competence and reliability, including education, training, physical, mental, and moral standards, for licensing as an officer, county jailer, or public security officer or employment as a telecommunicator.").

[125] *See* MULTICULTURALISM & HUMAN RELATIONS, *in* BASIC PEACE OFFICER COURSE CURRICULUM: PART 1, TEX. COMM'N ON LAW ENFORCEMENT OFFICER STANDARDS & EDUC. (2013), *available at* http://www.tcleose.state.tx.us/content/training_instructor_resources.cfm.

[126] *Id.* at 4.

[127] TEX. OCC. CODE ANN. §§ 1701.351(a), 1701.352(a) (2013).

[128] TEX. OCC. CODE ANN. § 1701.352(b) (2013). *See also* CULTURAL DIVERSITY, TEX. COMM'N ON LAW ENFORCEMENT OFFICER STANDARDS & EDUC. (2009), *available at* http://www.tcleose.state.tx.us/content/training_instructor_ resources.cfm.

[129] TEX. OCC. CODE ANN. § 1701.352(e) (2013).

Prosecutors, Defense Counsel, and Judges

Attorneys licensed to practice law in Texas, including prosecutors and defense counsel, must complete fifteen hours of continuing legal education each year.[130] With the exception of requiring that three hours of this education be "devoted to legal ethics/professional responsibility subjects,"[131] attorneys are not required to receive continuing legal education stressing that race not be a factor in any aspect of the administration of justice.

Prosecutors' ethical responsibilities under Texas law—including the duty of prosecutors "not to convict, but to see that justice is done"[132]—are discussed, for example, at trainings provided by the Texas District and County Attorneys Association.[133] The Dallas County District Attorney in 2005 stated that all attorneys employed by his office receive a "45-page training paper devoted to jury selection," and "[a]ll are instructed to follow a written policy prohibiting jury selection based on race."[134] While this training may occur in other jurisdictions within the State, it is unclear the extent to which other Texas prosecutors are educated on the inappropriateness of considering race in the administration of the death penalty. It appears that some training programs on the subject areas covered under Recommendation #6 are available to defense counsel who undertake death penalty representation.[135]

Pursuant to the Texas Government Code, the Court of Criminal Appeals has promulgated rules regarding judicial education.[136] Judicial Education Rule 2(a) provides that new trial and appellate court judges must complete thirty hours of instruction "in the administrative duties of office and substantive, procedural and evidentiary laws," and it also requires judges to complete each year thereafter sixteen hours of continuing judicial education.[137] Furthermore, Rule 12 specifies that judicial education entities' "statutorily mandated training" must include "information about issues related to race fairness, ethnic sensitivity and cultural awareness."[138] It appears, therefore, that Texas judges are educated on the inappropriateness of considering race both in carrying out their duties and in the state's administration of the death penalty.

Although some training may be offered to actors in the criminal justice system stressing that racial considerations should play no role in the administration of justice, improved education programs are needed to ensure that actors do not make racially-discriminatory decisions. A 2005 *Dallas Morning News* series on jury selection in Dallas County, for example, found that "[m]ost Dallas County judges rarely object—or even notice—when prosecutors reject disproportionate numbers of blacks from juries and defense lawyers do the same with whites."[139] The series

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130 TEX. STATE BAR R. art. XII, § 6(a) (2013).

131 TEX. STATE BAR R. art. XII, § 6(b) (2013).

132 TEX. CODE CRIM. PROC. ANN. art. 2.01 (2013).

133 *See, e.g.*, *TDCAA Summer Regional Series*, TEX. DIST. & CNTY. ATT'YS ASS'N, http://www.tdcaa.com/training/tdcaa-summer-regional-series (last visited Apr. 26, 2013). *See also* TEX. DISCIPLINARY R. OF PROF'L CONDUCT R. 3.09 (2013) (describing the special responsibilities of a prosecutor).

134 Steve McGonigle et al., *supra* note 109.

135 Defense counsel training relative to raising claims of racial discrimination and identifying biased jurors during voir dire is described under Recommendation #7, *infra* note 160 and accompanying text.

136 *See* TEX. GOV'T CODE ANN. § 56.006 (2013).

137 JUD'L EDUC. R. 2(a) (2013).

138 JUD'L EDUC. R. 12(b) (2013).

139 Holly Becka et al., *Judges Rarely Detect Jury Selection Bias*, DALLAS MORNING NEWS, Aug. 23, 2005.

found that "there is wide variation in reasons that judges will accept for removing jurors. For instance, some Dallas judges will not let prosecutors remove jurors because they have gold teeth and jewelry; [but] at least one will."[140]

Furthermore, the series found that defense counsel and prosecutors may handle jury selection through an "informal Batson hearing[]," in which no court record is kept, thereby eliminating "any chance that allegations of biased jury selection can be raised on appeal."[141] The authors advised that these informal agreements, in which defense counsel fails to preserve a *Batson* claim, are due in part to how "unwilling most lawyers are to accuse colleagues of racism."[142] On a similar note, one former Dallas County prosecutor advised that her supervisors in the District Attorney's office had advised her "how to get around Batson."[143] Such allegations highlight the failure of the criminal justice system—including prosecutors, defense counsel, and judges—to prevent both overt and more subtle forms of racial discrimination in, and discriminatory outcomes of, jury selection.

Meaningful Sanctions

The State of Texas has established some meaningful sanctions for state actors found to have acted on the basis of race, whether in a capital or non-capital case. For example, Texas law provides an avenue for investigating allegations of misconduct against law enforcement,[144] and the Texas Code of Criminal Procedure "require[s] appropriate corrective action to be taken against a peace officer employed by the agency who, after an investigation, is shown to have engaged in racial profiling."[145] The District Attorney of Dallas County in 2005 also advised that he had demoted a prosecutor in his office due to her "philosophy" on jury selection that had resulted in her violating *Batson* during voir dire.[146]

While the criminal justice system provides a variety of mechanisms to prevent or remedy misconduct by actors in that system, these mechanisms, as a practical matter, do not impose meaningful sanctions on those who have acted on the basis of race in capital cases. The Code of Criminal Procedure, for example, only addresses racially-discriminatory conduct in the context of racial profiling, and it fails to specify a sanction for those law enforcement officers found to

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[140] Holly Becka et al., *supra* note 139.

[141] Holly Becka et al., *supra* note 139. By contrast, the *Batson* claim raised and preserved by Miller-El's counsel "set the foundation for a successful appeal of his death[]penalty conviction by making allegations of race bias in jury selection a part of the trial record." Steve McGonigle et al., *A Process of Juror Elimination*, DALLAS MORNING NEWS, Aug. 21, 2005.

[142] Steve McGonigle et al., *supra* note 109.

[143] Steve McGonigle et al., *supra* note 109.

[144] *See* TEX. GOV'T CODE ANN. §§ 614.021–614.023 (2013). Peace officers "employed by a political subdivision that is covered by a meet and confer or collective bargaining agreement" are exempt from these complaint procedures "if that agreement includes provisions relating to the investigation of, and disciplinary action resulting from, a complaint against a peace officer." *Id.* at § 614.021(b). *See also* LOC. GOV'T CODE ANN. § 143.051 (2013) (specifying the necessary content for a valid commission rule regarding peace officer removal or suspension).

[145] TEX. CODE CRIM. PROC. ANN. art. 2.132(b)(5) (2013).

[146] Steve McGonigle et al., *supra* note 109. However, another prosecutor employed in 2005 by the Dallas County District Attorney was twice found by the trial court to have engaged in a *Batson* violation and was not disciplined. *Id.* The District Attorney advised that "he does not necessarily make Batson violations part of employees' personnel files." *Id.*

have acted improperly on the basis of race.[147] Similarly, Texas's appellate procedures do not provide a mechanism to sanction actors who have engaged in misconduct at trial, even if that conduct contributed to the reversal of a death sentence or conviction. The Texas Disciplinary Rules of Professional Conduct, which pertain to all lawyers, also do not address specifically capital punishment or racial discrimination in its administration, and the anti-discrimination standards established by these rules are decidedly broad and, therefore, difficult to enforce.[148]

Finally, only in 2011 did the State of Texas sever all ties with Dr. Walter Quijano, the psychiatrist who testified in at least seven cases that a black or Hispanic defendant's race made the defendant more prone to violence.[149] Although Dr. Quijano's more recent work on behalf of the State involved counseling and treatment services to the Texas Youth Commission—versus appearances as an expert witness in capital cases—it is troubling that any agency of state government would have contracted for Dr. Quijano's services after the outcome in *Saldaño v. State*.

Conclusion

While some law enforcement and judges are educated on the inappropriateness of considering race in the administration of the death penalty, it is unclear the extent to which prosecutors and defense counsel receive such education. Furthermore, only select actors in Texas's criminal justice system, such as law enforcement, could expect to face meaningful sanctions for carrying out their duties on the basis of racial considerations, while others remain virtually immune from official sanction for that same conduct. Thus, the State of Texas only partially complies with Recommendation #6.

G. Recommendation #7

> **Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during jury selection.**

Although Texas has adopted standards for appointed counsel representing indigent defendants and inmates in capital cases, these standards are not specific with regard to training to identify and develop racial discrimination claims.[150]

Trial and Direct Appeal Counsel

Depending upon the location of the offense, an indigent capital defendant may be represented by the Regional Public Defender for Capital Cases (RPDO),[151] the El Paso County Public Defender,[152] or locally-appointed counsel.[153]

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[147] TEX. CODE CRIM. PROC. ANN. art. 2.131 (2013).

[148] *See, e.g.*, TEX. DISCIPLINARY R. OF PROF'L CONDUCT R. 5.08 (2013) (prohibiting lawyers from "willfully . . . manifest[ing], by words or conduct, bias or prejudice based on race, color, [or] national origin," but excluding from this prohibition "the process of jury selection").

[149] Grissom, *supra* note 12.

[150] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(b) (regarding representation by a public defender's office), 26.052(c)–(d) (regarding representation by locally-appointed counsel) (2013).

Attorneys employed by RPDO must "have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases."[154] While this requirement does not mention training on identification and development of racial discrimination claims, RPDO reports that its public defenders have received such training.[155] Likewise, counsel with the El Paso County Public Defender receive training on the identification and development of racial discrimination claims in capital cases, although statutory and internal guidelines do not explicitly require it.[156] The El Paso County Public Defender reports that its attorneys receive this training through both in-state and out-of-state entities.[157]

As for locally-appointed counsel, the Code of Criminal Procedure requires local selection committees in each of Texas's nine administrative judicial regions[158] to "adopt standards for the qualification of attorneys to be appointed to represent indigent defendants in capital cases in which the death penalty is sought."[159] These standards are in addition to those required under the Code. Neither Texas statutory law nor the standards promulgated by the local selection committees require appointed counsel to receive training on identification and development of racial discrimination claims in death penalty cases.[160] Instances described in Recommendation

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[151] *About Us*, REG'L PUB. DEFENDER FOR CAPITAL CASES, http://rpdo.org/about.php (last visited Aug. 21, 2013); *19 Public Defender Offices in Texas*, TEX. INDIGENT DEFENSE COMM'N, http://www.txcourts.gov/tidc/pdf/webpagepdomac.pdf (last visited Apr. 26, 2013). RPDO represents capital defendants in all nine of Texas's administrative judicial regions. *Id.*

[152] Interview by Ryan Kent with Carole Jean Powell, Deputy Public Defender, El Paso County Public Defender (July 24, 2012) (on file with author) [hereinafter Powell Interview]; *19 Public Defender Offices in Texas*, TEX. INDIGENT DEFENSE COMM'N, http://www.txcourts.gov/tidc/pdf/webpagepdomac.pdf (last visited Apr. 26, 2013) (listing the El Paso County Public Defender as providing capital case services).

[153] TEX. CODE CRIM. PROC. ANN. art. 26.052(b)–(c) (2013).

[154] *Job Description for Assistant Public Defender, Lubbock County, Texas*, LUBBOCK CNTY., June 10, 2012 (on file with author).

[155] Interview by Ryan Kent with Philip Wischkaemper, Assistant Chief Public Defender, Regional Public Defender for Capital Cases (July 19, 2012) (on file with author) (noting that RPDO public defenders have attended capital-case seminars hosted by the Texas Criminal Defense Lawyers Association, the Center for American and International Law, and the Bureau of Justice Assistance, as well as the NAACP Legal Defense Fund's Airlie Conference, the Capital Case Defense Seminar of the California Attorneys for Criminal Justice, and the Center for Justice in Capital Cases at DePaul University College of Law).

[156] Email from Carole Jean Powell, Deputy Pub. Defender, El Paso Cnty. Pub. Defender, to Ryan Kent, Staff Att'y (July 25, 2012) (on file with author); Powell Interview, *supra* note 152.

[157] *Id.*

[158] *See* TEX. GOV'T CODE ANN. § 74.042 (2013) (establishing administrative judicial regions, which are composed of as few as eleven counties or as many as forty-five counties).

[159] TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(1) (2013).

[160] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(2) (2013); STANDARDS FOR APPOINTMENT OF COUNSEL IN DEATH PENALTY CASES PROMULGATED PURSUANT TO ART. 26.052 C.C.P., FIRST ADMIN. JUD. REGION OF TEX., at 1–2 (rev. Nov. 13, 2009); APPLICATION FOR APPROVAL AS QUALIFIED TRIAL COUNSEL IN DEATH PENALTY CASES, SECOND ADMIN. JUD. REGION OF TEX., at 1–2 (2012); APPLICATION FOR APPROVAL AS QUALIFIED APPELLATE COUNSEL IN DEATH PENALTY CASES, SECOND ADMIN. JUD. REGION OF TEX., at 1 (2012); STANDARDS FOR THE QUALIFICATIONS OF LEAD TRIAL COUNSEL FOR APPOINTMENT IN DEATH PENALTY CASES, THIRD ADMIN. JUD. REGION OF TEX., at 1 (2011); STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT IN THE FOURTH ADMINISTRATIVE JUDICIAL REGION, FOURTH ADMIN. JUD. REGION OF TEX., at 1–2 (2011); STANDARDS AND RULES FOR QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES PURSUANT TO ARTICLE 26.052, TEXAS CODE OF CRIMINAL PROCEDURE, FIFTH ADMIN. JUD. REGION OF TEX., at 1–4 (eff. Nov. 17, 2011); 2011 PLAN: STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT

#6, above, in which defense counsel intentionally fail to preserve claims of racial discrimination in jury selection, underscore the importance of defense counsel receiving training on identifying and developing such claims prior to appointment to a capital case.[161]

State Habeas Corpus Counsel

An indigent inmate pursuing a writ of habeas corpus in state court will be represented by the Office of Capital Writs (OCW), an agency established in 2010 for the exclusive purpose of representing death-sentenced inmates in state habeas and related proceedings.[162] If OCW is unable to accept appointment, then capital post-conviction counsel will be appointed from counsel lists promulgated by each administrative judicial region.[163]

OCW internal guidelines do not explicitly require that state habeas counsel receive training on the identification and development of racial discrimination claims in capital cases.[164] OCW reports, however, that a majority of its attorneys have received training specific to identifying and developing claims of racial discrimination in capital cases.[165]

As for other appointed state habeas counsel, Texas statutory law does not require that these attorneys be trained in accordance with Recommendation #7.[166] Indeed, the only explicit requirements for each attorney on the statewide list are that counsel "(1) must exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases; and (2) may not have been found by a state or federal court to have rendered ineffective assistance of counsel during the trial or appeal of a death penalty case."[167]

Conclusion

Training is offered to and completed by capital counsel with respect to identifying and developing racial discrimination claims in capital cases, but it is not required. Therefore, the State of Texas only partially complies with Recommendation #7.

DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEX. CODE OF CRIM. PROC., SIXTH ADMIN. JUD. REGION OF TEX., at 1–5 (2011); STANDARDS FOR QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES PURSUANT TO ARTICLE 26.052, TEXAS CODE OF CRIMINAL PROCEDURE, SEVENTH ADMIN. JUD. REGION OF TEX., at 1–3 (eff. Oct. 1, 2011); STANDARDS FOR THE QUALIFICATION OF ATTORNEYS FOR APPOINTMENT TO DEATH PENALTY CASES IN THE EIGHTH ADMINISTRATIVE JUDICIAL REGION OF TEXAS PURSUANT TO ARTICLE 26.052 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, EIGHTH ADMIN. JUD. REGION OF TEX., at 1–4 (Sept. 11, 2006); 2011 PLAN: STANDARDS FOR THE QUALIFICATION OF ATTORNEYS TO BE APPOINTED TO REPRESENT INDIGENT DEFENDANTS IN CAPITAL CASES IN WHICH THE DEATH PENALTY IS SOUGHT PURSUANT TO ART. 26.052(D) OF THE TEXAS CODE OF CRIMINAL PROCEDURE, NINTH ADMIN. JUD. REGION OF TEX., at 1–5 (2011) (all on file with author).

[161] *See supra* note 141 and accompanying text.

[162] *See* TEX. GOV'T CODE ANN. §§ 78.052, 78.054 (2013); *Homepage*, OFFICE OF CAPITAL WRITS, http://www.ocw.texas.gov/ (last visited Apr. 26, 2013).

[163] TEX. GOV'T CODE ANN. § 78.056(a) (2013).

[164] Email from Brad D. Levenson, Dir., Office of Capital Writs, to Ryan Kent, Staff Att'y (July 20, 2012) (on file with author) (quoting OCW's internal guidelines).

[165] Interview by Ryan Kent with Brad D. Levenson, Dir., Office of Capital Writs (July 20, 2012) (on file with author).

[166] *See* TEX. GOV'T CODE ANN. § 78.056(a) (2013).

[167] TEX. GOV'T CODE ANN. § 78.056(a) (2013).

H. Recommendation #8

Jurisdictions should require jury instructions that it is improper for jurors to consider any racial factors in their decision-making and that jurors should report any evidence of racial discrimination in jury deliberations.

Texas jury instructions do not require judges to explicitly inform jurors that it is improper to permit racial factors to affect their decision-making and that they should report any evidence of racial discrimination in jury deliberations.[168]

However, an instruction routinely given in capital cases reads: "[You are] not to be swayed by mere sentiment, conjecture, sympathy, passion, *prejudice*, public opinion or public feeling in considering all of the evidence before you and in answering [the 'mitigation' special issue]."[169] Although instructing jurors not to permit prejudice to sway their decision-making would go some way toward satisfying Recommendation #8's requirements, the instruction's other directives do more, on balance, to limit a juror's ability to give full consideration to mitigating evidence than to remedy a juror's inclination to consider racial factors in his/her deliberations.[170]

Nevertheless, in view of the above instruction's urging against "prejudice" in juror decision-making, the State of Texas is in partial compliance with Recommendation #8.

I. Recommendation #9

Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision-making could be affected by racially discriminatory factors.

The Texas Rules of Civil Procedure provide the grounds for recusal for trial court judges in civil and criminal cases alike.[171] Specifically, Rule 18b requires judges to recuse themselves in any proceeding in which "the judge's impartiality might reasonably be questioned" or "the judge has a personal bias or prejudice concerning the subject matter or a party."[172] A ground for recusal may be waived by the parties, but only after it is fully disclosed on the record.[173]

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[168] For a discussion of those jury instructions that are required in capital cases, see Chapter Ten on Capital Jury Instructions.

[169] Tong v. State, 25 S.W.3d 707, 710 n.4 (Tex. Crim. App. 2000) (internal quotations omitted) (emphasis added). *See also* Chapter Ten on Capital Jury Instructions.

[170] *See* Chapter Ten on Capital Jury Instructions.

[171] *See* TEX. R. CIV. PROC. 18a–b (2013); Arnold v. State, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993).

[172] TEX. R. CIV. PROC. 18b(b)(1)–(2) (2013). In addition, Texas judges are bound by the Code of Judicial Conduct and may be disciplined for violating that Code pursuant to the Texas Constitution. *See* TEX. CONST. art. V, § 1-a(6). Among the provisions contained in the Code is Canon 3, which requires judges to "perform [their] judicial duties without bias or prejudice" and to refrain from words or conduct "in the performance of [their] judicial duties" that "manifest bias or prejudice." TEX. CODE JUD. CONDUCT, Canon 3(B)(5)–(6). Canon 3 also prohibits judges from "knowingly permit[ting] staff, court officials and others subject to the judge's direction and control" from manifesting similar bias or prejudice. TEX. CODE JUD. CONDUCT, Canon 3(B)(6). Furthermore, judges must ensure that counsel before the court "refrain from manifesting, by words or conduct, bias or prejudice based on race . . . against parties, witnesses, counsel or others." TEX. CODE JUD. CONDUCT, Canon 3(B)(7).

[173] TEX. R. CIV. PROC. 18b(e) (2013).

In interpreting the application of Rule 18b, the Texas Court of Criminal Appeals has stated that "a judge's impartiality might reasonably be questioned 'only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.'"[174] If the motion to recuse is denied, then an appellate court will review that decision under an abuse of discretion standard.[175]

In its review of Texas cases from the past several decades, the Assessment Team could find no instance in which the Texas Court of Criminal Appeals addressed the issue of judicial recusal on account of a judge's racially discriminatory views—be they manifest or suspect.[176] Moreover, the annual reports of the State Commission on Judicial Conduct from 2001 through 2011 rarely mention the public or private reprimanding of a sitting judge for such questionable conduct.[177] And although two Texas judges have been reprimanded in the past twenty years for making plainly discriminatory remarks,[178] both judges served as justices of the peace and, consequently, were not in a position to hear capital cases.[179]

Because the Texas Court of Criminal Appeals routinely declines to publish an opinion in capital cases, however, the Assessment Team cannot conclude, from this absence of evidence, that the issue has not been raised or that it has been appropriately adjudicated. As documented elsewhere in this Report,[180] this practice by the Court of Criminal Appeals makes it difficult to determine Texas's responsiveness to the many concerns raised in this Assessment. Accordingly, the Assessment Team cannot determine whether Texas complies with Recommendation # 9.

J. Recommendation #10

States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such

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[174] Gaal v. State, 332 S.W.3d 448, 453 (Tex. Crim. App. 2011) (quoting Liteky v. United States, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring)).

[175] TEX. R. CIV. PROC. 18a(j)(1)(A); *Gaal*, 332 S.W.3d at 456.

[176] As described in other parts of this Report—particularly Chapter Eight on State Post-conviction Proceedings—the Texas Court of Criminal Appeals typically does not address explicitly the issues of fact and law raised by state habeas petitioners in its capital case orders.

[177] *See, e.g.*, STATE COMM. JUD. CONDUCT, FISCAL YEAR 2008 ANNUAL REPORT (2008) (noting the public warning and order of additional education of a county court-at-law judge whose discussion with plaintiff's counsel regarding "slavery, the Middle Passage, and the possible effect of that event on today's African-Americans" may have "caus[ed] some members of the public to reach the conclusion, perhaps mistakenly, that the judge harbored a bias or prejudice against the attorney on the basis of his race"); STATE COMM. JUD. CONDUCT, FISCAL YEAR 2007 ANNUAL REPORT (2007) (noting the private reprimand and order of additional education of a municipal judge whose statements regarding an arrestee "suggested to some members of the public that the judge was exhibiting a bias or prejudice against the arrestee on the basis of race").

[178] *See* Richard Stewart, *Justice of the Peace Taped Cursing Resigns / Won't Run Again, Says His Attorney*, HOUS. CHRON., Feb. 18, 2004, at A18 (reporting Brazoria County Justice of the Peace Matt Zepeda's resignation and agreement "to stay out of office" after he was videotaped "cursing and using a racial slur while arraigning prisoners in the Pearland city jail"); *In re* Lowery, 999 S.W.2d 639, 646 (Tex. Rev. Trib. 1998) (recounting Dallas County Justice of the Peace Bill R. Lowery's use of racial epithets in a dispute with a parking attendant).

[179] TEX. CONST. art. V, § 19 (establishing the jurisdiction of justices of the peace); TEX. GOV'T CODE ANN. § 27.031 (2013) (enlarging the jurisdiction of justices of the peace, but not to include capital cases).

[180] For a discussion of the Texas Court of Criminal Appeals' treatment of state habeas petitions in capital cases, see Chapter Eight on State Post-conviction Proceedings.

claims, unless the State proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.

A claim that racial discrimination has occurred in the imposition of a death sentence takes many forms. For example, a death-sentenced inmate may allege that racial considerations influenced the prosecutor's charging decision,[181] that the composition of the jury pool did not reflect the racial diversity of the community,[182] or that the prosecutor exercised his/her peremptory challenges during jury selection on the basis of race.[183]

On direct appeal, the Texas Court of Criminal Appeals generally will consider claims of racial discrimination in the imposition of a death sentence if those claims have been properly preserved.[184] A claim not properly preserved also may provide a basis for relief, but only if the unassigned error is a "fundamental" one—i.e., a failure to correct the unassigned error would result in a "miscarriage of justice."[185] That said, "[i]t is well settled in [Texas] that in the ordinary case the failure to make a specific, timely objection at trial will waive error on appeal. This is no less true when the error is one of constitutional dimension."[186]

With respect to state post-conviction review,[187] which runs concurrent with the direct review process described above, the Court of Criminal Appeals generally will not entertain a claim if (1) the claim is not cognizable in a collateral attack; (2) the applicant expressly waived the right now asserted; or (3) the applicant failed to exercise the right now asserted in the trial court.[188] To be

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[181] *See, e.g.*, KY. REV. STAT. ANN. § 532.300 (2013) (prohibiting charging and sentencing decisions "on the basis of race" and authorizing the use of statistical evidence to support claims based thereon); N.C. GEN. STAT. § 15A-2011 (2013) (prohibiting charging and sentencing decisions in which "race was a significant factor" and authorizing the use of statistical evidence to support claims based thereon).

[182] *See* Taylor v. Louisiana, 419 U.S. 522, 537 (1975) (holding that a defendant in a criminal trial has a constitutional right "to have the jury drawn from venires representative of the community").

[183] *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that the prosecution may not exercise its peremptory challenges to exclude potential jurors "solely on account of their race"); TEX. CODE CRIM. PROC. ANN. art. 35.261 (2013) (codifying *Batson* analysis under state law).

[184] *See* TEX. R. APP. P. 33.1(a). An error is properly preserved if the record shows that "(1) the complaint was made to the trial court by a timely request, objection, or motion . . . [and] (2) the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; or (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal." *Id. See, e.g.*, Storey v. State, No. AP-76018, 2010 WL 3901416, at *17–18 (Tex. Crim. App. Oct. 6, 2010) (considering, but ultimately rejecting, defendant's preserved *Batson* claim). *See also* Chapter Seven on the Direct Appeal Process.

[185] *See* Carter v. State, 639 S.W.2d 13, 15 (Tex. App. 1982). *See also* Lott v. State, 874 S.W.2d 687, 688 (Tex. Crim. App. 1994).

[186] Williams v. State, 773 S.W.2d 525, 529 (Tex. Crim. App. 1988) (internal citations omitted). *See, e.g.*, Manuel v. State, No. 12-10-00137-CR, 2011 WL 3805900, at *2 (Tex. App. Aug. 24, 2011) (*Batson* claim not preserved and, therefore, not considered); Reese v. State, 936 S.W.2d 327, 328 (Tex. App. 1996) (same).

[187] Under Texas constitutional and statutory law, post-conviction review is available exclusively through applications for a writ of habeas corpus. *See* TEX. CONST. art. I, § 12; TEX. CODE CRIM. PROC. ANN. art. 11.071 (2013) (specifying post-conviction review procedures for cases "in which the applicant seeks relief from a judgment imposing a penalty of death"). Although the Texas Code of Criminal Procedure includes a distinct article specifying the post-conviction procedures that must be followed in death-sentence cases, the availability of the writ has been significantly informed by case law in non-death-sentence cases pursued under Article 11.07. *See* TEX. CODE CRIM. PROC. ANN. art. 11.07 (2013) (specifying post-conviction review procedures for cases "in which the applicant seeks relief from a felony judgment imposing a penalty other than death"). For further discussion of Texas's framework for post-conviction review, see Chapter Eight on State Post-conviction Review.

[188] Ex parte McCain, 67 S.W.3d 204, 208 (Tex. Crim. App. 2002).

cognizable in a collateral attack, a claim must invoke a jurisdictional defect or a violation of "certain fundamental or constitutional rights."[189] However, state post-conviction review is not intended as a substitute for direct appeal, thus a claim that was—or could have been—raised on direct appeal generally will not be considered during state post-conviction review.[190] In addition, the Court of Criminal Appeals has clarified that "not all constitutional errors cause the level of harm necessary to warrant cognizability under a writ of habeas corpus," but it has avoided establishing a bright-line rule for determining cognizability.[191] Accordingly, constitutionally-based claims that racial discrimination occurred in the imposition of a death sentence will not, as a matter of course, be adjudicated on the merits during state post-conviction review.[192] There is also no law or rule permitting Texas courts to apply a "knowing and intelligent" standard for waivers of claims of constitutional error—like racial discrimination—that have not been properly preserved at trial or on appeal.

Several cases illustrate or intimate that claims of racial discrimination will be rejected on appellate review—whether direct or collateral—due to a capital defendant's failure to properly preserve the claim. In *Ex parte Balentine*, for instance, the Texas Court of Criminal Appeals dismissed a capital defendant's *Batson* claim of discriminatory jury selection for failure to satisfy the state habeas procedural requirements of the Texas Code of Criminal Procedure.[193] Likewise,

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[189] *Ex parte* McCain, 67 S.W.3d 204, 206, 210 (Tex. Crim. App. 2002); *Ex parte* Sanchez, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996). By contrast, "[p]rocedural errors or statutory violations may be reversible error on direct appeal, but they are not 'fundamental' or 'constitutional' errors which require relief on a writ of habeas corpus." *McCain*, 67 S.W.3d at 209–10 (citing *Ex parte* Seidel, 39 S.W.3d 221. 225 (Tex. Crim. App. 2001)).

[190] *Ex parte* Banks, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989) ("The Great Writ should not be used to litigate matters which should have been raised on appeal."). Furthermore, "[a] failure to file an application before the filing date . . . constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A [addressing untimely applications]." TEX. CODE CRIM. PROC. ANN. art. 11.071, § 4(e) (2013).

[191] *Ex parte* McKay, 819 S.W.2d 478, 481–82 (Tex. Crim. App. 1990) (plurality opinion). In *McKay*, a capital case, the plurality found cognizable the trial court's improperly limiting the scope of voir dire questioning. *Id.* at 483–84. Moreover, in resolving the issue of cognizability, the plurality cited approvingly the U.S. Supreme Court's recognition in *Woodson v. North Carolina*, 428 U.S. 280 (1976), that there is a "heightened need for assurances that the requirements of due process are followed in a capital case." *Id.* at 484. *But see McKay*, 819 S.W.2d at 486–87 (Clinton, J., concurring) (criticizing the plurality's cognizability analysis as "proceed[ing] upon no more than the premise . . . that under the Eighth Amendment 'more process is due' capital murder defendants").

[192] Such claims also may be based on statutory provisions, *see, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 35.261 (2013) (requiring the trial court to "call a new array in the case" if it "determines that the attorney representing the state challenged prospective jurors on the basis of race"), but more often are grounded in state and federal constitutional provisions.

[193] *Ex parte* Balentine, Nos. WR-54071-01, WR-54071-02, 2009 WL 3042425, at *1 (Tex. Crim. App. Sept. 22, 2009) (per curiam) (unpublished). Interestingly, the Texas Court of Criminal Appeals has implied—most likely unintentionally—that a *Batson* claim is cognizable on state post-conviction review. In *Ex parte Balentine*, the Court held that an applicant's subsequent application for habeas relief, which alleged a *Batson*-type error, did not satisfy the requirements of Article 11.071. *Id.* (citing TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5 (2013)). The relevant part of that provision reads:

> [A] court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that . . . the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application.

the Court held in *Williams v. State* that a *Batson* claim would not be considered on direct appeal when a defendant "fail[s] to object or raise the issue in any manner in the trial court."[194] The same strict standard also has been applied to claims of improper argument.[195] Indeed, the Court has clarified that "[a] defendant must object each time an improper argument is made, or he waives his complaint, *regardless of how egregious the argument*."[196]

The need for the courts to permit defendants or inmates to raise directly claims of racial discrimination in the imposition of the death penalty, notwithstanding a capital defendant's failure to preserve the claim in an underlying proceeding, is underscored by the historical and systemic inadequacy of counsel provided to those facing the death penalty in Texas. Since reinstatement of the death penalty, Texas counties with the highest rates of capital prosecutions and death sentences have not imposed any requirements that appointed counsel be adequately trained on preservation of issues of critical import in capital cases, including claims of racial discrimination during jury selection, counsel argument, or jury deliberations.[197] The system fails to provide adequate counsel and then erects considerable obstacles to bar judicial review of capital cases due to the very inadequacy of that counsel.[198]

In view of Texas's general disinclination to permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, the State is not in compliance with Recommendation #10.

TEX. CODE CRIM. PROC. ANN. art. 11.071, § 5(a) (2013). According to the *Balentine* Court, then, the applicant's *Batson* claim must have fallen within these parameters—that is, the claim "could [] have been presented previously in a timely initial application or in a previously considered application filed under [Article 11.071]." *Id.*

[194] *See, e.g.*, Williams v. State, 773 S.W.2d 525, 535 (Tex. Crim. App. 1988); Mejia v. State, No. 14-04-01136-CR, 2006 WL 3026297, at *3 (Tex. App. July 25, 2006).

[195] Cockrell v. State, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996).

[196] Brown v. State, No. 01-11-00462-CR (Tex. App. May 24, 2012) (emphasis added).

[197] *See supra* note 160 and accompanying text. *See also, e.g.*, LA. PUB. DEFENDER BD. (LPDB), *Capital Defense Guidelines* (effective May 20, 2010), adopted pursuant to LA. REV. STAT. ANN, 15:148(f)(10) (requiring LPDB to "[c]reat[e] separate performance standards and guidelines for attorney performance in capital case representation . . ."). LPDB's adopted certification standards "seek to insure . . . that every capital defendant" possess at least the requisite skills outlined in Protocol #2, *supra*. LA. PUB. DEFENDER BD., *Capital Defense Guidelines* § 915 (A)–(B), *available at* http://lpdb.la.gov/Supporting%20Practitioners/Capital%20Defense/txtfiles/pdf/Rule%20(Capital%20Defense%20Guidelines),%20promulgated%20May%2020,%202010.pdf; *In the Matter of Adopting a Plan for Review of Appointed Counsel*, Sup. Ct. Maricopa Cty., Order No. 2012-008 ("To be qualified for assignment to capital cases, the attorney must demonstrate that he or she . . . possesses the requisite qualifications set forth in Guideline 5.1 of the ABA Guidelines [and that] the attorney has a demonstrated history of practice, and can be expected to continue to practice, in accordance with the performance and practice standards set forth in Guidelines 10.1 through 10.13 of the ABA Guidelines."); OHIO SUP. CT. R. 20.01(A) (requiring that every "attorney representing a capital defendant" possess the qualifications described in ABA Guideline 5.1).

[198] For a discussion of the Texas Court of Criminal Appeals' treatment of state habeas petitions in capital cases, see Chapter Eight on State Post-conviction Proceedings.

CHAPTER THIRTEEN

MENTAL RETARDATION AND MENTAL ILLNESS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Mental Retardation[1]

In 2002 in *Atkins v. Virginia*,[2] the U.S. Supreme Court held that the application of the death penalty to persons with mental retardation violates the Eighth Amendment prohibition on cruel and unusual punishment. However, *Atkins* did not define the parameters of mental retardation, nor did the decision explain what process capital jurisdictions should employ to determine if a capital defendant or death row inmate has mental retardation. Without a sound definition and clear procedures, the execution of persons with mental retardation remains possible.

In an effort to assist capital jurisdictions in determining who meets the criteria of mental retardation, the ABA adopted a resolution opposing the execution or sentencing to death of any person who, at the time of the offense, "had significant limitation in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or traumatic brain injury."[3] The ABA policy reflects language adopted by the American Association on Intellectual and Developmental Disabilities (AAIDD) and the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.[4]

Unfortunately, some states do not define mental retardation in accordance with these commonly accepted definitions. Moreover, some states impose upper limits on the intelligence quotient

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[1] While "intellectual disability" is gaining currency as the preferred term to describe the same condition known as mental retardation, the ABA Assessment Reports will continue to use the term mental retardation until the term "intellectual disability" is more fully integrated into the legal system. *See FAQ on Intellectual Disability*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://aaidd.org/intellectual-disability/definition/faqs-on-intellectual-disability (last visited Aug. 27, 2013). For example, mental retardation is more commonly used in death penalty jurisprudence in such definitive decisions as *Atkins v. Virginia*, 536 U.S. 304 (2002). ABA policy refers explicitly to mental retardation in its long-standing opposition to the execution of people with this condition, and use of the term mental retardation maintains consistency with previous reports authored by the ABA and its jurisdictional assessment teams on the death penalty.

[2] *Atkins*, 536 U.S. at 304.

[3] ABA, RECOMMENDATION 122A, 2006 Ann. Mtg. (adopted Aug. 7–8, 2006), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_am_122a.authcheckdam.pdf. *See* AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYS. OF SUPPORTS 13 (10th ed. 2002); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 49 (text rev. 4th ed. 2000) [hereinafter DSM]. The American Association on Mental Retardation (AAMR) later changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). *About Us*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://aaidd.org/about-aaidd (last visited Aug. 27, 2013).

[4] For example, the AAIDD defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills[, and which] originates before the age of 18." *FAQ on Intellectual Disability*, *supra* note 1. The DSM defines a person as mentally retarded if, before the age of eighteen, s/he exhibits "significantly subaverage intellectual functioning and concurrent deficits or impairments in present adaptive functioning." DSM, *supra* note 3, at 39.

(IQ) score necessary to prove mental retardation that are lower than the range that is commonly accepted by psychologists and other mental retardation experts (approximately seventy to seventy-five or below). In addition, lack of sufficient knowledge and resources often precludes defense counsel from properly raising and litigating claims of mental retardation. In some jurisdictions, the burden of proving mental retardation is not only placed on the defendant, but also requires proof greater than a preponderance of the evidence. Accordingly, a great deal of additional work is required to make the *Atkins* holding a reality.

The ABA resolution also encompasses dementia and traumatic brain injury; disabilities functionally equivalent to mental retardation, but that typically manifest after age eighteen. While these disabilities are not expressly covered in *Atkins*, the ABA opposes the application of the death penalty to any person who suffered from significant limitations in intellectual functioning and adaptive behavior at the time of the offense, regardless of the cause of the disability.

Mental Illness

In *Atkins*, the Court held that offenders with mental retardation are less culpable than other offenders because of their "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."[5] In the ABA's view, this same reasoning must logically extend to persons suffering from a severe mental disability or disorder that significantly impairs their cognitive or volitional functioning at the time of the capital offense.

In 2006, the ABA adopted a policy opposing imposition of the death penalty on persons who, at the time of the offense, suffered from a severe mental disability or disorder that affected (1) their capacity to appreciate the nature, consequences or wrongfulness of their conduct; (2) their ability to exercise rational judgment in relation to their conduct; or (3) their capacity to conform their conduct to the requirements of the law.[6]

Mental Illness after Sentencing

Concerns about a prisoner's mental competence and suitability for execution also arise long after the prisoner has been sentenced to death. Almost 13% of all prisoners executed in the modern death penalty era have been "volunteers," or prisoners who elected to forgo all available appeals.[7] Approximately 88% of these volunteers suffered from a mental illness.[8] When a prisoner seeks to forgo or terminate post-conviction proceedings, jurisdictions should implement procedures that will ensure that the prisoner fully understands the consequences of that decision, and that the prisoner's decision is not the product of his/her mental illness or disability.

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[5] *Atkins*, 536 U.S. at 318.

[6] ABA, RECOMMENDATION 122A, 2006 Ann. Mtg. (adopted Aug. 7–8, 2006), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_am_122a.authcheckdam.pdf.

[7] John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 959 (2005).

[8] *Id.* at 962.

Given the irreparable consequence that flow from a death row inmate's decision to waive his/her appeals, the ABA also opposes execution of prisoners whose mental disorders or disabilities significantly impair their capacity (1) to make rational decisions with regard to post-conviction proceedings; (2) to assist counsel in those proceedings; or (3) when facing an impending execution, to appreciate the nature and purpose of the punishment or reason for its imposition.

Irrespective of a state's law on the application of the death penalty to offenders with mental retardation or mental illness, mental disabilities and disorders can affect every stage of a capital trial. Evidence of mental illness is relevant to the defendant's competence to stand trial, it may provide a defense to the murder charge, and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, defense attorney, or jury is misinformed about the nature of mental illness and its relevance to the defendant's culpability and life experience, tragic consequences often follow for the defendant.

Juries often mistakenly treat mental illness as an aggravating circumstance rather than a mitigating factor in capital cases. States, in turn, have often failed to monitor or correct such unintended and unfair results. For example, a state's capital sentencing statute may provide a list of mitigating factors that implicate mental illness, such as whether the defendant was under "extreme mental or emotional disturbance" or whether the defendant had the capacity to "appreciate the criminality (wrongfulness) of his conduct" at the time of the offense. However, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness.[9] One study found specifically that jurors' consideration of "extreme mental or emotional disturbance" in capital cases correlated positively with decisions to impose death sentences.

Mental illness particularly weighs against a capital defendant when it is considered in the context of determining "future dangerousness," a criterion for imposing the death penalty in some jurisdictions. One study showed that a judge's instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. This perception unquestionably affects decisions in capital cases. In addition, the medication some mentally ill defendants receive during trial often causes them to appear detached and unremorseful. This, too, can lead jurors to impose a sentence of death.

[9] State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under "extreme mental or emotional disturbance" at the time of the offense; (2) whether "the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication"; and (3) whether "the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct." MODEL PENAL CODE § 210.6(1)(f) (1962). In 2009, the American Law Institute formally withdrew all Model Penal Code provisions related to the imposition of capital punishment. Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, Jan. 5, 2010, at A11.

I. FACTUAL DISCUSSION: TEXAS OVERVIEW

A. Mental Retardation in Death Penalty Cases

In 2002, the U.S. Supreme Court held, in *Atkins v. Virginia*, that executing persons with mental retardation violates the Eighth Amendment's prohibition on cruel and unusual punishment.[10] The Court, however, allowed the individual states to decide the procedure for determining whether an offender has mental retardation and thus cannot be subject to the death penalty.[11]

Texas has not enacted a statute prohibiting the death penalty for persons with mental retardation.[12] In the 2004 case *Ex parte Briseno*, however, the Texas Court of Criminal Appeals established "temporary judicial guidelines" to be used in addressing claims of mental retardation.[13] The court defined mental retardation as "a disability characterized by: (1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18."[14]

While this definition is based on the clinical criteria established by the American Association on Intellectual and Developmental Disabilities (AAIDD), the court also described seven non-clinical factors—later known as the *Briseno* factors—to be used to determine whether a person has mental retardation:

> (1) Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
> (2) Has the person formulated plans and carried them through or is his conduct impulsive?
> (3) Does his conduct show leadership or does it show that he is led around by others?
> (4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
> (5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
> (6) Can the person hide facts or lie effectively in his own or others' interests?
> (7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[15]

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[10] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[11] *See id.*

[12] Legislative proposals in 1999 and 2001 to ban the application of the death penalty to mentally retarded persons failed to become law. *Dozens of Bills Run Out of Time: Most of the Measures Passed in One Chamber but Never Made It to the Floor in the Other*, FT. WORTH STAR-TELEGRAM, May 27, 1999, at 3; Paul Duggan, *Tex. Ban on Executing Retarded Is Rejected*, WASH. POST, June. 18, 2001, at A2.

[13] *Ex parte* Briseno, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).

[14] *Id.* at 7. (citing AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).

[15] *Id.* at 8–9.

1. Determinations of Mental Retardation at Trial

At trial, the defendant bears the burden of proving mental retardation by a preponderance of the evidence.[16] Because Texas has not enacted a mental retardation statute, there are few other established rules and procedures governing the determination of whether a capital defendant has mental retardation. The determination of a defendant's mental retardation is not required to take place at a particular time during the capital proceeding; rather, the decision is at the discretion of the trial court.[17] In general, it appears most Texas trial courts have opted to allow the jury to determine whether the defendant has mental retardation during penalty phase deliberations.[18]

2. Determinations of Mental Retardation in State Habeas Corpus Proceedings

Texas statutory law permits a death row inmate to file a subsequent application for a writ of habeas corpus if the current claims and issues have not been and could not have been presented in a previous application "because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application."[19] Under this provision, a death row inmate whose state habeas claims were exhausted before the U.S. Supreme Court's *Atkins* decision may raise a mental retardation claim in a subsequent habeas application.[20]

The inmate's application must allege "sufficient specific facts" supporting his/her mental retardation claim.[21] If the inmate meets this standard, the trial court will consider the claim on the merits.[22] As with trial-level claims of mental retardation, the inmate must prove mental retardation by a preponderance of the evidence.[23] However, the mental retardation determination must be made by the trial court, not a jury.[24]

Texas applies a different standard for habeas corpus applicants who were convicted after the *Atkins* decision and thus could have raised a mental retardation claim in a prior proceeding. Such inmates must demonstrate in their application "'sufficient specific facts' that, if true, would establish 'by clear and convincing evidence' that no rational fact finder would fail to find him mentally retarded."[25]

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[16] Gallo v. State, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007).

[17] *Id.* (noting that a jury determination of mental retardation occurred but was not required). *See also* Williams v. State, 270 S.W.3d 112, 132 (Tex. Crim. App. 2008); Hunter v. State, 243 S.W.3d 664, 667 (Tex. Crim. App. 2007).

[18] Renée Feltz, *Cracked*, TEX. OBSERVER, Jan. 5, 2010, http://www.texasobserver.org/cracked/ (last visited Aug. 27, 2013) (noting that the practice in Texas is for the jury to determine whether a defendant has mental retardation during penalty phase deliberations). *See also, e.g.*, Neal v. State, 256 S.W.3d 264, 272 (Tex. Crim. App. 2008); *Williams*, 270 S.W.3d at 132; *Gallo*, 239 S.W.3d at 770; *Hunter*, 243 S.W.3d at 667.

[19] TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(1) (2013).

[20] *See, e.g.*, *Ex parte* Briseno, 135 S.W.3d 1, 2 (Tex. Crim. App. 2004).

[21] *Ex parte* Johnson, No. 36139-04, 2003 WL 21715265, at *1–2 (Tex. Crim. App. 2003) (Johnson, J., concurring) (quoting TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (2003)).

[22] TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (2013).

[23] *Briseno*, 135 S.W.3d at 12.

[24] *Id.* at 11.

[25] *Ex parte* Blue, 230 S.W.3d 151, 162 (Tex. Crim. App. 2007) (quoting TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(3) (2007)).

B. Evidence of Mental Illness During Capital Sentencing Proceedings

1. Mental Condition as Evidence of Future Dangerousness

Texas statutory law provides that, in the penalty phase of a capital murder trial, the jury must determine that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" before it can sentence the defendant to death.[26] To prove this "future dangerousness" requirement, the Texas Court of Criminal Appeals has held that "psychiatric evidence" is relevant factor for the jury to consider "when determining whether the defendant will pose a continuing threat of violence to society."[27] Thus, mental health experts often testify for the prosecution in Texas death penalty cases on the issue of future dangerousness.[28]

2. Mental Condition Evidence in Mitigation of Punishment

The U.S. Supreme Court has held that the trier of fact in the sentencing phase of a capital trial must be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[29] While Texas permits evidence of mental disability and mental illness to be presented as mitigating evidence during the penalty phase of a capital trial, jurors are not required to be instructed on the manner by which mental health evidence should be considered.[30] Instead, one of the three special issues that capital jurors must answer in sentencing phase deliberations requires them to consider "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed."[31] While this instruction does not expressly mention mental condition, it provides a means for jurors to consider mitigation generally.

Prior versions of Texas's capital sentencing procedure, however, did not include this special issue, and thus capital jurors did not have a vehicle to consider mitigating evidence, in particular evidence related to the defendant's mental condition and background.[32] In the 1989 case *Penry v. Lynaugh* (*Penry I*), the U.S. Supreme Court invalidated Texas's capital sentencing scheme as unconstitutional because the three special issues upon which jurors were instructed at the time did not include an instruction related to the consideration of mitigating evidence.[33] The Court

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[26] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)–(e) (2013).

[27] Keeton v. State, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987).

[28] Coble v. State, 330 S.W.3d 253, 299 (Tex. Crim. App. 2010) (Keller, P.J., concurring) (noting that one expert alone had testified on the issue of future dangerousness in approximately fifty cases).

[29] Lockett v. Ohio, 438 U.S. 586, 604 (1978).

[30] Williams v. State, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996) (citing Penry v. State, 903 S.W.2d 715, 766 (Tex. Crim App. 1995)).

[31] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013).

[32] For further discussion of this issue, see Chapter Eight on State Post-conviction Proceedings, Recommendations #9 and #10.

[33] Penry v. Lynaugh (*Penry I*), 492 U.S. 302 (1989) (citing Lockett v. Ohio 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982)).

specifically found that the second of the three special issues did "not provide a vehicle for the jury to give mitigating effect to [the defendant's] evidence of mental retardation and childhood abuse."[34]

In 1991, the Texas Legislature amended the capital sentencing statute so that jurors must be instructed on mitigating evidence.[35] Before this statutory change was enacted, Texas courts provided capital jurors with a supplemental jury instruction in an attempt to comport with the requirements of *Penry I*.[36] The supplemental instruction required jurors to give a "negative finding" to one of the special sentencing issues if they found that the mitigating evidence justified a life sentence.[37] In the 2001 case *Penry v. Johnson* (*Penry II*), the U.S. Supreme Court held that this procedure also did not give the jury an adequate vehicle to give effect to mitigating evidence.[38] The Court noted that because the jurors were still instructed on the pre-*Penry I* special issues, "the jury charge as a whole [was] internally contradictory, and placed law-abiding jurors in an impossible situation."[39] In order to give effect to mitigation, jurors were forced to ignore the very special issues on which they were instructed.[40]

C. Competency

1. Competency to Stand Trial

In *Dusky v. United States*, the U.S. Supreme Court held that a defendant is mentally incompetent and thus cannot be tried for a criminal offense if s/he lacks "sufficient present ability to consult with [his/her] counsel with a reasonable degree of rational understanding" or does not have "a rational as well as factual understanding of the proceedings."[41]

Texas statutory law provides that a defendant is incompetent to stand trial if s/he lacks "(1) sufficient present ability to consult with the [his/her] lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings."[42] However,

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[34] *Penry*, 492 U.S. at 324.

[35] Acts 1991, 72nd Leg., ch. 838 §§ 1–6, eff. Sept. 1, 1991.

[36] Penry v. Johnson, 532 U.S. 782, 796–97 (2001).

[37] *Id.* at 789–90. The full instruction provided as follows:

> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues. *Id.*

[38] *Id.* at 797.

[39] *Id.* at 799.

[40] *See id.* at 799–80.

[41] Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam).

[42] TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (2013).

a defendant is "presumed competent" to stand trial "unless proved incompetent by a preponderance of the evidence."[43]

The defense, prosecution, or trial court on its own motion may raise the issue of the defendant's competency to stand trial.[44] If the issue is raised, the court must "determine by informal inquiry whether there is some evidence from any source that would support a finding that the defendant may be incompetent to stand trial."[45]

If the court finds such evidence, it must stay the trial proceedings[46] and "order a[] [mental] examination . . . to determine whether the defendant is incompetent to stand trial."[47] The court must also "appoint one or more disinterested expert[]" psychiatrists or psychologists to examine the defendant.[48] These experts must meet certain qualification standards prescribed by statute, such as having specialized training in forensic examinations.[49] After performing an evaluation of the defendant, the expert must submit a detailed report to the trial court.[50]

Once the examinations are complete, the court must hold a trial on the question of the defendant's competency unless "(1) neither party's counsel requests a trial on the issue of incompetency; (2) neither party's counsel opposes a finding of incompetency; and (3) the court does not, on its own motion, determine that a trial is necessary to determine incompetency."[51] A jury is required to make the competency determination if so requested by either party or on the trial court's own motion.[52] Otherwise, the issue will be decided by the trial judge.[53]

If the defendant is found incompetent to stand trial, the court may release him/her on bail or order him/her to be committed to a mental health facility.[54] Assuming the defendant is committed, s/he will be confined for 120 days for the purposes of treatment and restoration of competency.[55] During this period, the defendant may be forcibly medicated if the court so orders.[56] At the end of this restoration period, the defendant must be returned to court for a new

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43 TEX. CODE CRIM. PROC. ANN. art. 46B.003(b) (2013).

44 TEX. CODE CRIM. PROC. ANN. art. 46B.004(a) (2013).

45 TEX. CODE CRIM. PROC. ANN. art. 46B.004(c) (2013).

46 TEX. CODE CRIM. PROC. ANN. art. 46B.004(d) (2013). However, "[i]f the issue of the defendant's incompetency to stand trial is raised after the trial on the merits begins, the court may determine the issue at any time before" the defendant is sentenced, and need not stay the proceedings. TEX. CODE CRIM. PROC. ANN. art. 46B.005(d) (2013). "If the determination is delayed until after the return of a verdict, the court shall make the determination as soon as reasonably possible after the return." *Id.*

47 TEX. CODE CRIM. PROC. ANN. art. 46B.005(a) (2013).

48 TEX. CODE CRIM. PROC. ANN. art. 46B.021(b) (2013).

49 TEX. CODE CRIM. PROC. ANN. art. 46B.022 (2013). The court may appoint a non-qualified expert "only if exigent circumstances require the court to base the appointment on professional training or experience of the expert that directly provides the expert with a specialized expertise to examine the defendant that would not ordinarily be possessed by a psychiatrist or psychologist who meets the requirements." *Id*. art. 46B.022(c) (2012).

50 TEX. CODE CRIM. PROC. ANN. art. 46B.025 (2013).

51 TEX. CODE CRIM. PROC. ANN. art. 46B.005(b)–(c) (2013).

52 TEX. CODE CRIM. PROC. ANN. art. 46B.051(a) (2013). This must be a separate jury from the jury that determines the defendant's guilt of the charged crime. TEX. CODE CRIM. PROC. ANN. art. 46B.051(c) (2013).

53 TEX. CODE CRIM. PROC. ANN. art. 46B.051(b) (2013).

54 TEX. CODE CRIM. PROC. ANN. art. 46B.071(a) (2013).

55 TEX. CODE CRIM. PROC. ANN. art. 46B.073 (2013).

56 TEX. CODE CRIM. PROC. ANN. art. 46B.086(b)–(e) (2013).

competency determination.[57] If the defendant remains incompetent, the court must commence civil commitment proceedings.[58]

A defendant is entitled to court-appointed counsel during competency proceedings.[59]

2. Competency to Be Executed

The U.S. Supreme Court has held that it is unconstitutional to execute a death row inmate "whose mental illness prevents him from comprehending the reasons for the penalty or its implications."[60] Furthermore, the state must grant a fair evidentiary hearing to the inmate once "a substantial threshold showing of" incompetency is made.[61] The hearing must provide "an opportunity to submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination."[62]

Texas statutory law defines an incompetent inmate as one who does not understand "(1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed."[63] The inmate bears the burden of proving s/he is incompetent by a preponderance of the evidence.[64]

To raise a claim of incompetency for execution, a Texas death row inmate must file a motion in the trial court after his/her execution date has been set "clearly set[ting] forth alleged facts in support of the assertion that [s/he] is presently incompetent to be executed."[65] The trial court must then determine whether the inmate has "raised a substantial doubt of [his/her] competency."[66] If the trial court finds that the inmate meets this standard, "the court shall order at least two mental health experts to examine" the inmate.[67] The court will determine the inmate's competency based on the experts' reports and any other evidence presented.[68]

On appeal of the trial court's decision, the Texas Court of Criminal Appeals must determine whether "to adopt the trial court's order, findings, or recommendations" and "whether any existing execution date should be withdrawn and a stay of execution issued."[69] If the Court of

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[57] TEX. CODE CRIM. PROC. ANN. art. 46B.084 (2013). The court may also find that the defendant's competency has been restored prior to the 120-day period and without a hearing in certain circumstances. TEX. CODE CRIM. PROC. ANN. art. 46B.0755 (2013).

[58] TEX. CODE CRIM. PROC. ANN. art. 46B.084(e) (2013).

[59] TEX. CODE CRIM. PROC. ANN. art. 46B.006 (2013).

[60] Ford v. Wainwright, 477 U.S. 399, 416–18 (1986). *See also* Panetti v. Quarterman, 551 U.S. 930, 959–60 (2007).

[61] *Panetti*, 551 U.S. at 950 (quoting Ford v. Wainwright, 477 U.S. at 426, 427 (1986)).

[62] *Id.* at 949–50 (quoting *Ford*, 477 U.S. at 427).

[63] TEX. CODE CRIM. PROC. ANN. art. 46.05(h) (2013).

[64] TEX. CODE CRIM. PROC. ANN. art. 46.05(k) (2013).

[65] TEX. CODE CRIM. PROC. ANN. art. 46.05(c) (2013).

[66] TEX. CODE CRIM. PROC. ANN. art. 46.05(d) (2013). If the inmate was previously found to be competent under the Texas statute, however, s/he will be presumed competent "unless [s/he] makes a prima facie showing of a substantial change in circumstances sufficient to raise a significant question as to [his/her] competency to be executed." TEX. CODE CRIM. PROC. ANN. art. 46.05(e) (2013).

[67] TEX. CODE CRIM. PROC. ANN. art. 46.05(f) (2013).

[68] TEX. CODE CRIM. PROC. ANN. art. 46.05(k) (2013).

[69] TEX. CODE CRIM. PROC. ANN. art. 46.05(l) (2013).

Criminal Appeals determines that the inmate is competent, "the court may set an execution date as otherwise provided by law."[70] If the Court of Criminal Appeals grants a stay of execution, "the trial court periodically shall order that the [inmate] be reexamined by mental health experts to determine whether [s/he] is no longer incompetent to be executed."[71]

3. Other Competency Issues

Texas law also permits courts to consider a defendant's mental illness or disability as it relates to other issues of competency.

In determining whether a defendant was competent under state law to waive his/her *Miranda* rights or confess to a crime, the trial court may consider evidence that the defendant "was mentally retarded and may not have 'knowingly, intelligently and voluntarily' waived his[/her] rights" or that s/he "lacked the mental capacity to understand his[/her] rights."[72] However, "mental retardation, and other disabilities are usually not enough, by themselves, to render a statement inadmissible."[73]

Before finding that a defendant has competently waived his/her right to counsel, the trial court must inform the defendant about "the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."[74] However, the Texas Court of Criminal Appeals has held that the trial court is not required to inquire into an accused's "age, education, background or previous mental health history in every instance."[75]

A defendant's guilty plea will be "presumed competent[. . .] unless proved incompetent by a preponderance of the evidence."[76] The court must find the defendant incompetent to plead guilty if s/he lacks either "(1) sufficient present ability to consult with the [his/her] lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against" him/her.[77]

D. Mental Conditions Affecting Criminal Liability

A defendant is not guilty by reason of insanity under Texas law if "at the time of the conduct charged, the [defendant], as a result of severe mental disease or defect, did not know that his conduct was wrong."[78] However, "'mental disease or defect' does not include an abnormality

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70 TEX. CODE CRIM. PROC. ANN. art. 46.05(n) (2013).
71 TEX. CODE CRIM. PROC. ANN. art. 46.05(m) (2013).
72 Oursbourn v. State, 259 S.W.3d 159, 172–73 (Tex. Crim. App. 2008).
73 *Id.* at 173.
74 Faretta v. California, 422 U.S. 806, 835 (1975) (internal quotation marks omitted).
75 Goffney v. State, 843 S.W.2d 583, 584–85 (Tex. Crim. App. 1992) (internal quotation marks omitted).
76 TEX. CODE CRIM. PROC. ANN. art. 46B.003(b) (2013).
77 TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (2013).
78 TEX. PENAL CODE ANN. § 8.01(a) (2013).

manifested only by repeated criminal or otherwise antisocial conduct."[79] Texas also does not recognize the defense of diminished capacity.[80]

[79] TEX. PENAL CODE ANN. § 8.01(b) (2013).

[80] Ruffin v. State, 270 S.W.3d 586, 593 (Tex. Crim. App. 2008). In some jurisdictions, diminished capacity permits a defendant to present evidence of mental illness or mental disability to prove that s/he was incapable of specific intent or premeditation. *See, e.g.*, State v. Walkup, 220 S.W.3d 748, 750–51 (Mo. banc 2007).

II. ANALYSIS: MENTAL RETARDATION

A. Recommendation #1

> **Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities (AAIDD). Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than 75 should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.**

In 2002, the U.S. Supreme Court held in *Atkins v. Virginia* that the application of the death penalty to persons with mental retardation violates the Eighth Amendment's ban on cruel and unusual punishment.[81] Texas, however, has not enacted a statute prohibiting the death penalty for persons with mental retardation despite this constitutional mandate. This is especially troublesome given the frequency of death sentences and executions in Texas as compared to the other ten states that have not enacted statutes.[82] In 2012, for instance, Texas executed the same number of death row inmates as the ten other states combined.[83]

Legislative proposals that would have banned the practice have not been enacted. In 1999, a bill prohibiting the execution of those with mental retardation passed the Texas Senate but was never considered by the House of Representatives.[84] Two years later, a bill passed both houses of the Texas Legislature but was vetoed by the governor.[85] In 2013, another bill to erect a statutory framework to determine whether a defendant has mental retardation was introduced in the Texas Legislature.[86] Among the current provisions of the bill, a defendant could raise the issue of his/her alleged mental retardation—and thus ineligibility for the death penalty—before trial.[87] As of August 2013, however, the bill is still pending and has not been adopted by the Texas legislature.

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[81] *See* Atkins v. Virginia, 536 U.S. 304 (2002).

[82] *State Statutes Prohibiting the Death Penalty for People with Mental Retardation*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state-statutes-prohibiting-death-penalty-people-mental-retardation (last visited Mar. 6, 2013); *States That Have Changed Their Statutes to Comply With the Supreme Court's Decision in* Atkins v. Virginia, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/states-have-changed-their-statutes-comply-supreme-courts-decision-atkins-v-virginia (last visited Mar. 6, 2013). Only the following states do not appear to have adopted mental retardation statutes: Alabama, Mississippi, Montana, New Hampshire, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, and Wyoming.

[83] *Execution List 2012*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/execution-list-2012 (listing fifteen for both).

[84] *Dozens of Bills Run Out of Time: Most of the Measures Passed in One Chamber but Never Made It to the Floor in the Other*, *supra* note 12.

[85] Duggan, *supra* note 12. Explaining the veto, Governor Rick Perry stated that the proposed law "basically tells the citizens of this state, 'We don't trust you.'" *Id.*

[86] S.B. 750, 83rd Reg. Leg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB00750I.htm.

[87] *Id.*

Because no law governs the application of the death penalty to persons with mental retardation in Texas, the Court of Criminal Appeals in 2004 established "temporary judicial guidelines" for addressing *Atkins* claims in *Ex parte Briseno*.[88] While the court stated that its decision was designed to resolve mental retardation claims only during the "legislative interregnum" before the enactment of a mental retardation statute, such a statute was never enacted, and the definition of mental retardation provided in *Briseno* is still in effect.[89]

Texas's Definition of Mental Retardation

While the *Atkins* Court referenced the AAIDD definition of mental retardation in its analysis, it left the individual states with the "task of developing appropriate ways to enforce" the prohibition on executing persons with mental retardation.[90] The AAIDD, founded in 1876, is "the oldest and largest interdisciplinary organization of professionals and citizens concerned about intellectual and developmental disabilities."[91] The AAIDD's definition of mental retardation, now referred to as "intellectual disability," is drafted by a team of psychologists, medical doctors, educators, and other experts.[92]

The AAIDD and Texas definitions of mental retardation are divided into three components: intellectual functioning, adaptive behavior, and age of onset. The AAIDD defines mental retardation, as "a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior**,** which covers a range of everyday social and practical skills[, and that] originates before the age of 18."[93]

The *Briseno* court held that Texas "will follow [the AAIDD definition of mental retardation] . . . in addressing *Atkins* mental retardation claims."[94] Specifically, the court referred to the AAIDD's definition as it existed in 2004, and defined mental retardation as "a disability characterized by: (1) 'significantly subaverage' general intellectual functioning; (2) accompanied by 'related' limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18."[95] The court further noted that the Texas Health and Safety Code similarly defined mental retardation as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."[96]

However, the *Briseno* court also questioned whether, even in light of *Atkins*, "there [is], and should [] be, a 'mental retardation' bright-line exemption from our state's maximum statutory

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[88] *Ex parte* Briseno, 135 S.W.3d 1, 5 (Tex. Crim. App. 2004).
[89] *See id.*
[90] Atkins v. Virginia, 536 U.S. 304, 308 (2002).
[91] *About Us*, *supra* note 3.
[92] *Authors*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://aaidd.org/intellectual-disability/definition#.Uii_bWTTX2E (last visited Aug. 5, 2013).
[93] *FAQ on Intellectual Disability*, *supra* note 1.
[94] *Briseno*, 135 S.W.3d at 8. The AAIDD was known as The American Association on Mental Retardation (AAMR) until 2007. *About Us*, *supra* note 3. Accordingly, *Briseno*, which was decided in 2004, refers to the organization as the AAMR.
[95] *Briseno*, 135 S.W.3d at 7. (citing AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 5 (9th ed. 1992)).
[96] *Id.* (quoting TEX. HEALTH & SAFETY CODE ANN. § 591.003(13)).

punishment."[97] The court indicated that Lennie, the slow-witted fictional character in John Steinbeck's *Of Mice and Men*, would likely be exempted from the death penalty under Texas law, but other persons with mental retardation might not be.[98] Moreover, as discussed below, many aspects of Texas's mental retardation standard deviate from the AAIDD definition, despite the court's endorsement of the AAIDD standard. In particular, the Texas Court of Criminal Appeals' interpretation of the adaptive behavior component diverges significantly from the AAIDD standard.[99]

Intellectual Functioning Component

The AAIDD definition of mental retardation does not require a particular intelligence quotient (IQ) test score to demonstrate a significant limitation in intellectual functioning. While the AAIDD notes that "limitations in intellectual functioning are generally thought to be present if an individual has an IQ test score of approximately 70 or below[,] IQ scores must always be considered in light of the standard error of measurement, appropriateness, and consistency with administration guidelines."[100] Specifically, "[s]ince the standard error of measurement for most IQ tests is approximately 5, the ceiling may go up to 75."[101] Moreover, mental retardation evaluations are too complex to rely on a single IQ score.[102]

Other factors may also decrease the reliability of an individual IQ test score. The Flynn Effect, for instance, is a phenomenon recognized by the AAIDD whereby average scores on an IQ test artificially increase over time.[103] For example, while the average score on an IQ test known as the WAIS-III was 100 when the test was developed in 1995, the average score increased to 103 in 2005.[104] Thus, a person who scored a seventy-three on this test in 2005 might have an actual

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[97] *Id.* at 6.

[98] *Id.* (citing John Steinbeck, OF MICE AND MEN (1937)).

[99] *See infra* notes 119–182 and accompanying text.

[100] *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, *available at* http://aaidd.org/docs/default-source/sis-docs/aaiddfaqonid_template.pdf?sfvrsn=2. *FAQ on Intellectual Disability*, *supra* note 1.

[101] *Id.*

[102] *See* James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 20 n.22 (2003) (noting that "relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation"); AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 5 (9th ed. 1992) ("Mental retardation is characterized by significantly subaverage intellectual capabilities or 'low intelligence.' If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner."); AM. ASS'N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983) ("This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment."); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 41 (text rev. 4th ed. 2000) ("[I]t is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.").

[103] AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 37 (11th ed. 2010) [hereinafter INTELLECTUAL DISABILITY].

[104] *Id.*

IQ of seventy.[105] According to the AAIDD, "best practices require recognition of a potential Flynn Effect when older editions of an intelligence test . . . are used in the assessment or interpretation of an IQ score."[106] Another phenomenon, the practice effect, causes an "artificial increase in IQ scores when the same [test] is readministered within a short time interval."[107] The AAIDD states that it is "established clinical practice" to "avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the examinee's true intelligence."[108] Finally, for an IQ test to be considered a valid measure of intellectual functioning, it must be "an individually administered, standardized instrument," as opposed to "[s]hort forms of screening tests" or group-administered IQ exams.[109]

In *Briseno*, the Texas Court of Criminal Appeals held that "'significantly subaverage intellectual functioning' is defined as an IQ of about 70 or below."[110] In a subsequent case, the court indicated that a score of seventy may not be absolutely necessary to establish mental retardation, but the court's precise holding remains unclear. The court stated that "the assessment of 'about 70 or below' is flexible," but also stated that this score "represent[s] a rough ceiling, above which a finding of mental retardation in the capital context is precluded."[111] However, the court has acknowledged the standard error of measurement, noting that "[t]here is 'a measurement error of approximately 5 points in assessing IQ,' which may vary from instrument to instrument."[112] The Court of Criminal Appeals has also recognized that the practice effect may artificially inflate an IQ score.[113] In one case, for instance, the court acknowledged that an IQ score of seventy-seven might have been invalid because the same test had been administered eleven months earlier.[114]

The Court of Criminal Appeals has not, however, recognized the Flynn Effect. Although the AAIDD has stated that the Flynn Effect must be considered when evaluating an IQ score, the court has referred to it as an "unexamined scientific concept."[115] In a later case, the Court explained that while it has not accepted the Flynn Effect, it has not rejected it either;[116] nonetheless, the concept has not been applied to any mental retardation claim reviewed by the court.

Furthermore, in some death penalty prosecutions, Texas prosecutors have hired experts who have employed scientifically invalid and unaccepted methods to determine that a defendant's actual IQ is higher than his/her test scores reflect. The methodology used by one such expert, who testified for the prosecution on the issue of mental retardation in several Texas death penalty cases, has been directly criticized by the AAIDD.[117] By accepting testimony from alleged

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105 *Id.*
106 *Id.*
107 *Id.* at 38.
108 *Id.*
109 *Id.* at 41.
110 *Ex parte* Briseno, 135 S.W.3d 1, 14 (Tex. Crim. App. 2004) (citing DSM, *supra* note 3, at 41).
111 *Ex parte* Hearn, 310 S.W.3d 424, 430 (Tex. Crim. App. 2010).
112 *Id.* at 428 (citing DSM, *supra* note 3, at 41).
113 *Ex parte* Chester, No. AP-75037, 2007 WL 602607, at *3 (Tex. Crim. App. Feb. 28, 2010).
114 *Id.*
115 *Ex parte* Blue, 230 S.W.3d 151, 166 (Tex. Crim. App. 2007).
116 *Ex parte* Butler, No. WR-41,121-02, 2012 WL 2400634, at *12 (Tex. Crim. App. June 27, 2012).
117 INTELLECTUAL DISABILITY, *supra* note 103, at 53. The AAIDD

experts who deviate from accepted clinical practices, Texas increases the risk that persons who meet the clinical definition of mental retardation will be executed. This issue is discussed further in Mental Illness Recommendation #4.[118]

Adaptive Behavior Component

1. AAIDD

In addition to intellectual limitations, the AAIDD definition of mental retardation requires "significant limitations in . . . adaptive behavior, which covers a range of everyday social and practical skills."[119] Whereas the intellectual functioning component of mental retardation relates to a person's academic skills, adaptive behavior skills reflect one's capacity to perform everyday tasks and to conform to social norms.[120] Because adaptive behavior is a separate component of mental retardation, a person with an IQ below seventy might not be considered mentally retarded if s/he does not also exhibit deficiencies in adaptive skills. The current AAIDD definition divides adaptive behavior skills into three categories:

(1) Conceptual skills—language and literacy; money, time, and number concepts; and self-direction
(2) Social skills—interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules, obey laws, and avoid being victimized
(3) Practical skills—activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone[121]

Under AAIDD standards, a person suffers from significant limitations in adaptive behavior if s/he performs "at least 2 standard deviations below the mean of either (a) one of the [aforementioned] three types of adaptive behavior . . . , or (b) an overall score on a standardized measure of conceptual, social, and practical skills."[122] An older AAIDD definition, in effect at the time of the *Atkins* and *Briseno* decisions, required the person to demonstrate adaptive behavior limitations in two out of ten more specific categories: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.[123]

> strongly discourage[s] any score corrections that are not part of test procedures that attempt to correct for any culture or socioeconomic that are thought to impact the individual's scores on a standardized adapative behavior scale. Until firmly supported by empirical evidence, [the AAIDD] strongly caution[s] against practices such as those recommended by Denkowski and Denkowski (2008).

Id. Dr. George Denkowski, who employs these practices, has testified for the prosecution in a number of Texas death penalty cases on the issue of mental retardation. *See infra* notes 348–367 and accompanying text.

[118] *See infra* notes 343–373 and accompanying text.

[119] *FAQ on Intellectual Disability*, *supra* note 1.

[120] INTELLECTUAL DISABILITY, *supra* note 103, at 43–44.

[121] *FAQ on Intellectual Disability*, *supra* note 1.

[122] *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, *supra* note 100.

[123] AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 5 (9th ed. 1992).

2. *Briseno* Factors

With respect to adaptive behavior limitations, Texas's definition of mental retardation differs significantly from the AAIDD standard and other clinical definitions. Although the Texas Court of Criminal Appeals' *Briseno* decision requires the defendant to demonstrate adaptive behavior limitations to prove that s/he has mental retardation, the court's decision does not discuss or analyze adaptive behavior with reference to the adaptive behavior categories established by the AAIDD.[124] Instead, the court adopted seven factors—referred to as the *Briseno* factors in subsequent cases—to assess whether the defendant suffers from adaptive functioning limitations:

(1) Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?
(2) Has the person formulated plans and carried them through or is his conduct impulsive?
(3) Does his conduct show leadership or does it show that he is led around by others?
(4) Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
(5) Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
(6) Can the person hide facts or lie effectively in his own or others' interests?
(7) Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?[125]

The *Briseno* factors were created by the Court of Criminal Appeals without reference to the AAIDD definition or any other scientifically-accepted method for assessing mental retardation.[126] The *Briseno* court indicated that these factors should be used to determine whether a defendant suffers from a personality disorder rather than mental retardation.[127] However, subsequent Court of Criminal Appeals' decisions have expanded their application, holding that the factors may be used to assess adaptive behavior without reference to personality disorders or other mental illnesses.[128]

The *Briseno* factors create an especially high risk that a defendant with mental retardation will be executed because, in many ways, they contradict established methods for diagnosing mental retardation. The AAIDD itself has criticized the *Briseno* factors as "depart[ing] from a clinical assessment or diagnosis, especially as [] related to evaluating the adaptive behavior criteria" and having "no basis of support in the clinical literature or in the understanding of mental retardation

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[124] *See Ex parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004).
[125] *Id.* at 8–9.
[126] *See id.* The court cites no authority to provide support for use of the factors in diagnosing mental retardation. *Id.*
[127] *Id.* at 8.
[128] *E.g.*, *Ex parte* Woods, 296 S.W.3d 587, 589 (Tex. Crim. App. 2009). Notably, the *Woods* opinion quotes directly from *Briseno* but omits any reference to personality disorders. *Id.*

by experienced professionals in the field."[129] Instead, the factors are based on "preconceived notions of what mental retardation looks like to the lay person."[130] Notably, there are few similarities between the *Briseno* factors and the types of abilities that the AAIDD lists as relevant to considering adaptive behavior skills.[131]

For instance, many of the *Briseno* factors depart from the AAIDD and other clinical definitions by focusing on a defendant's adaptive strengths rather than his/her limitations.[132] The factors ask if the defendant can do such things as "hide facts or lie effectively in his own or others' interests" and "respon[d] to external stimuli [in a] rational and appropriate" manner. Under the AAIDD definition of adaptive behavior deficits, however, the focus is on the subject's adaptive limitations. The AAIDD requires significant limitations in only one of three adaptive skill categories to be diagnosed as mentally retarded;[133] thus, a capital defendant could possess significant adaptive strengths in a variety of areas and still meet the clinical definition of mental retardation. As the AAIDD has described, "individuals with [mental retardation] typically demonstrate both strengths and limitations in adaptive behavior. Thus, in the process of diagnosing [mental retardation], significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills."[134]

In addition, the *Briseno* factors consider whether untrained laypersons, such as family and friends, believed the defendant to have mental retardation.[135] While laypersons may be able to provide descriptions of the defendant's behavior that are relevant to a mental retardation diagnosis, they are not qualified to make this diagnosis themselves, as they may not be aware of the range of tasks that a person with mental retardation can competently perform. Moreover, one of the factors asks whether "the commission of th[e] [capital] offense require[d] forethought, planning, and complex execution of purpose."[136] By focusing on a particular event in the defendant's life, the *Briseno* factors may diminish other life events that more accurately reflect the defendant's skills. The AAIDD states that an adaptive behavior assessment should consider the person's "typical" behavior, "rather than what the individual can do or could do."[137] A defendant's behavior during the commission of a crime, even if it demonstrates some level of sophistication, may not be representative of his/her typical abilities and conduct.

Notably, the *Briseno* factors are absent from other areas of Texas law where a court or government agency is required to determine if a person has mental retardation. For instance, the Texas Health and Safety Code, which is used to determine whether a disabled person qualifies for certain public services, served as the basis for the *Briseno* decision.[138] However, the Health and Safety Code definition makes no reference to *Briseno*-like factors, and is instead based on

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[129] Brief for the Am. Ass'n on Intellectual and Developmental Disabilities and the Arc of the U.S. as Amici Curiae Supporting Petitioner, at 22–23, Hall v. Thaler, 131 S.Ct. 414 (2010) (No. 10-37), 2010 WL 3068089.
[130] *Id.* at 24.
[131] *See FAQ on Intellectual Disability*, *supra* note 1.
[132] *See Ex parte* Briseno, 135 S.W.3d 1, 6–7 (Tex. Crim. App. 2004).
[133] *FAQ on Intellectual Disability*, *supra* note 1.
[134] INTELLECTUAL DISABILITY, *supra* note 103, at 47.
[135] *Briseno*, 135 S.W.3d at 8.
[136] *Id.* at 8–9.
[137] INTELLECTUAL DISABILITY, *supra* note 103, at 47.
[138] *Briseno*, 135 S.W.3d at 7.

the clinical definition.[139] The Texas Administrative Code also uses the clinical definition of mental retardation to determine whether a student qualifies for special education services.[140]

In cases subsequent to *Briseno*, the Court of Criminal Appeals has clarified that expert testimony is also permitted on the issue of adaptive behavior, and that results of standardized adaptive behavior tests may also be considered by the factfinder.[141] In this context, the court has described the *Briseno* factors as merely "some additional factors that factfinders *might* also focus upon in weighing evidence as indicative of mental retardation."[142] However, in many cases the *Briseno* factors have been used to overrule clinical adaptive functioning assessments that indicate the defendant has mental retardation. Consequently, there is a significant risk that persons with mental retardation remain on Texas's death row, and perhaps have been executed.

a. Elroy Chester

In *Ex parte Chester*, for example, death row inmate Elroy Chester, who had been sentenced to death before the *Atkins* decision, sought state habeas corpus relief on the grounds that he had mental retardation.[143] On appeal of the denial of habeas corpus relief by the trial court, the Texas Court of Criminal Appeals held that Chester had "met his burden in regard to demonstrating significant limitations in intellectual functioning" because three of his four school-age IQ scores were below seventy.[144]

With respect to adaptive behavior, the Court of Criminal Appeals noted that, when Chester was imprisoned for a prior offense, he was administered the Vineland Adaptive Behavior Survey.[145] The Vineland is a standardized measure of adaptive behavior used by clinicians in diagnosing mental retardation.[146] Chester received a score of fifty-seven on the Vineland test and was

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[139] TEX. HEALTH & SAFETY CODE ANN. § 591.003(7-a) (2013) (defining "intellectual disability" as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period").

[140] 19 TEX. ADMIN. CODE § 89.1040(c)(5) (2012) The statute defines a person with mental retardation as one who

> (A) has been determined to have significantly sub-average intellectual functioning as measured by a standardized, individually administered test of cognitive ability in which the overall test score is at least two standard deviations below the mean, when taking into consideration the standard error of measurement of the test; and
>
> (B) concurrently exhibits deficits in at least two of the following areas of adaptive behavior: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.

Id.

[141] *See ex parte* Hearn, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010); Gallo v. State, 239 S.W.3d 757, 776–77 (Tex. Crim. App. 2007).

[142] *Gallo*, 239 S.W.3d at 776.

[143] *Ex parte* Chester, No. AP-75037, 2007 WL 602607, at *1 (Tex. Crim. App. Feb. 28, 2007).

[144] *Id.* at *2–3. Chester had scored sixty-five, fifty-nine, seventy-seven, and sixty-nine on his childhood IQ exams. *Id.* There was evidence that the aberrant score of seventy-seven had been inflated due to the practice effect as Chester had been administered the same IQ test only eleven months earlier. *Id.*

[145] *Id.* at *3.

[146] *Vineland Adaptive Behavior Scales, Second Edition (Vineland-II)*, PEARSON ASSESSMENTS, http://psychcorp.pearsonassessments.com/HAIWEB/Cultures/en-us/Productdetail.htm?Pid=Vineland-II (last visited Aug. 4, 2013). In a subsequent case, the Court of Criminal Appeals endorsed the Vineland as a useful standardized test for determining adaptive behavior limitations. *Hearn*, 310 S.W.3d at 428 n.10.

enrolled in the Mentally Retarded Offender Program while in prison.[147] At Chester's state habeas evidentiary hearing on the issue of mental retardation, "even the State's expert witness[. . .] acknowledged that a person with a Vineland score of 57, combined with an IQ of 69 as measured at the same time, would be correctly diagnosed as mildly mentally retarded."[148] The Court of Criminal Appeals, however, upheld the trial court's finding that Chester had not demonstrated significant limitations in adaptive behavior.[149] The Court relied entirely on the trial court's findings with respect to the *Briseno* factors.[150] Contrary to the AAIDD definition of mental retardation, the Court's analysis focused largely on Chester's adaptive strengths, not the extent of his adaptive weaknesses.[151]

Moreover, a significant portion of the Court's analysis was devoted to Chester's conduct during the commission of the capital crime.[152] The Court noted, for instance, that Chester had attempted to conceal his crime by wearing a mask and gloves.[153] As the AAIDD has stated, however, assessment of adaptive skills should be based on typical behavior, not behavior during a specific event.[154] Even if Chester's conduct during the offense exhibited some sophistication, it may not have been representative of his usual abilities. Elroy Chester was executed on June 12, 2013.[155]

b. Juan Lizcano

In *Lizcano v. State*, defendant Juan Lizcano argued on direct appeal that the jury's finding that he did not have mental retardation was "against the great weight and preponderance of the evidence."[156] Most of Lizcano's IQ scores were seventy or below, and the Court of Criminal Appeals held that he "clearly satisfied the [intellectual functioning] prong of the mental retardation definition."[157] With respect to adaptive behavior, however, the Court held that there was enough evidence to support the jury's conclusion that Lizcano did not have mental retardation.[158] The Court did not consider any expert testimony or standardized measures of adaptive behavior in reaching this conclusion.[159] In fact, the prosecution did not offer any expert testimony at trial.[160] The Court's analysis instead focused on the testimony of lay witnesses, many of whom testified that they did not believe Lizcano had mental retardation.[161] While lay testimony may provide useful examples of a defendant's behavior, it is of little use without a mental retardation expert who can place these examples in context. The Court also weighed

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147 *Chester*, 2007 WL 602607, at *3.
148 *Id.*
149 *Id.* at *3–4.
150 *Id.* at *4–9.
151 *Id.*
152 *Id.* at *4–7.
153 *Ex parte* Chester, No. AP-75037, 2007 WL 602607, at *5 (Tex. Crim. App. Feb. 28, 2007).
154 *See* INTELLECTUAL DISABILITY, *supra* note 103, at 47.
155 *Executed Offenders*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_executed_offenders.html (last visited Sept. 3, 2013).
156 Lizcano v. State, No. AP-75879, 2010 WL 1817772, at *10 (Tex. Crim. App. May 5, 2010).
157 *Id.* at *1–12.
158 *Id.* at *15.
159 *Id.* at *12–15.
160 *Id.* at *10.
161 *Id.* at *12–15.

evidence of adaptive strength against evidence of adaptive weaknesses,[162] a practice the AAIDD has stated is improper.[163]

In a dissenting opinion, however, three judges stated that the *Lizcano* majority "fail[ed] to take [] diagnostic criteria into account in gauging whether the jury's rejection of mental retardation is against the great weight and preponderance of the evidence."[164] Specifically, the majority failed to discuss two experts who testified about Lizcano's adaptive behavior.[165] The first, "an expert on evaluating mental retardation in native Spanish speakers," evaluated Lizcano according to the American Psychological Association's diagnostic criteria and determined that he suffered from adaptive limitations in several areas.[166] A second expert, who also testified with respect to IQ, agreed with the first expert's findings.[167] The second expert further noted that while Lizcano "possesses some adaptive strengths, this does not negate the evidence of his possessing adaptive deficits since childhood" because "strengths often co-exist with deficits as [in] all people whether they are mentally retarded or are of normal intelligence."[168]

c. Marvin Lee Wilson

Another Texas death row inmate, Marvin Lee Wilson, was executed despite significant evidence of mental retardation. Wilson had been sentenced to death in 1998 after he was convicted of murdering a police informant with the help of an accomplice.[169] Following the Supreme Court's *Atkins* decision, Wilson filed a state habeas petition with the Texas trial court alleging mental retardation.[170] At the evidentiary hearing, Wilson presented IQ scores ranging from sixty-one to seventy-nine; however, as a federal court later acknowledged, the sixty-one score "was on the Wechsler Adult Intelligence Scale, Third Edition . . . , which is considered the most accurate test instrument, and the other scores were obtained on less accurate tests."[171]

Wilson also presented the trial court with significant evidence of adaptive behavior limitations. His expert witness "testified that [his] composite score of 44 on the Vineland Adaptive Behavior Skill Test was well within retarded range."[172] The expert's determination was supported by "affidavits from friends and family members attesting to his difficulties in written communication and understanding money management concepts, his inability to get along with others and avoid being victimized, and his problems with personal hygiene and maintaining employment."[173] A childhood friend, for instance, said that Wilson "would put on his belt so

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[162] *Id.* at *15.
[163] INTELLECTUAL DISABILITY, *supra* note 103, at 47.
[164] *Lizcano*, 2010 WL 1817772, at *33 (Price, J., concurring and dissenting).
[165] *Id.* at *36 (Price, J., concurring and dissenting).
[166] *Id.* (Price, J., concurring and dissenting). The expert did not administer a standardized adaptive behavior test because such tests are not normed for Spanish speakers such as Lizcano. *Id.* (Price, J., concurring and dissenting).
[167] *Id.* (Price, J., concurring and dissenting).
[168] *Id.* (Price, J., concurring and dissenting).
[169] Wilson v. Quarterman, No. 6:06cv140, 2009 WL 900807, at *1 (E.D. Tex. Mar. 31, 2009). Wilson was first tried in 1994 and sentenced to death, but the Texas Court of Criminal Appeals reversed his conviction. He was subsequently retried and sentenced to death again. *Id.*
[170] *Id.* at *3.
[171] *Id.* at *5.
[172] *Id.* at *8.
[173] *Id.*

tight that it would almost cut off his circulation" and that "[h]e couldn't even play with simple toys like marbles or tops."[174] The prosecution presented no evidence of its own in rebuttal, instead arguing that the Supreme Court's *Atkins* decision "was never intended to protect capital murderers [such as Wilson] who commit execution-style killings."[175] A federal court later stated in a subsequent proceeding that the evidence presented at Wilson's mental retardation hearing demonstrated "significant limitations in all three areas of adaptive functioning: the conceptual domain, the social domain, and the practical domain."[176]

Following the hearing, however, the Texas trial court "did not make explicit findings and reached no explicit conclusion as to whether Wilson had significant limitations in adaptive functioning."[177] Instead, the court relied on the *Briseno* factors as a checklist, and applied the factors in place of an adaptive behavior determination.[178] For instance, the court noted that "Wilson was capable of lying and hiding facts when he felt it was in his best interest; and, that the crime at issue showed deliberate forethought, planning, and execution of purpose."[179] In subsequent federal habeas proceedings, the federal district court was critical of the Texas court's analysis, but denied relief, noting that federal law requires federal courts to defer to a state court's factual findings unless those findings are contradicted by clear and convincing evidence.[180] The district court's denial of relief was later affirmed by the U.S. Court of Appeals for the Fifth Circuit.[181] Marvin Lee Wilson was executed on August 7, 2012.[182]

As these cases demonstrate, the *Briseno* factors are at odds with the clinical definition of mental retardation. A defendant who exhibits adaptive behavior deficits under the AAIDD definition may nonetheless fail to meet each of the *Briseno* factor thresholds for mental retardation.

Age of Onset Component

The AAIDD definition of mental retardation states that the disability must "originate[] before the age of 18."[183] According to the AAIDD, "[t]he purpose of the age of onset criterion is to distinguish [mental retardation] from other forms of disability that may occur later in life," such as brain damage due to malnutrition.[184] The AAIDD, however, specifically warns that mental retardation "does not necessarily have to have been formally identified" before age eighteen for a diagnosis to be valid.[185] Mental retardation might go unnoticed in childhood for a variety of

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[174] Adam Liptak, *Date Missed, Court Rebuffs Low—I.Q. Man Facing Death*, N.Y. TIMES, Dec. 17, 2005, at A14.

[175] *Id.* The prosecution's argument is at odds with the U.S. Supreme Court's decision in *Atkins v. Virginia*, as Atkins himself had been found guilty of an execution-style murder. *Atkins v. Virgnia*, 536 U.S. 304, 307 (2002). Atkins was convicted of kidnapping, robbing, and murdering a man with the assistance of an accomplice. *Id.* After forcing the victim to withdraw money from an automatic teller machine, Atkins and the accomplice "took [the victim] to an isolated location where he was shot eight times and killed." *Id.*

[176] Wilson v. Quarterman, No. 6:06cv140, 2009 WL 900807, at *8 (E.D. Tex. Mar. 31, 2009).

[177] *Id.* at *7.

[178] *Id.*

[179] *Id.*

[180] *Id.* at *7–8 (citing 28 U.S .C. § 2254(e)(1)).

[181] Wilson v. Thaler, 450 Fed. App'x 369, 378 (5th Cir. 2011).

[182] Allan Turner, *Texas Executes Man Despite Concerns Over IQ*, HOUS. CHRON. (Aug. 8, 2012).

[183] *FAQ on Intellectual Disability*, *supra* note 1.

[184] INTELLECTUAL DISABILITY, *supra* note 103, at 27.

[185] *Id.*

reasons. For instance, a person with mental retardation from an underprivileged background or from a foreign country might not have access to the mental health screening or educational resources needed to document mental retardation at a young age.[186]

The definition of mental retardation adopted by the Texas Court of Criminal Appeals conforms to the AAIDD definition with respect to age of onset.[187] The Assessment Team is not aware of any published cases showing that Texas courts have misunderstood this issue.[188]

Conclusion

While the Texas Court of Criminal Appeals' stated definition of mental retardation is similar to the AAIDD definition, it substantially deviates from the AAIDD definition in its application. In particular, the *Briseno* factors endorse the use of popular misconceptions about mental retardation as a means to assess adaptive behavior limitations. Although other states have adopted various procedures for determining mental retardation, no other state has adopted non-clinical mental retardation factors similar to those in *Briseno*.[189] The *Briseno* factors are also absent from other areas of Texas law, where courts and other factfinders are required to determine if a person has mental retardation for the purposes of receiving education and social services.

By allowing the *Briseno* factors to supplement or, in some cases, completely replace clinical judgments, Texas has created an unacceptable risk that persons with mental retardation will receive the death penalty. Accordingly, Texas is not in compliance with Recommendation #1.

As the U.S. Supreme Court held in *Atkins v. Virginia*, the Eighth Amendment to the U.S. Constitution prohibits the application of the death penalty to persons with mental retardation because "their disabilities in areas of reasoning, judgment, and control of their impulses" prevent them from "act[ing] with the level of moral culpability that characterizes the most serious adult criminal conduct."[190] The Court explained that the social purposes of the death penalty—retribution and deterrence—are not served by executing persons with mental retardation.[191] "The lesser culpability of the mentally retarded offender surely does not merit" the severe form of retribution that the death penalty entails, and the "cognitive and behavioral impairments" of mentally retarded persons "make it less likely that they can process the information" necessary for the death penalty to have a deterrent effect.[192] Moreover, the Court stated, "mentally retarded

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[186] John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL'Y 689, 730 (2009) (noting that such "tests are not performed for charitable reasons, for instance where institutions do not want to stigmatize a child, or financial reasons, if institutions do not want to pay benefits or have responsibility").

[187] *Ex parte* Briseno, 135 S.W.3d 1, 7 (Tex. Crim. App. 2004).

[188] Given that the Texas Court of Criminal Appeals disposes of a large number of capital habeas cases through unpublished summary orders, however, it is possible that courts have erred in the application of the age of onset component. For further discussion on the lack of published orders in Texas capital habeas corpus cases, *see* Chapter Eight on State Post-conviction Proceedings.

[189] Peggy M. Tobolowsky, *A Different Path Taken: Texas Capital Offenders' Post-*Atkins *Claims of Mental Retardation*, 39 HASTINGS CONST. L.Q. 1, 142 (2011).

[190] Atkins v. Virginia, 536 U.S. 304, 306 (2002).

[191] *Id.* at 318–19.

[192] *Id.* at 320.

defendants in the aggregate face a special risk of wrongful execution" because they are more likely to falsely confess, they have more difficulty assisting counsel, and "their demeanor may create an unwarranted impression of lack of remorse for their crimes."[193] The Court also found that mental retardation "may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."[194]

While the *Atkins* Court left the individual states with "the task of developing appropriate ways to enforce the constitutional restriction" on executing persons with mental retardation,[195] states have a responsibility to adopt procedures that ensure that persons with mental retardation are not subject to the death penalty. Texas's definition of mental retardation, in particular the *Briseno* factors, not only violates this constitutional mandate but also increases the likelihood that individuals with mental retardation will be executed.

Recommendation

The Assessment Team recommends that the Texas Legislature enact a statute barring the application of the death penalty to persons with mental retardation. The definition of mental retardation should be identical to the AAIDD definition, and the statute should require that determinations of mental retardation be based on accepted clinical criteria. Considerations such as the *Briseno* factors, which permit commonly-held misapprehensions about mental retardation to trump AAIDD-accepted criteria, should be forbidden.

The 2001 legislation passed by the Texas Legislature but vetoed by the governor, as well as the 2013 legislation, contain several provisions to remedy the ill-effects of the *Briseno* factors.[196] The definition of mental retardation found in the Health and Safety Code, which is substantially similar to the clinical definition, is contained in the legislation. Each provides for the trial court's determination of whether the defendant has mental retardation to be based on diagnoses by qualified experts. The 2013 bill also provides for the trial court to conduct a hearing on the issue of mental retardation *before* trial.[197]

B. Recommendation #2

All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.

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[193] *Id.* at 320–21.
[194] *Id.* at 321.
[195] Atkins v. Virginia, 536 U.S. 304, 317 (2002) (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).
[196] H.B. 236, 77th Reg. Leg. Sess. (Tex. 2001), *available at* http://www.capitol.state.tx.us/tlodocs/77R/billtext/html/HB00236F.htm (citing TEX. HEALTH & SAFETY CODE ANN. § 591.003 (2001)); S.B. 750, 83rd Reg. Leg. Sess. (Tex. 2013), *available at* http://www.capitol.state.tx.us/tlodocs/83R/billtext/html/SB00750I.htm. The bill died in committee. *History*, TEX. LEGIS. ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB750 (last visited Sept. 3, 2013)
[197] This issue is discussed further under Recommendation #4, *infra*.

Law Enforcement Officer Training[198]

Law enforcement officers are often the first actors in the criminal justice system to interact with the suspect in the course of an investigation and prosecution. As such, it is important for officers to be trained to recognize signs of mental retardation and mental illness in suspects. In particular, because persons with mental retardation or a mental illness face a special risk of false or coerced confessions, officers who conduct interrogations must be trained to recognize mental retardation and mental illness so that they can use appropriate, non-coercive interrogation techniques on persons with these disabilities.[199]

Texas law enforcement training standards are dictated by the Texas Commission on Law Enforcement Officer Standards and Education.[200] Texas statutory law requires that the Commission's "minimum curriculum requirements" include a "statewide education and training program on de-escalation and crisis intervention techniques to facilitate interaction with persons with mental impairments."[201] Licensed peace officers must complete this training course within two years of obtaining their license.[202] The course materials promulgated by the Commission require officers to be instructed on how to identify a person with mental retardation and strategies for effectively interacting with persons who have mental retardation during a crisis.[203] While these mental health training requirements are commendable, they are only directed at managing crises that involve persons with mental impairments, rather than with recognizing or understanding the broader effects of a suspect's mental retardation or mental illness on the proper course of a criminal investigation.

In addition, Texas law provides for the Commission to establish an optional "Certification of Officers for Mental Health Assignments."[204] To obtain this certification, an officer must "complete[] a training course administered by the commission on mental health issues and offenders with mental impairments."[205] The course materials promulgated by the Commission include more detailed information on recognizing mental retardation and mental illnesses than what is included in the basic course that all officers must complete.[206] The officer also must pass an exam administered by the Commission that tests "knowledge and recognition of the

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[198] For further discussion on law enforcement training, see Chapter Two on Law Enforcement Identifications and Interrogations.

[199] For further discussion of this issue, see Recommendation #6, *infra* note 273 and accompanying text.

[200] TEX. OCC. CODE ANN. § 1701.151(2) (2013). *See also TCLEOSE Mission, Responsibilities and Historical Development*, TEX. COMM'N ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUC., http://www.tcleose.state.tx.us/content/tcleose_history.cfm (last visited Nov. 15, 2012).

[201] TEX. OCC. CODE ANN. § 1701.253(j) (2013).

[202] *Id.* The training program must be completed "not later than the second anniversary of the date the officer is licensed under this chapter or the date the officer applies for an intermediate proficiency certificate, whichever date is earlier." *Id.*

[203] *Basic Peace Officer Part* 3, TEX. COMM'N ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUC., 21 –23, http://www.tcleose.state.tx.us/publications/publications_training/1000_peaceofficer_part3.zip (last visited Nov. 16, 2012).

[204] TEX. OCC. CODE ANN. § 1701.404 (2013). *See also* 37 TEX. ADMIN. CODE § 221.11 (2013).

[205] TEX. OCC. CODE ANN. § 1701.404(b)(2) (2013).

[206] *See Mental Health Officer Course*, TEX. COMM'N ON LAW ENFORCEMENT OFFICER STANDARDS AND EDUC., 21 –23, http://www.tcleose.state.tx.us/publications/publications_training/4001_mho.zip (last visited Nov. 16, 2012).

characteristics and symptoms of mental illness, mental retardation, and mental disabilities."[207] Most of the officers who complete this course are from Texas's larger law enforcement jurisdictions.[208]

Prosecutor Training[209]

Because prosecutors have broad discretion regarding whether and how to prosecute a capital case, it is imperative that they be trained to recognize mental retardation and mental illnesses in death penalty-eligible defendants. Prosecutors must be equipped with the knowledge to determine whether, based on the defendant's mental condition, the death penalty is permissible or warranted. Moreover, they must be able to recognize evidence of mental impairments and illnesses because such evidence may have mitigating value, and thus must be disclosed to the defense under *Brady v. Maryland.*[210] Prosecutors also have a duty to ensure that a defendant receives a fair trial and as such, they must be able to recognize when a defendant's decision to waive his/her constitutional rights is a product of the defendant's mental disability or illness.

Texas law does not require district attorneys or assistant district attorneys to receive any specialized training on recognizing mental retardation in capital defendants and death-row inmates. Some prosecutors may, however, elect to attend training programs that are relevant to this issue. The Center for American and International Law in Plano, Texas also conducts several capital litigation training programs for prosecutors.[211] In 2012, the Center held two such trainings, both of which included a session on mental retardation.[212] The Texas District and County Attorneys Association holds several training programs every year, but did not offer any courses related to recognizing mental retardation or other mental impairments in 2012.[213] The Assessment Team was unable to determine the content of these programs and it is unclear how many Texas prosecutors have attended such training sessions.

The Texas Criminal Justice Integrity Unit (TCJIU), founded by the Court of Criminal Appeals in 2008 to provide training programs for prosecutors, defense attorneys, and judges, also offered a two-day course in 2012 on mental health and substance abuse.[214] TCJIU representatives also

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[207] TEX. OCC. CODE ANN. § 1701.404(b)(3)(A) (2013).

[208] Telephone Interview by Mark Pickett with Susan Brundage, Educ. Programs, Tex. Comm'n on Law Enforcement Officer Standards and Educ. (Nov. 16, 2012) (on file with author).

[209] For further discussion on the training of prosecutors, see Chapter Five on Prosecutorial Professionalism.

[210] Brady v. Maryland, 373 U.S. 83 (1963).

[211] *Upcoming Events*, CTR. FOR AM. AND INT'L LAW, http://www.cailaw.org/calendar/CLE/index.html (last visited Aug. 16, 2013).

[212] The Capital Trial Prosecution program included a session called "Confronting Claims of Mental Retardation in Capital Litigation" taught by a Texas prosecutor. *Capital Trial Prosecution Revised Agenda*, CTR. FOR AM. AND INT'L LAW, *available at* http://65.110.85.160/ils_details/Agenda/ILS%20Capital%20Trial%20Prosecution%20Agenda%202012.pdf. The Capital Litigation Training for Texas Prosecutors program included a session called "Issues in the Evaluation of Possible Mental Retardation in Death Penalty Cases" taught by two psychologists. *Capital Litigation Training For Texas Prosecutors Agenda*, CTR. FOR AM. AND INT'L LAW, *available at* http://www.cailaw.org/ils_details/Agenda/ccli-agenda2012.pdf.

[213] *2012–2013 Training Calendar*, TEX. DISTRICT & CNTY. ATT'YS ASS'N, http://www.tdcaa.com/training (last visited Aug. 16, 2013).

[214] Email from Sadie C. Fitzpatrick, Research Att'y for Judge Barbara Hervey, Tex. Ct. of Criminal Appeals, to Jennifer Laurin, Chair, Tex. Assessment Team on the Death Penalty (Feb. 15, 2013) (on file with author).

state that they have "developed a comprehensive plan to address other mental health issues in the immediate future."[215] However, the exact nature of this training program is unclear, and the Assessment Team could not determine if any prosecutors attended the 2012 training.

Judicial Training

Judges may be required to rule on several issues related to mental retardation or mental illness during a capital case, such as competency and the admissibility of mental health expert testimony. Judges may also have to determine whether to raise *sua sponte* an issue of the defendant's competency if the defendant exhibits signs of mental retardation or mental illness.

The Texas Court of Criminal Appeals' Rules of Judicial Education require appellate and district court judges to "complete before taking office, or within one year after taking office, at least 30 hours of instruction in the administrative duties of office and substantive, procedural and evidentiary laws."[216] Furthermore, each year after taking office, these judges must "complete at least 16 hours of instruction in substantive, procedural and evidentiary laws and court administration."[217] The Rules do not mandate any training related to mental retardation or mental illness.[218] In fulfilling this requirement, however, Texas judges may attend training programs relevant to mental retardation or mental illness.

Prison Authority Training

Correctional officers and other prison authorities must be trained to recognize mental retardation and mental illness to ensure that death row inmates receive proper mental health treatment. Moreover, because a defendant's mental condition may degrade while in prison, correctional officers may be called upon to testify regarding the inmate's mental state in post-conviction proceedings.

The Texas Department of Criminal Justice requires prospective correctional officers to complete a two hundred hour, five-and-a-half week training course at one of five designated training academies.[219] This program includes a ninety-minute course on mental health issues.[220] The course discusses such topics as identifying characteristics of mentally ill and developmentally disabled offenders, accessing mental health services for these offenders, and identifying treatment options.[221] Officers are also required to complete forty hours of continuing education every year, which typically includes sixty to ninety minutes of coursework on mental health and suicide prevention issues.[222]

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[215] *Id.*

[216] TEX. CT. OF CRIMINAL APPEALS, RULES OF JUDICIAL EDUCATION 1 (2012), *available at* http://www.cca.courts.state.tx.us/jcptfund/pdf/RulesOfJudEdu.pdf.

[217] *Id.*

[218] *Id.*

[219] *Frequently Asked Questions: Correctional Officer Position Questions*, TEX. DEP'T CRIM. JUSTICE (DEC, 6, 2011), https://www.tdcj.state.tx.us/divisions/hr/hr-home/faq-co.html (last visited Sept. 3, 2013).

[220] Telephone Interview by Mark Pickett with Matt Gross, Curriculum Supervisor, Tex. Dep't Crim. Justice (Nov. 16, 2012) (on file with author).

[221] *Id.*

[222] *Id.*

Defense counsel training is discussed under Recommendation #3, below.[223]

Conclusion

Texas requires some, but not all, actors in the criminal justice system to complete training related to recognizing mental retardation. The Assessment Team applauds Texas for requiring law enforcement officers to receive training in this area. However, it is especially important for prosecutors and trial judges to receive training on mental retardation. Prosecutors are directly responsible for deciding whether to pursue the death penalty against a defendant who may have mental retardation, and trial judges must make rulings regarding a defendant's mental condition that could affect the outcome of a capital trial.

As such, Texas is in partial compliance with Recommendation #2.

Recommendation

The Texas Assessment Team recommends that Texas develop rules requiring all actors in the criminal justice system who are involved in capital cases or who work with death row inmates to receive training on mental retardation relevant to their respective roles in the criminal justice system.

C. Recommendation #3

> **The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.**

As the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* state, "mental health issues are so ubiquitous in capital defense representation that the provision of resources in that area should be routine."[224] Moreover, a defendant with mental retardation or a mental illness may fundamentally change the lawyer-client relationship, and counsel may need to take special steps to ensure clear communication and client trust.[225] As such, capital defense counsel must have the training and resources necessary to effectively

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[223] *See infra* notes 226–239 and accompanying text. For further discussion on the training of defense counsel, see Chapter Six on Defense Services.

[224] ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 957 (2003).

[225] *See id.* at 1008 ("Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea.").

recognize, research, and litigate claims of mental retardation and other claims related to mental illnesses and disabilities.

Training and resources are especially important at the trial level, as a defendant who does not raise an available claim at trial may be procedurally barred from raising it on direct appeal or during post-conviction proceedings. If not trained to recognize and litigate these issues, defense counsel may fail to raise a viable claim or may not litigate the claim effectively.

Defense Counsel Training[226]

Texas law does not require capital defense counsel to receive any special training on recognizing or assessing mental retardation or other mental health issues in their clients.[227] The only training requirement relevant to mental health states that counsel must have trial or appellate experience in "the use of and challenges to mental health or forensic expert witnesses."[228] Thus, appointment list-qualified counsel who are appointed to represent defendants in death penalty cases are not required to complete any special training on mental retardation or other mental health issues.

Some capital and public defender offices, however, may require their attorneys to obtain such training. The Regional Public Defender for Capital Cases (RPDO), which represents capitally-charged defendants in trial-level cases in 145 Texas counties,[229] states that at least one attorney assigned to each of its cases is trained to screen clients for the presence of mental retardation or mental illness.[230] The office explained that the training "focuses on identification, investigation and ultimately litigation of [mental retardation] claims."[231] RPDO also makes voluntary training available to its attorneys on "[m]ental [h]ealth issues, including mental retardation."[232] The El Paso Public Defender requires its capital-qualified attorneys to receive at least six hours of training every year on issues related to mental retardation and mental illness.[233] The office also has assisted in organizing mental health law conferences.[234]

The Texas Defender Service, which provides assistance to capital trial counsel throughout Texas, trains all of its attorneys on recognizing and litigating claims of mental retardation and mental

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[226] For further discussion on training of defense counsel, see Chapter Six on Defense Services.

[227] *See* TEX. CODE CRIM. PROC. ANN. art. 26.052(d) (2013).

[228] TEX. CODE CRIM. PROC. ANN. art. 26.052(d)(2)(F)(i), (d)(3)(F)(i) (2013).

[229] *Counties Covered*, REG'L PUB. DEFENDER FOR CAPITAL CASES, http://www.rpdo.org/regions.php (last visited Nov. 16, 2012) (listing 145 counties); REG'L PUB. DEFENDER OFFICE FOR CAPITAL CASES, PLANNING DOCUMENT SUMMER 2012 (2012), *available at* http://rpdo.org/publications/RPDO%20Planning%20Document%20(Summer%202012).pdf (listing forty-eight counties).

[230] Survey from Philip Wischkaemper, Deputy Dir., Reg'l Pub. Defender for Capital Cases, at 7 (Sept. 27, 2012) (on file with author) [hereinafter Wischkaemper Survey II].

[231] *Id.*

[232] *Id.* at 5.

[233] Survey from Carole J. Powell, Deputy Chief Pub. Defender, El Paso Cnty. Pub. Defender, at 7 (Oct. 9, 2012) (on file with author) [hereinafter Powell Survey II].

[234] *Id.* at 7.

illness.[235] In addition, the Gulf Region Advocacy Center (GRACE), a non-profit law firm in Houston, represents persons charged with capital crimes at trial in Texas.[236] GRACE conducts several training programs, including a "three-day intensive mitigation skills training at least once per year."[237] Such training should address issues of mental illness and mental retardation.[238]

With respect to the Office of Capital Writs, which represents Texas death row inmates in state habeas proceedings, the Assessment Team was unable to determine the qualification standards for this office's attorney employees.[239]

Access to Mitigation Specialists, Investigators, and Experts[240]

Access to qualified mental health experts is critical to litigating claims of mental retardation and other claims based on the defendant's mental status. This is especially true at the trial-level, as the defendant may be barred from presenting the claim in a subsequent proceeding.

Mitigation specialists also serve a crucial role in a capital trial team, especially with respect to claims of mental retardation and other claims based on mental status. A properly-trained mitigation specialist will be able to collect, review, and digest the defendant's school, medical, and other records to find evidence of mental retardation or mental illness.[241] As these records may be voluminous and complex, only a well-trained mitigation specialist may have the skills necessary to interpret them. A capital defendant's records in Texas are especially likely to be complex, given that a number Texas's capital defendants are foreign nationals and relevant records may be in another country and in another language.[242]

Trial

Texas's statute on the appointment of capital counsel at trial and on direct appeal provides that "[c]ounsel may incur expenses without prior approval of the court. On presentation of a claim for reimbursement, the court shall order reimbursement of counsel for the expenses, if the expenses are reasonably necessary and reasonably incurred."[243] While the statute does not specifically require the appointment of mitigation specialists, investigators, or experts, it does provide a procedure for "advance payment of expenses anticipated or reimbursement of expenses

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[235] Survey from Kathryn M. Kase, Exec. Dir., Tex. Defender Serv., at 6–7 (Oct. 11, 2012) (on file with author) [hereinafter Kase Survey].

[236] *About GRACE*, GULF REGION ADVOCACY CTR., http://gracelaw.org/AboutUs.html (last visited Dec. 17, 2012).

[237] *Services*, GULF REGION ADVOCACY CTR., http://gracelaw.org/services.html (last visited Sept. 5, 2013).

[238] Jeffrey Toobin, *The Mitigator: A New Way of Looking at the Death Penalty*, NEW YORKER, May 9, 2011, at 33.

[239] For more information on qualifications of counsel in state habeas proceedings, see Chapter Eight on State Post-conviction Proceedings.

[240] For further discussion on access to investigators and experts for defense counsel, see Chapter Six on Defense Services.

[241] *See generally* Toobin, *supra* note 238 (describing the effect of emphasis on investigation and presentation of mitigating evidence in capital case on the declining rate of death sentences in Texas).

[242] *Foreign Nationals and the Death Penalty in the US*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/foreign-nationals-and-death-penalty-us (last visited Mar. 5, 2013) (noting that, as of February 2013, twenty-four foreign nationals are on death row in Texas, second only to California).

[243] TEX. CODE CRIM. PROC. ANN. art. 26.052(h) (2013).

incurred for purposes of investigation or expert testimony."[244] However, it is unclear the extent to which capital, list-qualified appointed counsel are seeking and obtaining the appointment of mitigation specialists, investigators, and experts to assist with mental retardation claims.

Furthermore, hourly rates paid to investigators and mitigation specialists appointed in capital cases may be too low to recruit qualified professionals for these appointments. In Harris County, for example, the rate is $40 per hour.[245]

With respect to Texas's capital and public defender officers, RPDO states that it has the resources to provide its clients with qualified mitigation specialists, investigators, and experts.[246] The organization employs on-staff mitigation specialists and investigators to assist counsel in each of its capital cases.[247] The mitigation specialists must complete an annual training program, and they may attend voluntary training programs that cover issues related to mental retardation and mental health.[248]

The El Paso Public Defender also assigns an on-staff mitigation specialist and investigator to each of its capital cases.[249] The mitigation specialist holds a master of social work degree and typically attends the same training programs as capital defense counsel.[250] With respect to experts, the organization states that while "quality is the most important thing we look for," experts also are selected based on cost of services.[251]

The Texas Defender Service states that is has adequate resources to ensure that its clients receive the assistance of qualified mitigation specialists, experts, and investigators.[252] The organization employs on-staff mitigation specialists, who are trained to screen clients for mental retardation and mental illnesses.[253]

State Habeas Proceedings

As with trial-level proceedings, Texas law allows, but does not guarantee, funding for the appointment of mitigation specialists, investigators, and experts in state habeas proceedings.[254] The trial court may approve funding for such services in its discretion.[255] However, in applications for subsequent habeas writs, the court is not permitted to provide funding for expert services.[256] The Assessment Team was unable to determine whether the Office of Capital Writs

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[244] TEX. CODE CRIM. PROC. ANN. art. 26.052(l) (2012).
[245] *Harris Cnty. Dist. Cts., Attorney Fee Schedule*, at 1 (eff. Aug 1, 2011), *available at* http://www.justex.net/JustexDocuments/0/2011%20FDAMS%20Appt/Attorney%20Fee%20Schedule.pdf.
[246] Wischkaemper Survey II, *supra* note 230, at 8.
[247] *Id.* at 2, 11.
[248] *Id.* at 12.
[249] Powell Survey II, *supra* note 233, at 2, 11–12.
[250] *Id.* at 11.
[251] *Id.* at 12.
[252] Kase Survey, *supra* note 235, at 8.
[253] *Id.* at 6.
[254] TEX. CODE CRIM. PROC. ANN. art. 11.071 § 3(b), (d) (2013).
[255] *See id.*
[256] *Ex parte* Blue, 230 S.W.3d 151, 166–67 (Tex. Crim. App. 2007).

is typically able to obtain the appointment of qualified mitigation specialists, investigators, and mental health experts.

Conclusion

It appears that some capital defense attorneys receive training relevant to recognizing, investigating, and litigating mental retardation in their clients. However, such training is not required by law. Given that a large number of capital defendants in Texas are represented by appointment list-qualified counsel who are not affiliated with a public or capital defender organization, it is likely that many capital defense attorneys are not adequately trained on issues related to mental retardation. Moreover, while some capital defense counsel have access to qualified mitigation specialists, investigators, and experts, the provision of these experts is not required by law, and no such services are permitted in successive habeas proceedings. Thus, Texas is in partial compliance with Recommendation #3.

Recommendation

Because Texas's current capital defense system consists of a patchwork of appointed, list-qualified counsel, capital defender offices, and local public defenders, it is critically important for the state to mandate that all capital defense counsel understand how to recognize and investigate claims of mental retardation. Accordingly, Texas should amend its capital defense counsel qualification standards to guarantee that at least one member of the defense team is trained to screen capital clients for mental retardation, mental illness, and other psychological disorders. In addition, Texas should, upon request of defense counsel, require the appointment of investigators, mitigation specialists, and, when reasonably necessary, mental health experts in all capital proceedings.

D. Recommendation #4

> **For cases commencing after the United States Supreme Court's decision in *Atkins v. Virginia*[257] or the State's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.**

There are distinct advantages to determining whether a capital defendant has mental retardation in a pretrial hearing. If a defendant is determined to have mental retardation before trial, and thus cannot be subject to the death penalty, the court is spared a long and expensive capital trial. In addition, when the mental retardation issue is resolved pretrial, jurors are not required to decide the issue in the penalty phase of the trial. Studies have shown that jurors' understanding of mental retardation is often inconsistent with the definition accepted by the AAIDD and mental health experts.[258] Furthermore, confusion on mental retardation may be exacerbated when it is presented to jurors in the penalty phase, after they have heard evidence related to the crime itself. As discussed in Mental Retardation Recommendation #1, a mental retardation determination

[257] Atkins v. Virginia, 536 U.S. 304 (2002).

[258] Marcus T. Boccaccini et al., *Jury Pool Members' Beliefs about the Relation between Potential Impairments in Functioning and Mental Retardation: Implications for* Atkins-*Type Cases*, 34 LAW & PSYCHOL. REV. 1, 1–2 (2010).

should be based on a person's "typical behavior," not his/her behavior during a specific event.[259] Given that the evidence presented in the guilt phase of the trial relates primarily to the defendant's conduct during the crime, jurors may give that evidence undue weight when later deciding if the defendant has mental retardation.

While trial judges may also be susceptible to error, their experience ruling on mental health issues in other cases will likely aid them in a mental retardation hearing. Perhaps for these reasons, several jurisdictions have already adopted procedures that grant defendants the right to a pretrial determination of mental retardation.[260]

In Texas, the trial court has discretion to determine when during a capital proceeding the court will determine if the defendant has mental retardation.[261] The Court of Criminal Appeals has indicated, however, that it may be preferable for the jury make the determination during penalty phase deliberations.[262] The court reasoned that "the nature of the offense itself may be relevant to a determination of mental retardation; thus, a jury already familiar with the evidence presented at the guilt stage might be especially well prepared to determine mental retardation."[263]

Moreover, a review of Texas cases indicates that most Texas trial courts have opted to allow the jury to determine whether the defendant has mental retardation during penalty phase deliberations.[264] It appears that the trial court instructs the jury on mental retardation as an additional "special issue" prior to penalty phase deliberations.[265] In one case, for instance, the court instructed the jury as follows: "Do you find, taking into consideration all of the evidence, that the Defendant is a person with mental retardation?"[266]

For the stated reasons, Texas is not in compliance with Recommendation #4.

The Assessment Team recommends that Texas enact a law requiring the issue of mental retardation to be determined before the capital trial provided the defendant can demonstrate some evidence that s/he has mental retardation. The determination of mental retardation should be made by the trial judge unless the defendant requests that a jury be impaneled to decide the issue.

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[259] *See supra* notes 135–137 and accompanying text.

[260] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-753 (2013) (providing that Arizona capital defendants who score seventy-five or below on a pretrial IQ test are entitled to a pretrial hearing on mental retardation); KY. REV. STAT. ANN. § 532.135(1)–(2) (2012) (providing that when a Kentucky capital defendant raises the issue of mental retardation, the trial court "shall determine whether or not the defendant is a defendant with a serious intellectual disability" at least ten days before the beginning of the trial); State v. Lott, 779 N.E.2d 1011, 1015 (Ohio 2002) (holding that the question of whether an Ohio capital defendant is mentally retarded should be decided by the trial court "in a manner comparable to a ruling on competency"); FLA. R. CRIM. P. 3.203 (2013) (stating that a Florida capital defendant is entitled to a pretrial determination of mental retardation following the proper defense motion and an examination by at least one qualified expert).

[261] Neal v. State, 256 S.W.3d 264, 272 (Tex. Crim. App. 2008).

[262] *Id.*

[263] *Id.*

[264] *E.g.*, Neal v. State, 256 S.W.3d at 272; *Williams*, 270 S.W.3d at 132; *Gallo*, 239 S.W.3d at 770; *Hunter*, 243 S.W.3d at 667. *See also* Renée Feltz, *Cracked*, TEX. OBSERVER, Jan. 5, 2010, at 6 (noting that the practice in Texas is for the jury to determine whether a defendant has mental retardation during penalty phase deliberations).

[265] *E.g.*, *Gallo*, 239 S.W.3d at 770.

[266] *Id.*

This procedure would resemble Texas's current procedure for determining competency to stand trial.[267] This procedure should not preclude the defendant from offering evidence of mental retardation during the criminal trial.

E. Recommendation #5

> **Where the defense has presented a substantial showing that the defendant may have mental retardation, the burden of disproving mental retardation should be placed on the prosecution. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.**

The Texas Court of Criminal Appeals has held that the defendant bears the burden of proving mental retardation by a preponderance of the evidence at trial.[268] A death row inmate sentenced before *Atkins* must also prove by a preponderance of the evidence that s/he has mental retardation during state habeas corpus proceedings.[269]

However, "[f]or the post-*Atkins* applicant who bypassed the opportunity to raise mental retardation at trial or in an initial writ [of habeas corpus], [Texas statutory law] mandates that his subsequent application 'contain[ ] sufficient specific facts' that, if true, would establish 'by clear and convincing evidence' that no rational fact finder would fail to find him mentally retarded."[270] The Court of Criminal Appeals noted that the Texas Legislature adopted this higher standard because "the State's interest in the finality of its judgments justifies the imposition of higher burdens upon the subsequent applicant who did not avail himself of the opportunity and resources available to him at trial or in an initial writ to raise his claim of mental retardation."[271]

Notwithstanding the state's interest in final judgments, imposing this higher burden of proof in certain state habeas proceedings increases the likelihood that a person with mental retardation will be executed. A defendant might have failed to present evidence of his/her mental retardation at trial because that evidence was not readily available, because s/he did not wish to publicly acknowledge his/her disability, or because his/her counsel was ill-equipped to recognize mental retardation or lacked sufficient resources to effectively present the claim at trial. In Texas, there is a special risk that counsel will not recognize a client with mental retardation, as Texas law does not require attorneys who handle capital cases to have any special training related to identifying or litigating mental retardation.[272] While states have a justifiable interest in protecting the finality of judgments in some instances, that interest should not trump the state's duty to ensure that no person with mental retardation is executed in violation of the U.S. Constitution.

Accordingly, Texas is in partial compliance with Recommendation #5.

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[267] *See* TEX. CODE CRIM. PROC. ANN. art. 46B.051 (2013).
[268] Gallo v. State, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007).
[269] *Ex parte* Briseno, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004).
[270] *Ex parte* Blue, 230 S.W.3d 151, 162 (Tex. Crim. App. 2007) (quoting TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(3) (2007)).
[271] *Id.*
[272] *See supra* notes 226–239 and accompanying text.

The Assessment Team recommends that Texas enact a preponderance of the evidence standard for mental retardation claims in all proceedings, including subsequent habeas petitions. A higher standard of proof may be reasonable for other claims in subsequent habeas petitions; however, a higher standard is inappropriate when determining whether a person has mental retardation and thus is categorically ineligible for the death penalty under the Constitution. In these cases, the court's primary interest should be ensuring that a person with mental retardation is not executed.

F. Recommendation #6

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

The Risk of False or Coerced Confessions

The U.S. Supreme Court has observed that "[m]entally retarded defendants . . . face a special risk of wrongful execution" because of the possibility that they will confess to crimes they did not commit.[273] Social science research on the topic confirms this assertion. One study, for instance, found that 50% of study participants with mild mental retardation "could not correctly paraphrase *any* of the five *Miranda* components," compared to less than 1% of the general population.[274] Moreover, because persons with mental retardation are more likely to "change accounts in response to suggestive questioning" and "possess less confidence in their own memories and beliefs," they are more likely to falsely confess to a crime.[275]

Legal Protections from Coerced Confessions

In *Miranda v. Arizona*, the U.S. Supreme Court held that the Fifth Amendment protection from self-incrimination requires law enforcement officers to inform a suspect of his/her right to remain silent and right to an attorney prior to a custodial interrogation.[276] A suspect, however, may waive his/her *Miranda* rights if the waiver is knowingly and intelligently made.[277]

In addition to the requirement that the defendant's *Miranda* waiver be knowing and voluntary, the confession itself must be voluntary to be admissible.[278] The U.S. Supreme Court has held that a court must consider the totality of the circumstances to determine whether the defendant's statements "were the product of his free and rational choice."[279] However, the Court held in

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[273] Atkins v. Virginia, 536 U.S. 304, 320 (2002).

[274] Saul M. Kasin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 21 (2010) (citing Michael J. O'Connell et al., Miranda *Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 LAW & HUM. BEHAV. 359 (2005)).

[275] William C. Follette, Deborah Davis & Richard A. Leo, *Mental Health Status and Vulnerability to Police Interrogation Tactics*, 22 CRIM. JUST. 42, 49 (2007).

[276] Miranda v. Arizona, 384 U.S. 436, 478–79 (1966).

[277] *Id.* at 479.

[278] Schneckloth v. Bustamonte, 412 U.S. 218, 225–26 (1973) (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

[279] Greenwald v. Wisconsin, 390 U.S. 519, 521 (1968).

Colorado v. Connelly that "coercive police activity is a necessary predicate to finding that a confession is not 'voluntary.'"[280]

Interpreting these cases, the Texas Court of Criminal Appeals held that a defendant must present evidence of "police overreaching," such as coercive interrogation tactics, to prove that a *Miranda* waiver or confession was involuntary.[281] Thus, absent coercive police tactics, a Texas defendant with mental retardation would not be able to challenge the validity of his/her *Miranda* waiver or confession on constitutional grounds.[282]

The Texas Legislature, however, has codified interrogation requirements that are substantially similar to the constitutional *Miranda* and confession voluntariness requirements.[283] In contrast with constitutional claims, voluntariness claims based on the Texas statutes "can be, but need not be, predicated on police overreaching."[284] Specifically, under the state statute, the defendant may argue that his/her *Miranda* waiver or confession was involuntary because s/he "was mentally retarded and may not have 'knowingly, intelligently and voluntarily' waived his[/her] rights" or because s/he "lacked the mental capacity to understand his[/her] rights."[285]

The Court of Criminal Appeals has clarified that "mental retardation, and other disabilities are usually not enough, by themselves, to render a statement inadmissible."[286] As such, the court has upheld the admissibility of the confessions of several defendants with IQs in the mentally retarded range.[287] In lieu of ruling such confessions inadmissible, the defendant is entitled to a jury instruction on the voluntariness of his/her confession or *Miranda* waiver.[288] Because the voluntariness claim is based on state law and not the Constitution, however, the trial court must provide only a "general instruction" explaining that "unless the jury believes beyond a reasonable doubt that the statement was voluntarily made, the jury shall not consider such statement for any purpose nor any evidence obtained as a result thereof."[289] The trial court cannot specifically instruct the jury that it should consider the defendant's alleged mental retardation.[290]

Texas Law Enforcement Practices

As discussed in Recommendation #2, Texas requires all law enforcement officers to complete a crisis intervention course related on methods for interacting with persons who have mental retardation or mental illness.[291] In addition, some officers may complete a special certification

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280 Colorado v. Connelly, 479 U.S. 157, 167 (1986).
281 Oursbourn v. State, 259 S.W.3d 159, 169–71 (Tex. Crim. App. 2008).
282 *See id.*
283 TEX. CODE CRIM. PROC. ANN. arts. 38.21, 38.22 (2013).
284 *Oursbourn*, 259 S.W.3d at 172.
285 *Id.* at 172–73.
286 *Id.* at 173.
287 *See, e.g.*, Penry v. State, 903 S.W.2d 715, 744 (Tex. Crim. App. 1995); Casias v. State, 452 S.W.2d 483, 488 (Tex. Crim. App. 1970); Grayson v. State, 438 S.W.2d 553, 555 (Tex. Crim. App. 1969).
288 Oursbourn v. State, 259 S.W.3d 159, 173–74 (Tex. Crim. App. 2008).
289 *Id.* at 175 (quoting TEX. CODE CRIM. PROC. ANN. art. 38.22, § 6 (2008)).
290 Bell v. State, 582 S.W.2d 800, 812 (Tex. Crim. App. 1979).
291 *See supra* notes 200–203 and accompanying text.

program for mental health assignments.[292] However, these training programs do not appear to require any special training specifically related to interrogating or issuing *Miranda* warnings to mentally retarded or mentally ill suspects.

Conclusion

Texas has taken some measures to protect persons with mental retardation from false or involuntary *Miranda* waivers and confessions. Texas law allows trial courts to consider a defendant's mental retardation when deciding whether a confession is admissible. However, Texas law does not require law enforcement officers to follow any special procedures when interrogating a suspect who may have mental retardation. Moreover, while Texas courts will consider a suspect's mental retardation when evaluating a confession, these confessions are generally found to be admissible. Accordingly, Texas is in partial compliance with Recommendation #6.

Recommendation

The Assessment Team recommends that Texas law enforcement agencies adopt policies requiring officers to follow special procedures when interrogating suspects with mental retardation. In developing these policies, law enforcement agencies should consult with psychologists and other experts. In addition, Texas defendants who have presented evidence of mental retardation at trial should be entitled to a jury instruction related to the impact of mental retardation on the voluntariness and veracity of a confession.

G. Recommendation #7

The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.

The U.S. Supreme Court has noted that capital defendants with mental retardation "face a special risk of wrongful execution" because they are less able "to make a persuasive showing of mitigation in the face of prosecutorial evidence" and "less able to give meaningful assistance to their counsel" at trial.[293] When a defendant with mental retardation waives his/her rights, such as the right to counsel or the right to present mitigating evidence, these risks are magnified, because his/her poor decision-making and communication skills are no longer buffered by the aid of attorneys. Accordingly, defendants with mental retardation should be protected against waivers that are the result of their disability.

Right to Counsel

In *Faretta v. California*, the U.S. Supreme Court held that a criminal defendant has the constitutional right to waive his/her right to counsel and proceed pro se, provided the defendant's

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[292] *See supra* notes 204–208 and accompanying text.
[293] Atkins v. Virginia, 536 U.S. 304, 320 (2002).

waiver is "knowingly and intelligently" made.[294] The Court later held in *Indiana v. Edwards*, however, that a trial court may deny a defendant's request for self-representation and insist upon appointment of counsel for defendants who "suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[295]

Texas statutory law provides that a "defendant may voluntarily and intelligently waive in writing the right to counsel."[296] Interpreting *Faretta*, The Texas Court of Criminal Appeals has held that the decision to waive counsel and represent oneself must be "clearly and unequivocably asserted."[297] The trial court must also "inform the defendant about the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."[298] However, the court "has no duty to inquire into an accused's age, education, background or previous mental history in every instance."[299] Thus, the trial court is not required to examine evidence of the defendant's mental retardation before allowing him/her to waive the right to counsel.

Right to Trial

A Texas defendant may waive his/her right to a trial and plead guilty only if "it appears [to the trial court] that the defendant is mentally competent and the plea is free and voluntary."[300]

The Texas Court of Criminal Appeals, however, has held that the standard for determining competence to plead guilty is the same as the standard for determining competence to stand trial.[301] As such, a defendant is "presumed competent" to plead guilty "unless proved incompetent by a preponderance of the evidence."[302] The defendant will be considered incompetent if s/he lacks either "(1) sufficient present ability to consult with the [his/her] lawyer with a reasonable degree of rational understanding; or (2) a rational as well as factual understanding of the proceedings against" him/her.[303]

"Either party may suggest by motion, or the trial court may suggest on its own motion, that the defendant may be incompetent" to plead guilty."[304] However, even if the issue is raised by counsel, the court is required to hold only an "informal inquiry" into the defendant's competency.[305] The Court of Criminal Appeals has also held that "unless an issue is made of an

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[294] Faretta v. California, 422 U.S. 806, 835 (1975) (internal quotations omitted).
[295] Indiana v. Edwards, 554 U.S. 164, 178 (2008).
[296] TEX. CODE CRIM. PROC. ANN. art. 1.051(f) (West 2013).
[297] Williams v. State, 252 S.W.3d 353, 356 (Tex. Crim. App. 2008) (quoting Funderburg v. State, 717 S.W.2d 637, 642 (Tex. Crim. App. 1986)).
[298] *Id.* (quoting *Faretta*, 422 U.S. at 835) (internal quotation marks omitted).
[299] *Id.* (quoting Goffney v. State, 843 S.W.2d 583, 584–85 (Tex. Crim. App.1992)) (internal quotation marks omitted).
[300] TEX. CODE CRIM. PROC. ANN. art. 26.13(b) (2013).
[301] *See* Luna v. State, 268 S.W.3d 594, 598–99 (Tex. Crim. App. 2008).
[302] TEX. CODE CRIM. PROC. ANN. art. 46B.003(b) (2013).
[303] TEX. CODE CRIM. PROC. ANN. art. 46B.003(a) (2013).
[304] TEX. CODE CRIM. PROC. ANN. art. 46B.004(a) (2013).
[305] TEX. CODE CRIM. PROC. ANN. art. 46B.004(c) (2013).

accused's present insanity or mental competency at the time of the plea the court need not make inquiry or hear evidence on such issue."[306]

The Court of Criminal Appeals held, in a non-capital case, that evidence of "at least *moderate* retardation" is required "to create a bona fide doubt" of the defendant's competency.[307] This requirement, however, excludes defendants with *mild* mental retardation from a finding of incompetence. Because approximately eighty-five percent of individuals with mental retardation are in the mildly mentally retarded range, the overwhelming majority of defendants with mental retardation could not be found incompetent to plead guilty under the Texas standard.[308]

Right to Direct Appeal and Habeas Corpus

To effectively waive his/her right to direct appeal or state habeas corpus proceedings as part of a plea agreement, the defendant's waiver must be "made voluntarily, knowingly, and intelligently."[309] The extent to which Texas courts will consider a defendant's mental retardation, mental disability, or mental illness when making this determination, however, is unclear.

Conclusion

Texas has taken some measures protect defendants with mental retardation from waivers that are the product of their disability. A defendant's mental retardation, at least in some circumstances, is a factor that will be considered when determining whether a defendant's waiver is valid.

Texas's waiver protections, however, are not sufficient. The trial court is not required to inquire into a defendant's "mental history" before permitting him/her to waive the right to counsel and proceed pro se. With respect to guilty pleas, the court must only make an "informal inquiry" into the defendant's competency, and then only if the issue of competency is raised by counsel. Because mental retardation is not necessarily noticeable during a cursory examination by a non-expert such as a trial judge, these waiver procedures create an unacceptably high risk that a defendant with mental retardation will waive rights s/he does not fully understand.
Furthermore, Texas law appears to state that a person with mild mental retardation is per se competent to plead guilty, absent some other mental impairment or illness. While not all persons with mild mental retardation are necessarily incompetent to plead guilty, Texas should not impose a bright-line cutoff between mild and moderate mental retardation.

Accordingly, Texas is in partial compliance Recommendation #7.

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[306] Runnels v. State , No. AP-75318, 2007 WL 2655682, at *5 (Tex. Crim. App. Sept. 12, 2007) (quoting Kuyava v. State, 538 S.W.2d 627, 628–29 (Tex. Crim. App. 1976)).
[307] McDaniel v. State, 98 S.W.3d 704, 710 (Tex. Crim. App. 2003) (quoting Alcott v. State, 51 S.W.3d 596, 602 (Tex. Crim. App. 2001)) (emphasis added).
[308] DSM, *supra* note 3, at 41.
[309] *Ex parte* Reedy, 282 S.W.3d 492, 495–96 (Tex. Crim. App. 2009).

Recommendation

The Assessment Team recommends that Texas amend its waiver procedures to ensure that a defendant's mental history, including evidence of mental retardation, is fully examined and considered by the trial court before the defendant is allowed to waive his/her rights. To that end, before a capital defendant is permitted to waive his/her right to counsel, trial, direct appeal, or habeas corpus, the trial court should be required to hold a hearing during which the defendant's mental history, education, and other relevant evidence is considered. In addition, Texas should eliminate the bright-line rule that prevents a person with mild mental retardation from being found incompetent to plead guilty.

II. ANALYSIS: MENTAL ILLNESS

H. Recommendation #1

All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, jailers, and prison authorities, should be trained to recognize mental illness in capital defendants and death row inmates.

As discussed in Mental Retardation Recommendation #2, some of the relevant actors in the Texas criminal justice system receive training relevant to recognizing mental illness in capital defendants and death row inmates.[310] For instance, Texas has enacted mental health training requirements for law enforcement officers.[311] This training, however, is focused on crisis intervention techniques. Judges and prosecutors are not required to receive any training on recognizing mental illness in defendants.[312] Accordingly, Texas is in partial compliance with Recommendation #1.

I. Recommendation #2

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

As with persons who have mental retardation,[313] the mentally ill face an increased risk of falsely or involuntarily confessing to a crime because they often lack confidence in their own memories and are more susceptible to coercive interrogation tactics.[314]

As discussed in Mental Retardation Recommendation #6, the Texas Court of Criminal Appeals has held that mental illness is a factor to be considered in determining whether a confession or waiver of *Miranda* rights was voluntary.[315] However, mental impairments are not enough to render a statement inadmissible.[316] Specifically, the Texas Court of Criminal Appeals held that a defendant must present evidence of "police overreaching," such as coercive interrogation tactics, to prove that a confession or *Miranda* waiver was involuntary.[317] Thus, a mentally ill suspect cannot establish that a confession or *Miranda* waiver was involuntary based solely on his/her mental condition.

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[310] *See supra* notes 198–222 and accompanying text.
[311] *See supra* notes 198–208 and accompanying text.
[312] *See supra* notes 209–212 and accompanying text.
[313] *See supra* notes 273–275 and accompanying text.
[314] Follette, *supra* note 275, at 48–49.
[315] *See supra* notes 273–290 and accompanying text.
[316] *See id.*
[317] Oursbourn v. State, 259 S.W.3d 159, 169–71 (Tex. Crim. App. 2008). By contrast, the U.S. Supreme Court has required coercive police activity only to prove that the confession itself—as opposed to the *Miranda* waiver—was involuntary. *See* Colorado v. Connelly, 479 U.S. 157, 167 (1986).

Typically, a defendant will only be entitled to a general instruction to the jury on the requirement that confessions are voluntary.[318] While Texas law enforcement officers are required to complete a training course on mental health issues, this course does not appear to require any training specifically related to interrogating or issuing *Miranda* warnings to mentally retarded or mentally ill defendants.[319]

The Andre Thomas case, discussed in more detail under Mental Illness Recommendation #7 below, demonstrates the problems that can arise when special procedures are not used when interrogating a mentally ill suspect. Thomas turned himself in at a local police station after murdering three family members.[320] He had also stabbed himself in the chest in an apparent suicide attempt.[321] Thomas was arrested, taken the hospital, and returned to police custody two days later, at which point he was interrogated.[322]

Thomas told the officers that he wished to waive his *Miranda* rights.[323] Despite his odd behavior and recent suicide attempt, however, the officers did not take any special steps to be certain that Thomas truly understood his rights.[324] Thomas explained to police that "God had wanted him to [kill his family], that the victims had been evil, that his wife had been a 'jezebel,' and that his son had been 'the anti-Christ.'"[325] The next day, Thomas spoke to police again and told them a similar story and elaborated that he had "cut open [the victims'] chests and ripped their hearts out, and that he stabbed himself in the chest afterwards."[326] A nurse who observed the interview later testified that Thomas "exhibited some delusional behavior and said nonsensical things during the interview."[327] While she further testified that Thomas "knew very much what was going on," the basis for this opinion is unclear, as Thomas had not received a mental evaluation.[328]

Thomas was later sentenced to death and is still on death row.[329] He has been diagnosed with schizophrenia.[330]

Accordingly, Texas is in partial compliance with Recommendation #2.

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[318] *See id.*
[319] *See supra* notes 291–292 and accompanying text.
[320] Thomas v. State, No. AP–75218, 2008 WL 4531976, at *1 (Tex. Crim. App. Oct. 8, 2008).
[321] *Id.* at *1.
[322] *Id.* at *2. Police had attempted to interrogate Thomas at the hospital, but stopped when Thomas mentioned that he might want to speak to a lawyer. *Id.*
[323] *Id.*
[324] *Id.*
[325] *Id.* at *3.
[326] *Id.*
[327] *Id.*
[328] *See id.*
[329] *Offenders on Death Row*, TEX. DEP'T CRIM. JUSTICE, http://www.tdcj.state.tx.us/stat/dr_offenders_on_dr.html (last visited June 10, 2013).
[330] Thomas v. State, No. AP–75218, 2008 WL 4531976, at *17–18 (Tex. Crim. App. Oct. 8, 2008).

J. Recommendation #3

The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable), and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.

As discussed in Mental Retardation Recommendation #3, Texas capital defense counsel are not required by law to receive training specifically related to recognizing and litigating issues related to mental illness and mental disability.[331] In addition, while Texas law allows for the appointment of mitigation specialists, investigators, and experts, these services are not guaranteed.[332]

Defender organizations such as the Regional Public Defender for Capital Cases (RPDO), the El Paso Public Defender, and the Texas Defender Service have enacted additional training requirements for their attorneys, and employ on-staff mitigation specialists to assist in the development of claims of mental illness. Many capital defendants in Texas, however, are represented by appointment list-qualified attorneys who are in private practice, and thus not subject to these additional standards.

Accordingly, Texas is in partial compliance with Recommendation #3.

K. Recommendation #4

Trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the State. Similarly, prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the State.

Recommendation #5

Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well-trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough

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[331] *See supra* notes 226–239 and accompanying text.
[332] *See supra* notes 240–256 and accompanying text.

evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.

Defense Experts

Texas requires capital defense counsel to seek funding for experts from the trial court in an *ex parte* proceeding.[333]

Trial and Direct Appeal

At trial and on direct appeal, the defense is entitled to seek reimbursement for expenses if they are "reasonably necessary and reasonably incurred."[334] "Advance payment of expenses anticipated or reimbursement of expenses incurred for purposes of investigation or expert testimony" may be paid directly to the expert.[335]

In cases in which the defendant is represented by list-qualified appointed counsel, it is unclear what criteria defense counsel and trial judges are using to request and appoint mental health experts. RPDO, the El Paso Public Defender, and the Texas Defender Service (TDS) state that they are able to obtain adequate funding to provide their clients with the necessary experts.[336] In selecting experts, the El Paso Public Defender's attorneys "try to find experts who recognize funding constraints faced by public defenders, but, ultimately, quality is the most important thing we look for."[337] Similarly, TDS sometimes selects experts "on the basis of cost of services" because of funding limitations.[338] It is unclear, however, whether judges have appointed experts based on cost or past status as expert for the state.

State Habeas Proceedings

In state habeas proceedings, appointed defense counsel must file an ex parte request for funds with the court "stating the claims of the application to be investigated . . . ; specific facts that suggest that a claim of possible merit may exist; and . . . an itemized list of anticipated expenses for each claim."[339] The court must grant the request if it is "timely and reasonable."[340] Alternately, defense counsel may obtain reimbursement without prior approval if the expenses are "reasonably necessary and reasonably incurred."[341] However, the Texas Office of Capital Writs, which represents many Texas death row inmates in state habeas proceedings, compensates

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[333] TEX. CODE CRIM. PROC. ANN. art. 26.052(h) (2013); *see also* TEX. CODE CRIM. PROC. ANN. art. 11.071 § 3(b), (d) (2013); Kase Interview, *supra* note 235.
[334] TEX. CODE CRIM. PROC. ANN. art. 26.052(h) (2013).
[335] TEX. CODE CRIM. PROC. ANN. art. 26.052(l) (2013).
[336] Wischkaemper Survey II, *supra* note 230, at 9; Powell Survey II, *supra* note 233, at 8; Kase Survey, *supra* note 235, at 9.
[337] Powell Survey II, *supra* note 233, at 12.
[338] Kase Survey, *supra* note 235, at 13.
[339] TEX. CODE CRIM. PROC. ANN. art. 11.071 § 3(b) (2013).
[340] TEX. CODE CRIM. PROC. ANN. art. 11.071 § 3(c) (2013).
[341] TEX. CODE CRIM. PROC. ANN. art. 11.071 § 3(d) (2013).

experts through use of its own funding.[342] It is unclear whether this funding is sufficient or on what basis experts are selected.

Prosecution Experts

Texas law permits prosecutors to select their own mental health experts for use in criminal prosecutions without prior approval from the trial judge.[343] The Assessment Team submitted surveys to several Texas District Attorneys regarding the manner by which prosecution experts are requested and appointed in practice.[344] In response to the question of what criteria and qualifications the prosecutor considers in selecting mental health experts to testify in a capital case, one office responded that it "normally do[es]n't use experts."[345] The other responding office stated that it considers "experiences in the field—especially criminal case experience."[346] Only two of the twenty-two offices queried responded to the Assessment Team's survey.[347]

In some capital cases, however, Texas prosecutors have hired mental health experts who offered false or scientifically invalid testimony. This calls into question whether prosecutors have consistently chosen experts based on their qualifications rather than on their willingness to provide favorable testimony.

Most notably, Texas prosecutors repeatedly employed a psychologist, Dr. George Denkowski, who was later investigated and reprimanded by the Texas State Board of Examiners of Psychologists (TSBEP) for using unscientific methods in mental retardation evaluations of capital defendants.[348] Dr. Denkowski applied non-standard and scientifically unrecognized techniques to elevate the IQ and adaptive behavior scores of capital defendants who alleged mental retardation.[349] The American Association on Intellectual and Developmental Disabilities (AAIDD), in its 2010 manual on evaluating mental retardation, "strongly caution[ed] against practices such as those recommended by Denkowski."[350] In 2011, following an investigation by the TSBEP, Denkowski "agreed not to conduct intellectual disability evaluations in future criminal cases and to pay a fine of $5,500."[351] Fourteen of the defendants against whom Dr. Denkowski testified, many of them from Harris County, are still on death row, and two others have been executed.[352]

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[342] Survey from Brad D. Levenson, Dir., Office of Capital Writs, at 3 (Sept. 19, 2012) (on file with author) [hereinafter Levenson Survey].

[343] No provision of Texas law appears to suggest that the prosecution must seek trial court approval of expenses.

[344] A copy of the survey is reproduced in the Appendix to this Report. *See infra* Appendix, *Texas Dist. Att'y Survey*.

[345] Dist. Att'y A Survey Response, provided to Jennifer Laurin, Chair, Tex. Death Penalty Assessment Team, at 9 (Mar. 14, 2013) (on file with author).

[346] Dist. Att'y B Survey Response, provided to Jennifer Laurin, Chair, Tex. Death Penalty Assessment Team, at 9 (Feb. 27, 2013) (on file with author).

[347] The Assessment Team agreed to keep confidential the name of any person and District Attorney office responding to the survey.

[348] Brandi Grissom, *Psychologist Who Cleared Death Row Inmates Is Reprimanded*, N.Y. TIMES, Apr. 15, 2011, at A19.

[349] *Id.*

[350] INTELLECTUAL DISABILITY, *supra* note 103, at 53.

[351] Grissom, *supra* note 348. TSBEP's complaints against Denkowski were dismissed as part of the agreement. *Id.*

[352] *Id.*

John Matamoros

In one case, Dr. Denkowski was hired by the Harris County District Attorney to testify in death row inmate John Matamoros's state habeas evidentiary hearing on the issue of mental retardation.[353] Matamoros had been diagnosed with mental retardation at age fourteen, and his IQ scores placed him in the mentally retarded range with respect to intellectual functioning.[354] Dr. Denkowski evaluated Matamoros's adaptive behavior skills using an exam known as the Adaptive Behavior Assessment System (ABAS), which tests the patient in ten AAIDD-recognized skill areas.[355] Subsequent to scoring the test, however, Dr. Denkowski used his own method to inflate several of Matamoros's scores.[356] For example, Dr. Denkowski inflated Matamoros's self-care skill score "based on Matamoros's self-reported information that he bit his fingernails to trim them, rather than cutting and filing them as listed on the ABAS."[357] Based in part on Dr. Denkowski's evaluation, the trial court found that Matamoros did not have mental retardation.[358] In 2011, however, the Texas Court of Criminal Appeals remanded the case to the trial court to be reevaluated in light of Dr. Denkowski's reprimand by the TSBEP.[359] As of January 2013, that decision is pending.

Virgilio Maldonado

The Harris County District Attorney also hired Dr. Denkowski to evaluate capital defendant Virgilio Maldonado for mental retardation in a state habeas proceeding.[360] Dr. Denkowski used an IQ test and the ABAS (discussed above) to assess Maldonado.[361] However, because Maldonado was not fluent in English, the tests were actually administered by a court-provided translator who "did not have a background in psychology and had never translated a written psychological instrument before Maldonado's examination."[362] Dr. Denkowski also inflated the IQ and ABAS scores by several points to account for supposed "cultural and educational factors, as well as mild anxiety and depression."[363] These upward adjustments "did not result from any statistical formula or established methodology"; rather, they were based on what Dr. Denkowski described as his "clinical judgment."[364] Moreover, in scoring the ABAS, Dr. Denkowksi "failed to verify Maldonado's self-reported responses [regarding his skills] by interviewing

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[353] *Ex parte* Matamoros, No. WR–50791–02, 2011 WL 6241295, at *1 (Tex. Crim. App. Dec. 14, 2011). Matamoros was unable to present a mental retardation claim at trial because he was convicted and sentenced prior to the U.S. Supreme Court's *Atkins* decision that banned the application of the death penalty to the mentally retarded. *Id*.

[354] Matamoros v. Thaler, No. H-07-2613, 2010 WL 1404368, at *15 (S.D. Tex. Mar. 31, 2010).

[355] *Id.* at *9. For further information on the manner in which adaptive behavior is evaluated, see *supra* notes 119–182 and accompanying text.

[356] *Id*.

[357] *Id*.

[358] *Id.* at *11. The decision was later upheld by the Texas Court of Criminal Appeals and the U.S. District Court for the Southern District of Texas. *Id.*

[359] *Ex parte* Matamoros, No. WR-50791-02, 2011 WL 6241295, at *1 (Tex. Crim. App. Dec. 14, 2011).

[360] *Ex parte* Maldonado, No. WR-51612-02, 2012 WL 1439056, at *1 (Tex. Crim. App. Apr. 25, 2012).

[361] Maldonado v. Thaler, 625 F.3d 229, 236 (5th Cir. 2010).

[362] *Id.*at 236–37

[363] *Id.* at 238 (internal quotation marks omitted).

[364] *Id*.

Maldonado's teachers, relatives, or associates."[365] The AAIDD "caution[s] against relying heavily only on the information obtained from the individual himself or herself when assessing adaptive behavior for the purpose of establishing a diagnosis" of mental retardation because such persons are likely to overstate their abilities.[366] Although the denial of Maldonado's mental retardation claim was initially upheld in state and federal habeas proceedings,[367] the Texas Court of Criminal Appeals granted Maldonado a new hearing in 2012 because of Dr. Denkowski's reprimand.[368]

Future Dangerousness Testimony

Texas prosecutors also repeatedly hired a forensic psychiatrist, Dr. Richard Coons, whose methodology was later found to be unreliable by the Texas Court of Criminal Appeals.[369] Dr. Coons testified in over fifty Texas capital cases on the issue of whether the defendant poses a future danger to society.[370] While Dr. Coons has testified that he considers several factors when evaluating future dangerousness, he also stated that he "does not know whether others rely upon [his] method, and he does not know of any psychiatric or psychology books or articles that use his factors."[371] He further stated that he "knows of no book or article that discusses [future dangerousness] factors or their overlap. He is not aware of any studies in psychiatric journals regarding the accuracy of long-term predictions into future violence in capital murder prosecutions or of any error rates concerning such predictions." Nor were there "any psychiatric studies which support the making of [future dangerousness] predictions," and Dr. Coons "has never gone back and obtained records to try to check the accuracy of the 'future dangerousness' predictions he has made in the past."[372] "Based upon the specific problems and omissions" in this methodology, the Texas Court of Criminal Appeals held in *Coble v. State* that Dr. Coons' testimony was scientifically unreliable.[373]

Other prosecution experts, including Drs. Clay Griffith[374] and James Grigson,[375] testified in several cases in a manner similar to Dr. Coons. Indeed, as discussed in more detail in Chapter Ten on Capital Jury Instructions, such testimony has generally been the rule rather than the

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[365] *Id.* at 239.

[366] INTELLECTUAL DISABILITY, *supra* note 103, at 51–52.

[367] *Maldonado*, 625 F.3d at 244.

[368] *Ex parte* Maldonado, No. WR-51612-02, 2012 WL 1439056 at *1 (Tex. Crim. App. Apr. 25, 2012).

[369] Steven Kreytak, *Longtime Expert Witness Unreliable, Court Says*, AM.-STATESMAN (Austin, Tex.), Oct. 18, 2010, http://www.statesman.com/news/texas-politics/longtime-expert-witness-unreliable-court-says-979494.html?viewAsSinglePage=true (last visited Sept. 3, 2013).

[370] *Id.* A capital jury in Texas must find that the defendant "would commit criminal acts of violence that would constitute a continuing threat to society" in order to sentence him/her to death. TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b) (2013).

[371] Coble v. State, 330 S.W.3d 253, 271 (Tex. Crim. App. 2010).

[372] *Id.* at 272.

[373] *Id.* at 279–80. The court upheld the defendant's death sentence, however, ruling that the admission of Dr. Coons's testimony was harmless error. *Id.* at 287. For further discussion on Dr. Coons's testimony, see Chapter Ten on Capital Jury Instructions.

[374] Flores v. Johnson, 210 F.3d 456, 463 (5th Cir. 2000) (Garza, J., specially concurring). *See also* Flores v. State, 871 S.W.2d 174 (Tex. Crim. App. 1993).

[375] Mike Tolson, *Effect of Dr. "Death" and His Testimony Lingers*, HOUS. CHRON., June 17, 2004, at A27, http://www.chron.com/news/houston-texas/article/Effect-of-Dr-Death-and-his-testimony-lingers-1960299.php (last visited Sept. 3, 2013); *Coble*, 330 S.W.3d at 283.

exception, despite the fact that there is no known reliable methodology for predicting a defendant's future dangerousness.

Conclusion

Texas has enacted procedures whereby capital defense counsel can obtain the appointment of reasonably necessary mental health experts at trial, on direct appeal, and during state habeas proceedings. However, in several cases, Texas prosecutors have relied on mental health experts who have offered unreliable testimony or used unreliable methods. Thus, Texas is in partial compliance with Recommendations #4 and #5.

Recommendation

The Assessment Team recommends that Texas enact qualification standards for mental health experts in capital cases. Furthermore, as discussed in Chapter Ten on Capital Jury Instructions, Texas should restructure its capital sentencing procedures to abandon altogether the use of the "future dangerousness" special issue. There is no reliable methodology by which a mental health expert can predict an inmate's proclivity for violence.[376] As such, a purported expert testimony on the issue is likely to be unreliable.

L. Recommendation #6

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

Recommendation #7

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this Recommendation.

Following the U.S. Supreme Court's decision in *Atkins v. Virginia* banning the application of the death penalty to persons with mental retardation,[377] the ABA adopted policies recommending

[376] Brief for Am. Psychiatric Ass'n as Amicus Curiae Supporting Petitioner at 3, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080), *available at* http://www.psych.org/lib_archives/archives/amicus_1982_barefoot.pdf. *See also* Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 162–63 nn. 70–77 (2008) (citing contemporary research).

[377] Atkins v. Virginia, 536 U.S. 304 (2002).

that the death penalty also be prohibited with respect to (1) persons who suffer from intellectual and adaptive skill limitations as a result of dementia or a traumatic brain injury and (2) persons who suffer from severe mental disorders.[378] Much as the ban on executing persons with mental retardation was supported by the AAIDD, the proposed bans discussed in these Recommendations are supported by three leading mental health groups: the American Psychiatric Association,[379] the American Psychological Association,[380] and the National Institute on Mental Illness.[381]

These recommendations extend the logic of the *Atkins* decision to a limited group of persons suffering from other disabilities and disorders because the application of the death penalty to these persons is also "inconsistent with both the retributive and deterrent functions of the death penalty."[382] Much like persons with mental retardation, these persons lack the impulse control of more culpable murderers and are less likely to be deterred from criminal conduct because of fear of the death penalty.[383]

Persons with dementia or traumatic brain injuries that cause significant limitations in intellectual functioning and adaptive behavior display the same symptoms as persons with mental retardation; the only difference is that, unlike mental retardation, these disabilities do not necessarily manifest during childhood. In addition, persons with severe mental disorders, such as "schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders," often suffer from "delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment."[384]

Texas Law on the Application of the Death Penalty to the Mentally Retarded and Mentally Ill

As discussed throughout this Chapter, the Texas Court of Criminal Appeals has defined mental retardation in a manner inconsistent with the clinical definition of the term.[385] Aspects of the Texas definition of mental retardation, in particular the manner by which adaptive behavior

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[378] ABA, RECOMMENDATION 122A, 2006 Ann. Mtg. (adopted Aug. 7–8, 2006), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_illness_policies.authcheckdam.pdf.

[379] *Position Statement on Diminished Responsibility in Capital* Sentencing, AM. PSYCHIATRIC ASS'N (2004), http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2005_DiminishedResponsibility.pdf (last visited Sept. 3, 2013).

[380] ABA, *supra* note 378, at 3 (*citing Excerpt from the Council of Representatives 2005 Meeting Minutes*, AM. PSYCHIATRIC ASS'N (Feb. 18–20, 2005), *available at* http://www.apa.org/about/governance/council/crminutef05.pdf; *Excerpt from the Council of Representatives 2006 Meeting Minutes*, AM. PSYCHIATRIC ASS'N (Feb. 17–19, 2006)), *available at* http://www.apa.org/about/governance/council/crminutef06.pdf.

[381] *Criminal Justice and Forensic Issues*, NAT'L INST. ON MENTAL ILLNESS, http://www.nami.org/Template.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=41302 (last visited Sept. 3, 2013).

[382] ABA, *supra* note 378, at 5.

[383] *Id.* at 3–6.

[384] ABA, *supra* note 378, at 6.

[385] *See supra* notes 90–197 and accompanying text.

limitations are determined, are such that persons who meet the accepted clinical definition of mental retardation could be executed under Texas law.

Texas also does not prohibit the application of the death penalty to persons whose significant limitations in intellectual functioning and adaptive behavior are the product of a disability other than mental retardation. Although the U.S. Supreme Court's decision in *Atkins v. Virginia* prohibits only the execution of persons with mental retardation,[386] traumatic brain injuries and dementia may cause mental limitations that are nearly identical to the limitations caused by mental retardation. The only distinguishing characteristic is age of onset: mental retardation must originate prior to age eighteen, while traumatic brain injuries and dementia may arise at any age.[387]

Furthermore, Texas does not forbid death sentences and executions with regard to persons who, at the time of the offense, had a severe mental disorder or disability, even if that person's mental illness impaired his/her ability to control or understand his/her conduct in a manner similar to that of a person with mental retardation.[388]

Andre Thomas

The Andre Thomas case demonstrates the myriad problems with the treatment of severely mentally ill capital defendants in Texas. In particular, it exhibits the need for Texas to adopt a law prohibiting the application of the death penalty to persons whose severe mental illness, while not rising to the level of legal insanity, makes them less culpable than the typical offender.

Thomas was arrested for the murder of his estranged wife, son, and step-daughter when, shortly after police discovered the victims, he turned himself in at the local police station.[389] One officer later testified that Thomas, who "appeared lethargic and calm, asked, 'Will I be forgiven?' and said he had stabbed himself in the chest" in an apparent suicide attempt.[390] Thomas was arrested, taken to the hospital, and returned to police custody two days later, at which point he was interrogated.[391]

Thomas told the officers that he wished to waive his *Miranda* rights.[392] Despite his odd behavior and recent suicide attempt, however, the officers did not take any special steps to be certain that Thomas truly understood his rights.[393] Thomas explained to police that "God had wanted him to [kill his family], that the victims had been evil, that his wife had been a 'jezebel,' and that his son

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[386] Atkins v. Virginia, 536 U.S. 304 (2002).

[387] INTELLECTUAL DISABILITY, *supra* note 103, at 27 ("The purpose of the age of onset criterion is to distinguish [mental retardation] from other forms of disability that may occur later in life.")

[388] Tabler v. State, No. AP-75677, 2009 WL 4931882, at *1–2 (Tex. Crim. App. Dec. 16, 2009). Freeney v. State, No. AP–74,776, 2005 WL 1009560, at *11 (Tex. Crim. App. Apr. 27, 2005).

[389] Thomas v. State, No. AP-75218, 2008 WL 4531976, at *1 (Tex. Crim. App. Oct. 8, 2008).

[390] *Id.* at *1.

[391] *Id.* at *2. Police had attempted to interrogate Thomas at the hospital, but stopped when Thomas mentioned that he might want to speak to a lawyer. *Id.*

[392] *Id.*

[393] *Id.*

had been 'the anti-Christ.'"[394] The next day, Thomas spoke to police again and told them a similar story and elaborated that he had "he cut open [the victims'] chests and ripped their hearts out, and that he stabbed himself in the chest afterwards."[395] Thomas's bizarre behavior continued after his interrogation. Three days after his second police interview, Thomas, who was alone in his jail cell, "pulled out one of his eyeballs with his hands" while yelling "It's God's will."[396]

Prior to trial, two court-appointed mental health experts found Thomas incompetent to stand trial, and the trial court committed him to the Department of Mental Health for "restoration to competency."[397] The next month, however, the Department of Mental Health found that Thomas's competency had been restored, and the trial court ordered the trial to proceed without holding a competency hearing.[398]

At trial, defense counsel argued that Thomas was not guilty by reason of insanity.[399] Evidence indicated that he suffered from schizophrenia, and that he had struggled with severe mental illness throughout his life.[400] At around the age of ten, Thomas "started telling classmates about the voices in his head."[401] He had also repeatedly tried to kill himself, starting in elementary school.[402] When his wife left him and moved in with another man after four months of marriage, Thomas's condition worsened.[403] Thomas began to "obsess[] over [the Biblical Book of] Revelation and sometimes duct-taped his mouth shut for days at a time."[404]

In the three weeks before the murder, Thomas twice attempted to obtain treatment for his illness at local medical clinics.[405] Thomas told medical staff about his Biblical delusions and violent thoughts.[406] Staff attempted to obtain orders to detain him, but by the time the orders were issued, Thomas had left.[407]

Despite this evidence, however, Thomas's insanity defense did not prevail. To be found not guilty by reason of insanity under Texas law, the defense must prove that "at the time of the conduct charged, the [defendant], as a result of severe mental disease or defect, did not know that his conduct was wrong."[408] Thus, even if defense counsel proved that Thomas believed his

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394 *Id.* at *3.
395 Thomas v. State, No. AP–75218, 2008 WL 4531976, at *3 (Tex. Crim. App. Oct. 8, 2008).
396 *Id.* at *4.
397 *Id.* at *13.
398 *Id.*
399 Thomas v. State, No. AP–75218, 2008 WL 4531976, at *1 (Tex. Crim. App. Oct. 8, 2008).
400 *Id.* at *17–18. *See also* Brandi Grissom, *Trouble in Mind*, TEX. MONTHLY, Mar. 2013, http://www.texasmonthly.com/story/trouble-mind (last visited Sept. 3, 2013).
401 Grissom, *supra* note 400.
402 *Id.*
403 *Id.*
404 *Id.*
405 Brandi Grissom, *Andre Thomas: Gaps in a 30-Year-Old Mental Health Code*, TEX. TRIB., Feb. 24, 2013, http://www.texastribune.org/2013/02/24/andre-thomas-gaps-30-year-old-mental-health-code/ (last visited Sept. 3, 2013).
406 *Id.*
407 *Id.*
408 TEX. PENAL CODE ANN. § 8.01(a) (2013).

actions were being directed by God, he would still be guilty under Texas law so long as he knew those actions were wrong. As such, Thomas was convicted and sentenced to death.[409]

There is little doubt that Thomas is severely mentally ill and that he was not acting rationally at the time of the murders. As a Texas Court of Criminal Appeals judge noted in a concurring statement denying habeas corpus relief, "there is no dispute that [Thomas] was, in laymen's terms, 'crazy' at the time he killed his wife and the children."[410] However, because "[t]here is [also] no dispute that applicant knew that it was his wife and the children that he was stabbing to death," his conviction and death sentence were still justified.[411] Thomas remains on death row.[412]

Conclusion

Texas's definition of mental retardation does not comport with the clinical definition. Moreover, Texas permits the application of the death penalty to the severely mentally ill and disabled. Because Texas's insanity defense statute imposes strict requirements on the defendant, severely mentally ill persons have little protection from a conviction and death sentence. Under Texas law, a defendant whose criminal conduct was motivated entirely by his/her mental illness is still eligible for the death penalty as long as the person knew that what s/he did was wrong. As a result, a severely mentally ill defendant whose actions were driven by schizophrenic delusions has no claim for relief.

Accordingly, Texas is not in compliance with Recommendations #6 and #7.

Recommendation

Texas should prohibit the application of the death penalty on persons who have significant limitations in intellectual functioning and adaptive behavior resulting from dementia or a traumatic brain injury. Texas also should prohibit the application of the death penalty for persons who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of his/her conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct, such as antisocial personality disorder, or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.

The law should further require the appointment of qualified mental health experts for a defendant who raises a claim based on this provision of the law. The determination that the defendant suffers from one of the qualifying mental conditions should be based on the diagnoses of

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[409] *Thomas*, 2008 WL 4531976, at *1.

[410] *Ex parte* Thomas, No. WR-69859-01, 2009 WL 693606, at *5 (Tex. Crim. App. Mar. 18, 2009).

[411] *Id.*

[412] *Offenders on Death Row*, TEX. DEP'T CRIM. JUST., http://www.tdcj.state.tx.us/stat/dr_offenders_on_dr.html (last visited Sept. 12, 2012). In January 2009, Thomas removed his other eyeball and ate it. Diane Jennings, *Case Fuels Debate on Insanity Defense Law: As Some Seek Change, Others Say Standards Work*, DALLAS MORNING NEWS, Apr. 11, 2009, at A1.

qualified experts. These laws should also apply retroactively so that severely mentally ill and mentally disabled death row inmates can challenge their death sentences. Current death row inmates should not be treated differently and denied relief simply because their cases arose at an earlier time.

While many death row inmates may have some type of mental disorder, the Assessment Team's recommendation is carefully tailored to ensure that only persons who suffer from mental retardation-like disabilities and *severe* mental disorders that significantly impair their ability to control their conduct would be eligible for relief. By enacting this recommendation, Texas will promote the integrity of its capital punishment system by ensuring that only a narrow class of seriously mentally ill and disabled persons are ineligible for the death penalty.

M. Recommendation #8

> **To the extent that a mental disorder or disability does not preclude imposition of the death sentence pursuant to a particular provision of law (see Recommendations #6–7 as to when it should do so), jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.**

As the U.S. Supreme Court has noted, capital defendants suffering from disabilities such as mental retardation face a special risk of wrongful execution because the disability "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury."[413] Moreover, empirical studies have found that jurors are more likely to impose a death sentence when a defendant is mentally ill or emotionally disturbed, irrespective of whether the evidence of mental illness is offered as a mitigating circumstance.[414] Accordingly, it is important for jurors to be fully and adequately instructed on the manner by which a defendant's mental disorders and disabilities must be considered.

While Texas statutory law imposes certain requirements with respect to capital jury instructions,[415] Texas has not adopted formal pattern jury instructions.[416] Instead, Texas trial courts are broadly required to "deliver to the jury . . . a written charge distinctly setting forth the law applicable to the case."[417] The prosecution and defense may also request "special charges"

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[413] *Atkins*, 536 U.S. at 321.

[414] *See, e.g.*, David Baldus et al., *Racial Discrimination and the Death Penalty in the Post*-Furman *Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1688–89 (1998) (noting, in Table 6, that submission of a defendant's "extreme emotional disturbance" as a mitigating circumstance increased the likelihood of a death sentence in capital cases in Philadelphia between 1983 and 1993). *See also* Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984).

[415] TEX. CODE CRIM. PROC. ANN. art. 37.071 (2013).

[416] For more information on the manner by which Texas capital juries are instructed, see Chapter Ten on Capital Jury Instructions.

[417] TEX. CODE CRIM. PROC. ANN. art. 36.14 (2013).

which the court may give or refuse.[418] The Texas Court of Criminal Appeals has urged caution, however, with respect to trial courts' issuing additional instructions, particularly "if [an] instruction is not derived from the [Texas] code, it is not 'applicable law'" and, therefore, neither party would be entitled to it. [419] In developing their instructions, Texas courts may rely on unofficial pattern jury instructions, such as those found in *Texas Criminal Jury Charges*.[420]

Texas law does not require capital jurors to be instructed that a mental disorder is a mitigating factor, not an aggravating factor. Nor are trial courts required to instruct jurors that they should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society or that they should distinguish between the defense of insanity and the defendant's subsequent reliance on a mental disorder or disability as a mitigating factor.

In fact, Texas law does not require any penalty phase capital jury instructions related to the defendant's mental health or the role it plays in mitigation.[421] Rather, capital jurors are required to receive only a broad instruction on mitigation which asks them to consider

> [w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.[422]

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[418] TEX. CODE CRIM. PROC. ANN. art. 36.15 (2013).

[419] *See* Walters v. State, 247 S.W.3d 204, 214 (Tex. Crim. App. 2007) (finding a requested instruction to be "a marginally 'improper judicial comment' because it [was] simply unnecessary and fail[ed] to clarify the law for the jury"). *See also* Brown v. State, 122 S.W.3d 794, 802 (Tex. Crim. App. 2003) (agreeing that the instruction "intent or knowledge may be inferred by acts done or words spoken [. . .] improperly tells the jury how to consider certain evidence before it," even though the instruction is "neutral and [] does not pluck out any specific piece of evidence" (internal quotations omitted)). For a full discussion on jury instructions in death penalty cases, see Chapter Ten.

[420] *See* ELIZABETH BERRY, GEORGE GALLAGHER & PAUL MCCLUNG, TEXAS CRIMINAL JURY CHARGES (2008). The Texas Court of Criminal Appeals and several districts of the Texas Court of Appeals have cited favorably *Texas Criminal Jury Charges*. *See, e.g.*, Cobarrubio v. State, 675 S.W.2d 749, 751 n.8 (Tex. Crim. App. 1983), *overruled by* Lawrence v. State, 700 S.W.2d 208, 213 (Tex. Crim. App. 1985). Perez v. State, No. 03-01-00514-CR, 2002 WL 1289842, at *5 (Tex. App. June 13, 2002) (third district); Mendoza v. State, 61 S.W.3d 498, 505 (Tex. App. 2001) (fourth district); Johnson v. State, No. 05-95-01024-CR, 1999 WL 1268056, at *7 n.6 (Tex. App. Dec. 30, 1999) (fifth district); Walters v. State, 206 S.W.3d 780, 783 n.3 (Tex. App. 2006) (sixth district), *vacated*, 247 S.W.3d 204 (Tex. Crim. App. 2007); Ratheal v. State, No. 07-97-0353-CR, 1998 WL 847584, at *1 n.1 (Tex. App. Dec. 8, 1998) (seventh district); North v. State, No. 08-05-00248-CR, 2007 WL 416691, at *9 (Tex. App. Feb. 8, 2007) (eighth district); Hernandez v. State, 10 S.W.3d 812, 819 (Tex. App. 2000) (ninth district); Lankford v. State, 255 S.W.3d 275, at 280 n.5 (Tex. App. 2008) (tenth district); Fox v. State, No. 13-03-230-CR, 2006 WL 2521622, at *4 n.32 (Tex. App. Aug. 31, 2006) (eleventh district); Lacaze v. State, 346 S.W.3d 113, 119 (Tex. App. 2011) (fourteenth district). *But see* Middleton v. State, 125 S.W.3d 450, 454 (Tex. Crim. App. 2003) (impliedly disagreeing with the recommendation from *Texas Criminal Jury Charges* that "probable cause" be defined for a jury); Johnson v. State, 739 S.W.2d 299, 305 n.4 (Tex. Crim. App. 1987) (explicitly criticizing the pattern instruction on alternative theories of culpability for "fail[ing] [to] sufficiently inform the jury which specific mode or modes of conduct enumerated [under Texas law] . . . may form an alternative basis for conviction").

[421] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (2013).

[422] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (2013). With respect to mitigation, jurors are further instructed that they "shall consider mitigating evidence to be evidence that [they] might regard as reducing the defendant's moral blameworthiness." TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f) (2013).

Texas Criminal Jury Instructions also provide no penalty phase instructions relevant to mental illness and disability.[423]

Moreover, the Texas Court of Criminal Appeals has held that there is "no constitutional requirement that the jury be charged concerning any particular circumstance alleged to be mitigating,"[424] nor are capital defendants "entitled to jury instructions specifically informing the jury that certain evidence may be considered" as mitigating evidence.[425] Thus, even if a capital defendant presents ample evidence of mental illness or disability to the jury, the trial court is not required to give any special instruction on how that evidence is to be considered.

The failure to explain to a capital jury how to give effect to evidence of mental illnesses and disabilities is especially troubling because of Texas's unique capital sentencing scheme. Texas statutory law dictates that, in penalty phase instructions, the trial court must first ask the jury to determine if the defendant represents a future danger to society; only after deciding unanimously that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" will the jury consider whether any evidence in mitigation supports a sentence less than death.[426]

The future dangerousness instruction forces the capital defendant's mental health history to be considered, first and foremost, as evidence in aggravation of punishment. The Texas Court of Criminal Appeals has held that "psychiatric evidence" is a relevant factor for the jury to consider "when determining whether the defendant will pose a continuing threat of violence to society."[427] Mental health experts routinely testify for the prosecution in Texas death penalty cases on the issue of future dangerousness,[428] despite the fact that social scientific research has discredited the ability of experts to assess a defendant's future danger to society.[429] As discussed above, one psychiatrist, Dr. Richard Coons, testified in over fifty Texas capital cases regarding future

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[423] *See* BERRY ET AL., *supra* note 420.

[424] Williams v. State, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996) (citing Penry v. State, 903 S.W.2d 715, 766 (1995)).

[425] Robertson v. State, 871 S.W.2d 701, 712 (Tex. Crim. App. 1993) (quoting Lane v. State, 822 S.W.2d 35, 39 (Tex. Crim. App. 1991)). *See also* Raby v. State, 970 S.W.2d 1, 3 (Tex. Crim. App. 1998) ("[T]he law does not require a juror to consider any particular piece of evidence as mitigating.")

[426] TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)–(e) (2013). Of the thirty-three states with the death penalty, Oregon is the only other jurisdiction to employ a capital punishment sentencing procedure like the Texas model. *See* Stephen Kanter, *Confronting Capital Punishment: A Fresh Perspective on the Constitutionality of the Death Penalty Statutes in Oregon*, 36 WILLAMETTE L. REV. 313, 317-318 (2000). As of July 2012, the Governor of Oregon has maintained a moratorium on executions in the state. Peter Wong, *Haugen to Return to Court*, STATESMAN J. (Salem, Or.), July 22, 2012, at A1, *available at* 2012 WLNR 15482882.

[427] Keeton v. State, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987).

[428] Coble v. State, 330 S.W.3d 253, 299 (Tex. Crim. App. 2010) (Keller, P.J., concurring) (noting that one expert alone had testified on the issue of future dangerousness in more than fifty cases).

[429] *See, e.g.*, Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 ALB. L. REV. 845, 848–49 (1990) (using data from Texas to show that "dangerousness is vastly over-predicted, and that predictions of nondangerousness are far more accurate than are predictions of dangerousness"); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984); Thomas J. Reidy, Mark D. Cunningham & Jonathan R. Sorensen, *From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana*, 28 CRIM. JUST. & BEHAV. 62 (2001). For further examination of the future dangerousness issue, see Chapter Ten on Capital Jury Instructions, Recommendation #5.

dangerousness before his methodology was deemed flawed by the Court of Criminal Appeals.[430] Nonetheless, expert diagnosis of a mental disorder continues to be used as a justification for a finding of future dangerousness.[431]

Conclusion

Texas law does not require capital jurors to be instructed on the manner by which evidence of mental illness and mental disorder should be considered in the penalty phase of a death penalty case, nor does it appear that trial courts typically provide such instructions. Accordingly, Texas is not in compliance with Recommendation #8.

Recommendation

The Assessment Team recommends that Texas implement capital jury instructions that clearly communicate that a mental disorder or disability is a mitigating factor, not an aggravating factor; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on a mental disorder or disability as a mitigating factor. For these new instructions to be effective, however, Texas must also remedy the underlying problems in its capital sentencing structure that permit evidence of psychiatric disorders to be used to justify a death sentence. Thus, the Assessment Team reiterates the need for Texas to substantially amend its capital sentencing scheme as described in Chapter Ten on Capital Jury Instructions, Recommendation #5.

N. Recommendation #9

> **Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant's perceived demeanor, and that this should not be considered in aggravation**.

The U.S. Supreme Court has observed that the courtroom demeanor of capital defendants who have a mental disability such as mental retardation "may create an unwarranted impression of lack of remorse for their crimes," thereby increasing the chance that they will receive the death penalty.[432] Similarly, a mentally ill defendant's demeanor may be affected if s/he is taking

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[430] *See supra* notes 369–373 and accompanying text. Despite this finding, psychiatric evidence of future dangerousness continues to be admissible in Texas capital cases. *See Coble*, 330 S.W.3d at 275.

[431] *See, e.g.*, Olsen v. State, No. AP–76175, 2012 WL 1438475, at *12 (Tex. Crim. App. Apr. 25, 2012) (holding that diagnosis of "conduct disorder/oppositional-defiant disorder pattern and an emerging narcissistic/histrionic/antisocial personality" justified finding of future dangerousness); Gobert v. State, No. AP-76345, 2011 WL 5881601, at *7 n.17 (Tex. Crim. App. Nov. 23, 2011) (holding that diagnosis of conduct disorder was relevant to finding of future dangerousness); Devoe v. State, 354 S.W.3d 457 (Tex. Crim. App. 2011) (holding that diagnosis of "intermittent explosive disorder" justified finding of future dangerousness); Robertson v. State, No. AP-71224, 2011 WL 1161381, at *2 (Tex. Crim. App. Mar. 9, 2011) (holding that diagnosis of antisocial personality disorder justified finding of future dangerousness).

[432] Atkins v. Virginia, 536 U.S. 304, 321 (2002). Some jurisdictions allow the trial court to instruct the jury that, because of the defendant's mental condition, s/he is being administered a prescription medication that may affect his/her courtroom demeanor. *See, e.g.*, FLA. BAR, FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(c)

prescription medication that has mood-altering side effects. Lithium, for instance, which is used to treat bipolar disorder, may cause "[c]onfusion, poor memory, or lack of awareness" in some patients.[433]

The Ernest Willis case demonstrates the risk that a jury will misinterpret the demeanor-altering effects of medication.[434] Willis had been involuntarily medicated with antipsychotic drugs by the State during his capital trial for murder by arson, causing him to appear "indifferen[t] to the proceedings."[435] During closing arguments in the penalty phase, the prosecution argued that Willis's courtroom demeanor was evidence of his guilt and future dangerousness.[436] Willis's defense counsel were not aware that he had been medicated, and it appears that the jury was not instructed on this fact either.[437] The jury found Willis guilty and sentenced him to death.[438]

In subsequent federal proceedings, however, Willis was granted relief on several claims.[439] Moreover, new evidence indicated that Willis was likely innocent of the crime: another inmate had offered a detailed confession to the murder, and new expert analysis contradicted aspects of the prosecution's arson theory.[440] Based on this evidence, the prosecutor elected not to retry Willis, stating that he did not believe Willis was responsible for the fire.[441] In 2004, Willis was released from prison after seventeen years on death row.[442]

Texas law does not require a capital jury to be instructed that the defendant is receiving medication for a mental disorder or disability, that this may affect the defendant's perceived demeanor, and that this should not be considered in aggravation. Nor do the *Texas Criminal Jury Instructions* include an instruction on this issue.[443]

For these reasons, Texas is not in compliance with Recommendation #9.

(7th ed. 2010) (allowing Florida trial courts to instruct that the "(Defendant) currently is being administered psychotropic medication under medical supervision for a mental or emotional condition. Psychotropic medication is any drug or compound affecting the mind or behavior, intellectual functions, perception, moods, or emotion and includes anti-psychotic, anti-depressant, anti-manic, and anti-anxiety drugs."); State v. Hayes, 389 A.2d 1379, 1382 (N.H. 1978) (requiring New Hampshire trial courts to instruct jurors "about the facts relating to the defendant's use of medication" when a criminal defendant is forcibly medicated before trial).

[433] *Lithium (Oral Route)*, MAYO CLINIC, http://www.mayoclinic.com/health/drug-information/DR600869/DSECTION=side-effects (last visited June 19, 2012).

[434] The myriad of issues that arose in the Willis case are discussed further in Chapter Eight on State Post-conviction Proceedings, Recommendation #4.

[435] Willis v. Cockrell, No. P-01-CA-20, 2004 WL 1812698, at *1–2, *4 (W.D. Tex. Aug. 9, 2004).

[436] *Id.* at *4.

[437] *Id.* at *5–6.

[438] *Id.* at *1–2.

[439] *Id.* at *35.

[440] *Id.* at *9–10.

[441] Michael Gracyzk, *Death-row Inmate Freed after 17 Years*, PHILA. INQUIRER, Oct. 7, 2004, at A19.

[442] *Id.*

[443] *See supra* note 420.

O. Recommendation #10

The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of their mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.

As with defendants who have mental retardation, there is a risk that the mentally ill will waive their rights due to their mental illness.[444] A study conducted in 2005 found that, of the 106 death row inmates in the United States who waived their appeals and volunteered for the death penalty, at least 77% suffered from a mental illness.[445] Given that there have been twenty-five such death penalty volunteers in Texas, more than in any other state, it is likely that a significant number of Texas death row inmates who chose to waive their appeals also suffered from mental illnesses.[446] As such, it is important for the mentally ill to be protected from waivers that are caused by their disability rather than by a rational choice.

Protection from Waivers

While the trial court may consider a defendant's mental illness when determining whether an inmate is competent to waive his/her rights, the court is not required to make a formal inquiry into the defendant's mental history under any circumstances.[447] Thus, there is a risk that mental illnesses and impairments that are not immediately apparent will go unnoticed, allowing mentally ill defendants to waive rights they do not fully understand.

In one recent non-capital case, *Chadwick v. State*, the Texas Court of Criminal Appeals applied the U.S. Supreme Court's decision in *Indiana v. Edwards* to allow a trial court to deny the defendant's request to represent himself.[448] In that case, the defendant outwardly displayed his mental illness by making bizarre statements in court, obviating the need for the trial court to conduct a deeper inquiry into his mental health.[449]

In other cases, however, courts have conducted a limited inquiry of the defendant's mental state before allowing the defendant to waive one or more constitutional rights. A 2012 review of Texas death row volunteers who sought to waive their right to appeal or collateral review found that "[i]n some cases, no mental health expert was consulted" and that "[t]wo prisoners were

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[444] *See supra* note 293 and accompanying text.
[445] Blume, *supra* note 7, at 962.
[446] NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), DEATH ROW U.S.A. 10–11 (Spring 2012), a*vailable at* http://www.naacpldf.org/files/publications/DRUSA_Spring_2012.pdf.
[447] *See supra* notes 293–309 and accompanying text.
[448] Chadwick v. State, 309 S.W.3d 558, 562 (Tex. Crim. App. 2010).
[449] *See id.* At one point during a pretrial hearing, the defendant told his attorney, "May Yaweh curse you till the end and may I put an eternal indictment on you and I will prosecute you to eternity." *Id.*

simply asked by the judge whether they had a history of mental illness."[450] In many cases, the court "relied heavily on interviews with the prisoner [instead of mental health experts], including for the prisoner's mental health history."[451]

For instance, Christopher Swift, a death row inmate who suffered from auditory hallucinations, was permitted to waive his appeals after he wrote a letter to the Texas Court of Criminal Appeals stating that he "had been manipulated into giving an interview [to a mental health expert] which could potentially destroy my chances of foregoing an appeal(s)."[452] Swift had told the expert that he still suffered from hallucinations, but he informed the court that "[s]ince that time and thanks be to God and my Christian friends who have encouraged me so, I have been freed completely from these voices."[453] Swift was executed in 2007 after only twenty-one months on death row.[454]

Next Friend Petitions

Next friend petitions provide a means to protect a mentally ill or disabled inmate from waiving his/her post-conviction rights. Under federal law, for instance, a third party may have standing as a next friend to file a post-conviction petition for federal habeas corpus relief if the purported next friend can demonstrate that (1) the inmate is incompetent and unable to make a rational decision as to whether to seek post-conviction relief; and (2) s/he is "truly dedicated to the best interests of the person on whose behalf [s/]he seeks to litigate."[455] It is in the federal court's discretion as to whether a next friend may be appointed to pursue post-conviction relief on behalf of an incompetent death row inmate.[456]

Texas does not expressly permit a next friend to act on a death row inmate's behalf in state habeas proceedings.[457] While Texas statutory law provides that next friends or guardians ad litem may be appointed to represent "[m]inors, lunatics, idiots, or persons non compos mentis who have no legal guardian" in civil proceedings, it does not appear that there is a similar provision for criminal proceedings.[458]

Conclusion

Texas has enacted some procedures to protect persons with mental disorders and disabilities from waivers that are the product of their mental disorder or disability. However, those

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[450] Meredith Martin Rountree, *"I'll Make Them Shoot Me": Accounts of Death Row Prisoners Advocating for Execution*, 46 LAW & SOC'Y REV. 589, 606 (2012).
[451] *Id.*
[452] *Id.* (citing State v. Swift, AP-75, 186 (Tex. Crim. App. 2006)).
[453] *Id.*
[454] *Killer of Wife, Mother-in-law Executed*, HOUS. CHRON., Jan. 31, 2007, at B5.
[455] *See* Whitmore v. Arkansas, 495 U.S. 149, 164–65 (1990); *see also* Harper v. Parker, 177 F.3d 567, 569 (6th Cir. 1999).
[456] *Whitmore*, 495 U.S. at 166 ("We therefore hold that [a would-be next friend], having failed to establish that [an inmate] is unable to proceed on his own behalf, does not have standing to proceed as "next friend" of [the inmate]"); *see also* Rees v. Peyton, 384 U.S. 312, 314 (1966).
[457] It is unclear whether a writ for habeas corpus relief can be filed without the death row inmate's participation.
[458] TEX. R. CIV. PROC. 44.

procedures, in many instances, are inadequate.[459] Moreover, Texas does not expressly permit next friends to represent death row inmates in state habeas proceedings. Thus, Texas is in partial compliance with Recommendation #10.

Recommendation

The Assessment Team recommends that Texas enact protections against waivers that are the product of mental disability or defect, as discussed in Mental Retardation Recommendation #7 above. In addition, Texas should develop a procedure that permits a next friend to act on a mentally impaired death row inmate's behalf in state habeas proceedings. This procedure could be modeled on existing federal law.

P. Recommendation #11

> **The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel in connection with such proceedings, and the prisoner's participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner's sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner's capacity to participate in post-conviction proceedings in the foreseeable future.**

Claims raised in post-conviction proceedings, such as ineffective assistance of counsel and prosecutorial misconduct, are often complicated and factually intensive. Thus, in order to effectively litigate post-conviction claims, the inmate must be able to communicate relevant facts to his/her attorney. When a death row inmate's mental illness or disability prevents such communication, proceedings should be stayed or tolled until the inmate is able to adequately assist with his/her case.

Texas law does not require state habeas proceedings to be stayed due to an inmate's mental disorder or disability.[460] While the Texas Court of Criminal Appeals has the power to hold habeas proceedings in abeyance, it has never done so because an inmate lacked the mental capacity to assist counsel.[461]

Moreover, Texas's capital habeas procedure imposes short filing periods, which may be especially burdensome on mentally ill or mentally disabled inmates who cannot effectively assist their attorneys. The habeas application "must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel . . . or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals,

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[459] *See supra* notes 293–309 and accompanying text.

[460] *See* TEX. CODE CRIM. PROC. ANN. art. 11.071 (2013).

[461] *E.g.*, *Ex parte* Powell, No. WR-70976-01, 2008 WL 5181705, at *2 (Tex. Crim. App. Dec. 10, 2008) (ordering state habeas application in a non-capital case to be held in abeyance to allow further development of factual issues); *Ex parte* Hendrix, No. WR-65462-01, 2006 WL 2879787, at *2 (Tex. Crim. App. Oct. 11, 2006) (same).

whichever date is later."[462] The trial court may grant the inmate an extension or excuse a late filing upon a showing of "good cause."[463] However, it does not appear that extensions or late filings have been permitted due to an inmate's mental illness or mental disorder.[464]

For these reasons, Texas is not in compliance with Recommendation #11. The Assessment Team recommends that Texas amend its capital state habeas statute to require the trial court to stay habeas proceedings upon a finding that the inmate has a mental disorder or disability that significantly impairs his/her capacity to understand or communicate pertinent information, or otherwise to assist counsel.

Q. Recommendation #12

> **The jurisdiction should provide that a death row inmate is not "competent" for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate's own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction's and death sentence's validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.**

Historical Background on Competency for Execution

In 1986, the U.S. Supreme Court held in *Ford v. Wainwright* that it is unconstitutional to execute an insane death row inmate who is not aware of his/her impending execution and the reasons for it.[465] However, the Court revisited the issue in a 2007 case arising out of Texas, *Panetti v. Quarterman*, due to several deficiencies in the procedures used by Texas courts to determine an inmate's competency for execution.[466]

The death row inmate, Scott Panetti, had previously filed a motion in a Texas trial court, pursuant to Texas statutory law, alleging he was incompetent to be executed due to mental illness.[467] The trial court denied the motion without a hearing.[468] Panetti appealed the ruling to the Texas Court of Criminal Appeals; however, the court held that it did not have the statutory authority to review the trial court's decision unless the trial court had found the inmate to be

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[462] TEX. CODE CRIM. PROC. ANN. art. 11.071 § 4(a) (2013).

[463] TEX. CODE CRIM. PROC. ANN. art. 11.071 §§ 4(b), 4A(b) (2013).

[464] In one case, for instance, late filing was permitted because inclement weather prevented overnight delivery of the habeas application. *Ex parte* Gobert, No. WR-77090-01, 2012 WL 479689, at *1 (Tex. Crim. App. Feb. 15, 2012). In another case, the court found good cause for a late filing because inmate's counsel had been hospitalized, and the state did not object to the late filing. *Ex parte* Carter, No. WR-70722-01, 2009 WL 190161, at *1 (Tex. Crim. App. Jan. 28, 2009).

[465] Ford v. Wainwright, 477 U.S. 399, 409–10 (1986).

[466] *See* Panetti v. Quarterman, 551 U.S. 930 (2007).

[467] *Id.* at 937–38 (citing TEX. CODE CRIM. PROC. ANN. art. 46.05). The motion was filed shortly after his execution date was set by the trial court. *Id.*

[468] *Id.* at 938.

incompetent following a hearing.[469] The federal district court subsequently granted Panetti a stay of execution to "allow the state court a reasonable period of time to consider the evidence of [his] current mental state."[470]

When Panetti returned to the state trial court, the trial judge refused to provide defense counsel with funding to hire its own mental health experts, and instead appointed its own experts without consulting counsel.[471] The court-appointed experts determined, in their evaluations, that Panetti was competent to be executed and that his symptoms were malingered.[472] Relying on these evaluations, the trial court denied Panetti's claim without an evidentiary hearing.[473]

In reviewing this procedure, however, the U.S. Supreme Court found several flaws. As a result, the Court reaffirmed that *Ford* requires the trial court to grant a fair evidentiary hearing to the inmate once "a substantial threshold showing of insanity" is made.[474] The hearing must provide "an opportunity to submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination."[475] The Court also clarified the standard for determining an inmate's competency: rather than simply being aware of his/her impending execution, the inmate must have a "*rational* understanding" of the reasons for it.[476]

Texas Law on Competency for Execution

The Texas statute governing competency for execution has not been substantively amended since the *Panetti* decision.[477] After an execution date has been set, the death row inmate must file a motion in the trial court "clearly set[ting] forth alleged facts in support of the assertion that he is presently incompetent to be executed."[478] The motion must be supported by "affidavits, records, or other evidence."[479] Based on this information, the trial court must determine whether the inmate has "raised a substantial doubt" of his/her competency.[480] If the inmate was previously found to be competent under the Texas statute, however, he will be presumed competent "unless he makes a prima facie showing of a substantial change in circumstances sufficient to raise a significant question as to his competency to be executed."[481]

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[469] *Id. See also Ex parte* Panetti, No. 74868, 2004 WL 231461, at *1 (Tex. Crim. App. Jan. 28, 2004) (citing *Ex parte* Caldwell, 58 S.W.3d 127 (Tex. Crim. App. 2000)).
[470] Panetti v. Quarterman, 551 U.S. 930, 940 (2007).
[471] *Id.* at 939.
[472] *Id.* at 940.
[473] *Id.*
[474] *Id.* at 949 (quoting Ford v. Wainwright, 477 U.S. at 426, 424 (1986).
[475] *Id.* at 949–50 (quoting *Ford*, 477 U.S. at 427).
[476] *Id.* at 959 (emphasis added). The U.S. Supreme Court remanded Panetti's case for a determination of his competency. *Id.* at 962. Subsequently, the federal district court found him competent to be executed. Panetti v. Quarterman, No. A-04-CA-042-SS, 2008 WL 2338498, at *37 (W.D. Tex. Mar. 26, 2008).
[477] A 2007 amendment to the statute consisted of minor changes not relevant to this discussion. *Compare* TEX. CODE CRIM. PROC. ANN. art. 46.05 (2013) *with* TEX. CODE CRIM. PROC. ANN. art. 46.05 (2006). *See also* Green v. State, 374 S.W.3d 434, 443 (Tex. Crim. App. 2012) ("No relevant changes to [Texas's execution competency statute] were made after *Panetti*").
[478] TEX. CODE CRIM. PROC. ANN. art. 46.05(c) (2013).
[479] *Id.*
[480] TEX. CODE CRIM. PROC. ANN. art. 46.05(d) (2013).
[481] TEX. CODE CRIM. PROC. ANN. art. 46.05(e) (2013).

If the trial court finds that the inmate has made a threshold showing of incompetency, "the court shall order at least two mental health experts to examine" the inmate.[482] The court must then determine the inmate's competency based on these experts' reports, "the motion, any attached documents, any responsive pleadings, and any evidence introduced in the final competency hearing."[483] The statute defines an incompetent inmate as one who "does not understand . . . that he or she is to be executed and that the execution is imminent; and . . . the reason he or she is being executed."[484] The inmate bears the burden of proving that s/he is incompetent by a preponderance of the evidence.[485]

Following the trial court's determination of the inmate's competency and "on motion of a party," the Texas Court of Criminal Appeals must determine whether "to adopt the trial court's order, findings, or recommendations" and "whether any existing execution date should be withdrawn and a stay of execution issued."[486] If the Court of Criminal Appeals determines that the inmate is not incompetent, "the trial court may set an execution date as otherwise provided by law."[487] On the other hand, if the Court of Criminal Appeals grants a stay of execution, "the trial court periodically shall order that the [inmate] be reexamined by mental health experts to determine whether he is no longer incompetent to be executed."[488]

The language of the Texas statute fails to comport with *Panetti*. While the statute mentions a "competency hearing," it does not state that an inmate is entitled to a hearing after making a threshold showing of incompetency.[489] Nor does the statute explain what evidence the inmate is entitled to present during the competency hearing. Moreover, while *Panetti* arguably entitles the inmate the right to funds to hire independent mental health experts,[490] the Texas statute provides only for experts to be appointed by the court.[491] Finally, the competency standard in the Texas statute does not require the inmate to have a *rational* understanding of the reasons for his/her execution.[492] Because of some of these deficiencies, a federal district court found the Texas statute to be unconstitutional in 2008.[493] This court further observed that the Texas system, which "requires an insane person to first make 'a substantial showing' of his own lack of mental capacity without the assistance of counsel or a mental health expert, in order to obtain such assistance is, by definition, an insane system."[494]

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[482] TEX. CODE CRIM. PROC. ANN. art. 46.05(f) (2013).
[483] TEX. CODE CRIM. PROC. ANN. art. 46.05(k) (2013).
[484] TEX. CODE CRIM. PROC. ANN. art. 46.05(h) (2013).
[485] TEX. CODE CRIM. PROC. ANN. art. 46.05(k) (2013).
[486] TEX. CODE CRIM. PROC. ANN. art. 46.05(l) (2013).
[487] TEX. CODE CRIM. PROC. ANN. art. 46.05(n) (2013).
[488] TEX. CODE CRIM. PROC. ANN. art. 46.05(m) (2013).
[489] *See* TEX. CODE CRIM. PROC. ANN. art. 46.05 (2013).
[490] Panetti v. Quarterman, 551 U.S. 930, 949–50 (2007) (noting a right to "submit evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination").
[491] TEX. CODE CRIM. PROC. ANN. Art. 46.05(f) (2012).
[492] TEX. CODE CRIM. PROC. ANN. Art. 46.05(h) (2012).
[493] Wood v. Quarterman, 572 F. Supp. 2d 814, 817–18 (W.D. Tex. 2008), *vacated on other grounds by* Wood v. Thaler, 787 F. Supp. 2d 458 (W.D. Tex. 2011).
[494] Wood v. Quarterman, 572 F. Supp. 2d at 817.

In a post-*Panetti* case, however, the Texas Court of Criminal Appeals held the competency statute to be constitutional.[495] The court found that *Panetti* requires only that the inmate be entitled to "(1) a constitutionally adequate opportunity to be heard, and (2) an 'adequate opportunity to submit expert evidence in response.'"[496] While the court did not examine the discrepancies between the statute's competency standard and the standard articulated in *Panetti*, it applied the *Panetti* standard in its analysis.[497] The court did not find that *Panetti* requires the appointment of independent experts to assist defense counsel.[498]

Marcus Druery

The Marcus Druery case highlights problems with Texas's method to determine competency for execution. Druery was sentenced to death in 2003 for a robbery and murder in Brazos County.[499] While on death row, however, Druery's behavior became erratic. He told prison officials that "his cell had been wired and voices were giving him orders to act out and question certain aspects of his trial."[500] Druery also sent a letter to the Brazos County District Court requesting a stay of execution because a reality television star "need[ed] to be questioned properly" about his case and alleging that he is "one of the last surviving males of God's lineage."[501] Prison psychiatrists and a neuropsychologist hired by defense attorneys diagnosed Druery with schizophrenia.[502] The defense neuropsychologist further stated that while Druery "has a factual awareness that an execution date has been scheduled for the crime for which he was tried, he does not believe that he will be executed because of his illogical, fixed and firmly held delusional belief system."[503]

In 2012, this evidence was presented to the trial court in a motion for a hearing on Druery's competency to be executed.[504] The trial court, however, ruled that a competency hearing was not necessary and denied the motion.[505] Furthermore, because the court ruled that Druery did not make a "substantial showing" of incompetency, it did not appoint mental health experts to examine him.[506]

A few days after the trial court's order, the Texas Court of Criminal Appeals "determined that further review [of Druery's competency] is necessary" and issued a stay of execution.[507] Under

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[495] Green v. State, Nos. AP–76,374, AP–76,376, AP–76,381, 2012 WL 2400651, at *7 (Tex. Crim. App. June 27, 2012).
[496] *Id.* at *4 (quoting Panetti v. Quarterman, 551 U.S. 930, 951 (2007)).
[497] *Id.* at *7.
[498] *See id.* at *4. In this specific case, however, the inmate was provided with expert assistance. *Id.*
[499] Maggie Kiely, *Judge Rejects Motions to Forestall Druery Execution*, EAGLE (Bryan, Tex.), July 25, 2012.
[500] *Id.*
[501] *Id.*
[502] *Id.*
[503] *Id.*
[504] *Id.*
[505] Allan Turner, *Bryan Judge Says Next Week's Execution Can Go Forward*, HOUS. CHRON., July 24, 2012.
[506] *Id. See also* TEX. CODE CRIM. PROC. ANN. art. 46.05(f) (2013).
[507] Druery v. State, No. AP-76,833 (Tex. Crim. App. July 27, 2012), *available at* http://www.cca.courts.state.tx.us/opinions/HTMLopinionInfo.asp?OpinionID=22777.

the Texas competency statute, however, a trial court's decision to refuse a competency hearing is not considered reviewable on appeal.[508]

Persons have been executed in Texas despite evidence of serious mental illness.[509] At least five persons who suffered from severe mental disorders, including paranoid schizophrenia, have been executed in Texas since the U.S. Supreme Court reinstated the death penalty in 1976.[510] One of these men, for instance, believed that supernatural intervention would prevent his execution; another was executed despite the fact that the Texas Board of Pardons and Parole recommended that the governor grant clemency.[511]

Conclusion

Although Texas has enacted a statute outlining procedures for determining whether an inmate is competent to be executed, that statute has several significant shortcomings. It requires the inmate to present substantial evidence of incompetency *before* mental health experts are appointed, effectively requiring the inmate to prove s/he suffers from a mental disorder before being granted resources to investigate that disorder. Even if experts are appointed, the experts are selected by the trial court without requiring input from defense counsel. The statute also fails to describe when, if ever, an inmate is entitled to a hearing on the issue of competency. Texas law also does not provide that when a finding of incompetence is made after challenges to the conviction and death sentence have been exhausted and execution has been scheduled, the death sentence shall be reduced to life in prison.

Finally, the Texas statute's competency definition does not comport with the definitions supported by the ABA or mandated by *Panetti*. While the Texas Court of Criminal Appeals has required courts to apply the *Panetti* standard notwithstanding the statutory definition, the statute may cause confusion among trial courts attempting to determine an inmate's competency. Accordingly, Texas is in partial compliance with Recommendation #12.

Recommendation

Texas law must be amended in order to comport with *Panetti* to ensure than any inmate facing execution possesses a rational understanding of the reason for imposition of the death penalty in his/her case. Moreover, the statute should provide that mental health experts must be appointed automatically when the inmate seeks to raise a competency claim shortly before his/her execution. The expert(s) should be selected by the court with input from defense counsel. The inmate should not be required to demonstrate evidence of incompetency *before* receiving the benefit of expert assistance. If, after the expert evaluation, the inmate can demonstrate a "substantial doubt" as to his/her competency under the *Panetti* standard, the court should be

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[508] TEX. CODE CRIM. PROC. ANN. art. 46.05 (2013); *Ex parte* Panetti, No. 74868, 2004 WL 231461, at *1 Tex. Crim. App. Jan. 28, 2004) (citing *Ex parte* Caldwell, 58 S.W.3d 127 (Tex. Crim. App. 2000)).

[509] Marc Bookman, *13 Men Condemned to Die Despite Severe Mental Illness*, MOTHER JONES (Feb. 12, 2013), http://www.motherjones.com/politics/2013/01/death-penalty-cases-mental-illness-clemency (identifying seven men in Texas who have been executed or who are currently on death row despite suffering from serious mental illness).

[510] *Id.*

[511] *Id.*

required to hold an evidentiary hearing on the issue. After the hearing, the court should issue a written order detailing its findings of fact and conclusions of law.

R. Recommendation #13

> **Jurisdictions should develop and disseminate—to police officers, attorneys, judges, and other court and prison officials—models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.**

The extent to which Texas has developed and disseminated best practices for the treatment of mentally ill individuals is unclear. The Houston Police Department has established a Mental Health Unit for "responding to individuals in serious mental health crises."[512] The unit is composed of Crisis Intervention Team (CIT) officers, who receive forty hours of specialized crisis intervention training.[513] The department has also established a Crisis Intervention Response Team, which includes a "licensed mental health clinician from the Mental Health Mental Retardation Authority" to assist CIT officers.[514] Currently, the Houston Police Department is assisting in the development of a statewide CIT program.[515]

The Assessment Team applauds the Houston Police Department for developing this program. However, because the extent to which this and other programs have been adopted statewide is unclear, the Team is unable to determine whether Texas is in compliance with Recommendation #13.

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[512] *Our Mission*, HOUS. CIT, http://www.houstoncit.org/?page_id=8 (last visited Aug. 19, 2013).
[513] *Training*, HOUS. CIT, http://www.houstoncit.org/?page_id=325 (last visited Aug. 19, 2013).
[514] *History of HPD CIT*, HOUS. CIT, http://www.houstoncit.org/?page_id=60 (last visited Aug. 19, 2013).
[515] *Id.*

Selection of Examined Counties in Texas

Death Sentences

Statistics compiled by the Texas Department of Criminal Justice[1] indicate that 1,060 individuals have been given death sentences in the state since 1976 through 2011. These sentences are dispersed across 120 counties. Selecting only those counties with ten or more death sentences, there are twenty counties:

Table 1

Rank	County	Individuals Sentenced to Death
1	Harris	288
2	Dallas	102
3	Bexar	74
4	Tarrant	70
5	Nueces	24
6	Jefferson	23
7	Smith	22
T-8	Cameron	19
T-8	El Paso	19
T-8	Lubbock	19
T-8	Travis	19
12	Montgomery	18
13	Potter	17
T-14	Bowie	16
T-14	Hidalgo	16
T-16	McLennan	15
T-16	Collin	15
T-16	Brazos	15
T-19	Fort Bend	10
T-19	Navarro	10
		811

These twenty counties account for 76.5% of the 1,060 individuals sentenced. There is also a significant gap between fourth-ranked Tarrant County (seventy individuals sentenced) and fifth-ranked Nueces County (twenty-four individuals sentenced). If it is determined that a smaller sample size should be used, this may be the smallest feasible sample size, as it accounts for 50.4% of the 1,060 individuals sentenced.

[1] *See Total Number of Offenders Sentenced to Death from Each County*, TEX. DEP'T OF CRIMINAL JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_number_sentenced_death_county.html (last visited Nov. 4, 2011).

Population

The political organization of Texas, however, is not merely by county; one also must consider statewide and municipal entities. As for municipalities, Table 2 presents the twenty-eight cities that, according to the 2010 census, have 100,000 residents or more:

Table 2

Rank	City	Population (2010)	Primary County
1	Houston	2,099,451	**Harris**
2	San Antonio	1,327,407	**Bexar**
3	Dallas*	1,197,816	**Dallas**
4	Austin	790,390	Travis
5	Fort Worth*	741,206	**Tarrant**
6	El Paso	649,121	El Paso
7	Arlington	365,438	**Tarrant**
8	Corpus Christi	305,215	Nueces
9	Plano	259,841	Collin
10	Laredo	236,091	Webb
11	Lubbock	229,573	Lubbock
12	Garland*	226,876	**Dallas**
13	Irving*	216,290	**Dallas**
14	Amarillo	190,695	Potter
15	Grand Prairie*	175,396	**Dallas**
16	Brownsville	175,023	Cameron
17	Pasadena	149,043	**Harris**
18	Mesquite*	139,824	**Dallas**
19	McKinney	131,117	Collin
20	McAllen	129,877	Hidalgo
21	Killeen	127,921	Bell
22	Waco	124,805	McLennan
23	Carrollton*	119,097	Collin/**Dallas**/Denton
24	Beaumont	118,296	Jefferson
25	Abilene	117,063	Jones/Taylor
26	Denton	113,383	Denton
27	Midland	111,147	Midland
28	Wichita Falls	104,553	Wichita
		10,671,955 **42.4% of total population** **(25,145,561)**	

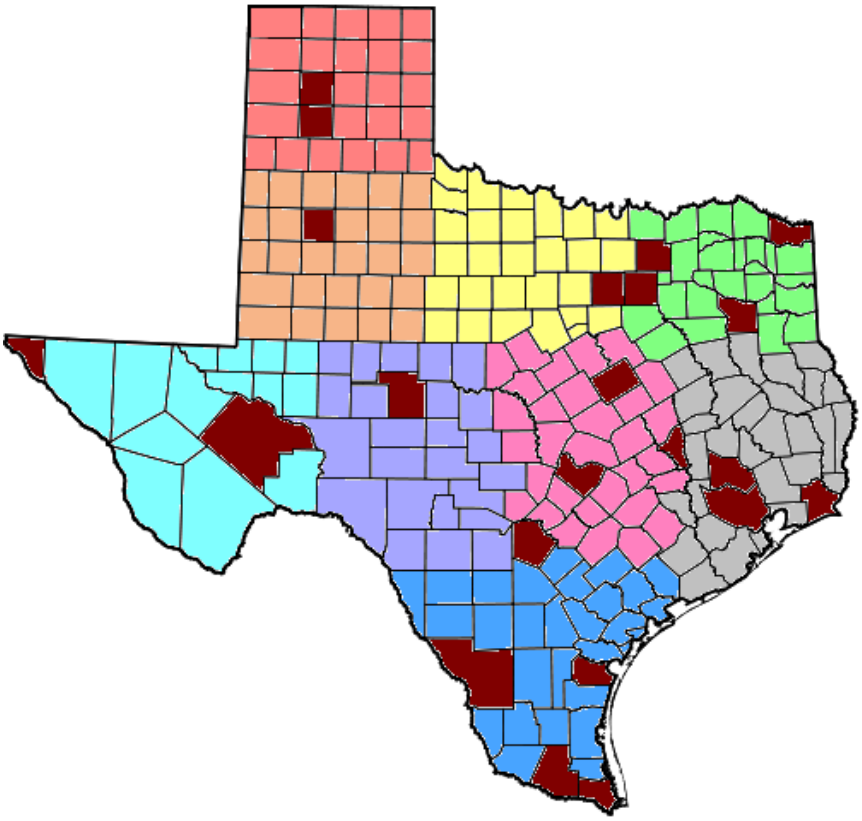
* City is part of the Dallas-Fort Worth "metroplex."

As Table 2 indicates, several of these cities are located within the counties listed in Table 1 (n.b., where that is *not* the case, the county name appears in gray; also, if the county is one of the top four ranked in Table 1, the county name appears in bold). Thus, by population, this table underscores the need for inclusion of Bexar, Dallas, Harris, and Tarrant Counties and—to a lesser extent Collin, El Paso, Lubbock, Nueces, and Travis Counties—in the Assessment Report's analysis.

Geography

An additional relevant consideration is the geographical diversity of the selected jurisdictions. The map of Texas (shown below) divides the state's 254 counties into nine regions: panhandle; northwest; north-central; north-east; west; central-west; central; central-east; and south.

Twenty-two counties have been shaded. These counties represent the vast majority of those counties included in Table 1 (eighteen of twenty), plus four additional counties added for geographic diversity. Specifically, these four counties are Randall (panhandle); Pecos (west); Tom Green (central-west); and Webb (south).



Final Selection of Examined Counties

Table 3, which includes only those counties shaded above, aggregates the information from Tables 1 and 2:

Table 3[2]

Rank	County	Region	Cities in County Among Top 28 in Population (2010)	Death Sentences
1	Harris	C-E	Houston (1), Pasadena (17)	288
2	Dallas	NE	Dallas (3), Garland (12), Irving (13), Grand Prairie (15), Mesquite (18), *Carrollton (23)*	102
3	Bexar	C	San Antonio (2)	74
4	Tarrant	N-C	Fort Worth (5), Arlington (7)	70
5	Nueces	S	Corpus Christi (8)	24
6	Jefferson	C-E	Beaumont (24)	23
7	Smith	NE	-	22
T-8	Cameron	S	Brownsville (16)	19
T-8	El Paso	W	El Paso (6)	19
T-8	Lubbock	NW	Lubbock (11)	19
T-8	Travis	C	Austin (4)	19
12	Montgomery	C-E	-	18
13	Potter	Panh.	*Amarillo (14)*	17
T-14	Bowie	NE	-	16
T-14	Hidalgo	S	McAllen (20)	16
T-16	McLennan	C	Waco (22)	15
T-16	Collin	NE	Plano (9), McKinney (19), *Carrollton (23)*	15
T-16	Brazos	C	-	15
T-21	Randall	Panh.	*Amarillo (14)*	9
T-29	Tom Green	C-W	-	6
T-39	Pecos	W	-	3
T-54	Webb	S	Laredo (10)	2
				811

To conclude, by focusing data collection efforts on the above-listed twenty-two counties and (the vast majority of) the above-listed twenty-three cities, the studied jurisdictions will account for 76.5% of the 1,060 individuals sentenced to death in Texas in the post-*Furman* era (as well as up to 40.2% of the state's total population as of 2010).[3] Furthermore, this scope encompasses all nine regions, ensuring that some of the geographical diversity of the state has been taken into account.

[2] The cities of Amarillo and Carrollton are in italics due to their multiple appearances in the fourth column.

[3] Whereas Table 2 includes the cities of Beaumont, Abilene, Denton, Midland, and Wichita Falls, Table 3 does not. In light of this exclusion, the total population percentage falls from 42.4% to 40.2%.

AMERICAN BAR ASSOCIATION
Texas Capital Punishment Assessment Team

Below is a list of questions related to the prosecution of capital cases in Texas. Please answer each question as thoroughly and accurately as possible, attaching additional pages if necessary.

Please note that we will keep confidential the name of the Office and District Attorney responding to this survey.

If your office has written policies that are fully responsive to any of the questions, please feel free to enclose the policies and respond to the question to which it is applicable by referring to the enclosed policy. If you prefer an electronic copy of this survey or would prefer to discuss the questions over the telephone, please email or call the *Texas Assessment Team Chair, Professor Jennifer Laurin, at (512) 232-3627 or via email at jlaurin@law.utexas.edu*. Responses may also be mailed to Professor Laurin at Office JON 5.235, The University of Texas at Austin, 727 E Dean Keeton Street, Austin, TX 78705.

For Contact Purposes Only:
Name: _____

District: _____

Date: _____

The areas of inquiry in the attached survey are the following:

1. **General Information about the Death Penalty in Your Jurisdiction**
2. **Training & Qualifications**
3. **Caseload, Funding & Compensation Information**
4. **Decision to Seek the Death Penalty**
5. **Plea Agreements**
6. **Discovery**
7. **Policies on Interrogations, Eyewitness Identifications, Informant Testimony**
8. **Policies on the Treatment of Persons with Mental Retardation and Mental Illness**
9. **Addressing Misconduct**

The survey also provides space for you to include any additional information you would like to pass on to the Texas Capital Punishment Assessment Team. Finally, the survey includes a copy of the ABA Protocols for the chapter on Prosecution. Other chapter protocols are available online at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/protocols2010.authcheckdam.pdf.

General Information about the Death Penalty in Your Jurisdiction

1. In how many cases has your office filed a notice to seek the death penalty since you became the District Attorney in your jurisdiction?

2. How many capital cases are currently pending in your office?

3. How many capital cases have been brought to a capital trial since you became the District Attorney?

4. How many capital cases have you personally tried (as first or second chair) in your capacity District Attorney or Assistant District Attorney? Please list dates, defendants' name, and dispositions. Please also include any other relevant experience, such as experience as a capital defense lawyer, you may have.

Training & Qualifications

5. How do you determine which prosecutors in your office handle cases in which the death penalty is sought? Please describe any minimum qualifications.

6. For each prosecutor in your office who handles capital cases, please provide the following information: (1) number of years each prosecutor has practiced law; (2) years of experience each has as a prosecutor; and (3) total number of prior capital cases handled by each prosecutor. *[Note: You need not provide names of prosecuting attorneys, but please provide some designation, such as "Prosecutor #1," etc.].*

7. What resources does your office use to train prosecutors to handle capital cases?

    a. What kinds of capital training programs, either in-house or through an outside organization, are offered?

    b. Are assistant prosecutors who handle capital cases required to attend these training programs? If not, how do you determine which prosecutors attend the trainings?

c. Do you feel these resources are adequate? Why or why not?

d. Are there any capital training programs that your prosecutors are no longer able to attend due to budget constraints? If so, please describe.

e. Do your capital prosecutors receive any special training relevant to the treatment of racial and ethnic minorities in capital cases? If so, please describe.

Caseload, Funding & Compensation

8. Are there any guidelines or office policies, practices, or procedures governing the caseload of prosecutors in your office who handle capital cases? Please describe these policies, practices, or procedures.

   a. Is there a minimum number of prosecutors assigned to each capital case? If so, what is that number and what is the procedure for determining whether a capital case receives a second-chair prosecutor?

   b. How many active capital cases is each of your capital prosecutors currently assigned to?

   c. What are the overall caseloads (capital and non-capital) of attorneys in your office who handle capital cases?

   d. What policies, if any, limit the number of active *non*-capital cases that your capital prosecutors are assigned to?

9. What is your office's current total budget?

   a. Has your office's budget changed over the last five years? If so, how?

   b. Have budget limitations required you to assign your capital prosecutors higher caseloads than you would prefer? If so, please describe what you believe your capital prosecutors' caseloads *should* be if you had a larger budget.

10. Does your office receive funding specifically designated for capital cases?

    a. If so, how much funding has your office received that is specifically earmarked for capital cases each year since you became the District Attorney, and what are the sources of that funding?

    b. If not, how does your office allocate funds to capital cases?

11. What are the current salaries for prosecutors in your office who handle capital cases?

12. If your office employs investigators, what are the current salary scales for the investigators in your office?

Decision to Seek the Death Penalty

13. Please describe your policies, practices, or procedures for determining whether to seek the death penalty in a case.

    a. *Evidence*. Does your office require any particular type of evidence be present in the case before deciding to seek a capital indictment? For instance, is physical evidence tying the defendant to the crime required for your office to seek a capital indictment?

    b. *Consultations.* With whom does your office consult before deciding to pursue a capital indictment *or* to seek the death penalty at sentencing after a capital conviction? (i.e. defense counsel, victim's family members, etc.) How does their opinion factor into your decision?

        i. Does your office consult with defense counsel before deciding to pursue a capital indictment *or* to seek the death penalty at sentencing after a capital conviction?

a. If so, does your office typically seek the consultation, or is the consultation at the request of defense counsel?

b. What sort of information does your office seek from defense counsel to help inform its decision (if applicable)?

c. *Alternative Punishment Available*. Has your office's decision to seek the death penalty since Life Without Parole became an available punishment in Texas? If so, please explain.

d. *Timing*. At one point during the investigation of a homicide case does your office decide to file a capital indictment?

1. Have there been instances in which your office initially charged a defendant with a lesser offense and then later amended the charge to include a capital indictment? If yes, please provide the names of the cases in which a capital indictment was sought after the defendant was originally charged with a lesser offense and dates of the original charge and subsequent capital indictment.

2. Please describe how your office determines, after capital indictment, not to seek the death penalty. If applicable, provide the names and dates of the cases in which you elected tonot to seek the death penalty after a capital indictment was returned, and provide an explanation as to why.

e. Who in your office is responsible for making the ultimate decision to seek the death penalty (whether at capital indictment or to move forward with the penalty phase after conviction of a capital offense)?

Plea Agreements

14. What policies, practices, or procedures are in place to determine whether to make a plea offer in capital or potentially-capital cases?

a. Who makes the ultimate decision as to whether to make a plea offer?

b. What factors are considered in making this determination?

15. Are there any circumstances in which your office prohibits plea offers? If so, what are those situations?

16. In your office, how many plea bargains were offered in capital cases and how many of those offers were accepted in the last three years?

Discovery

Trial

17. Please describe your office's policies, practices, and procedures relevant to discovery in trial-level capital cases.

    a. How does your office identify and disclose exculpatory, impeachment, or mitigating evidence for the defense?

    b. Do you provide prior statements of witnesses to the defense prior to trial? If so, how long before trial do you do so?

18. How do you ensure that the prosecutors in your office are meeting their discovery obligations?

19. What policies and procedures does your office have in place to ensure that other law enforcement agencies (police, crime laboratories, medical examiners, other experts employed by the state) provide all potentially exculpatory, impeachment, or mitigating evidence in a case to your office?

State Habeas

20. Explain your office's policies, practices, or procedures on providing discovery in capital state habeas cases?

    a. Do you require defense counsel to request specific discovery or do you accept a general discovery request in capital post-conviction cases?

Policies on Interrogations, Eyewitness Identifications, Informant Testimony

21. Does your office have any policies for evaluating the quality of the evidence in cases that primarily rely upon (1) eyewitness identifications, (2) confessions, or (3) the testimony of jailhouse informants and other witnesses who receive a benefit for their testimony? If so please describe.

22. Please describe any policies your office has in place governing how line-ups, show-ups, and photographic arrays should be administered to eyewitnesses.

Policies on the Treatment of Persons with Mental Retardation and Mental Illness

23. Does your office have any other policies relevant to the treatment of mentally ill or mentally retarded offenders in capital or potentially capital cases? If so, please describe.

24. Do your capital prosecutors receive any special training to help them recognize mental retardation, mental illness, and other mental health disorders in defendants, witnesses, or victims? If so, please describe the type of training they receive.

25. Please describe any policies your office has for assessing whether a confession made by a suspect who is mentally ill or mentally retarded was false or coerced, and whether that suspect fully understood his/her *Miranda* rights.

26. What criteria and qualifications does your office consider in selecting mental health experts to testify in a capital case?

Addressing Misconduct

27. Please describe any procedures and policies your office has in place to discover and appropriately discipline any misconduct by prosecutors in your office, including any policies that define what acts are considered to be "misconduct."

28. Have any of the prosecutors in your office been disciplined for prosecutorial misconduct in the last five years? If so, please describe.

Additional Information

29. What have been some of the most difficult challenges you or your office have faced in prosecuting capital cases?

30. Are there any other aspects of the capital punishment system in Texas that you believe the Assessment Team should focus on? If there are issues relevant to capital prosecutions that you believe were not covered in this survey, please do not hesitate to identify them.

Please do not hesitate to contact us if you have any questions or need clarification. We also welcome any additional comments or feedback you may have.