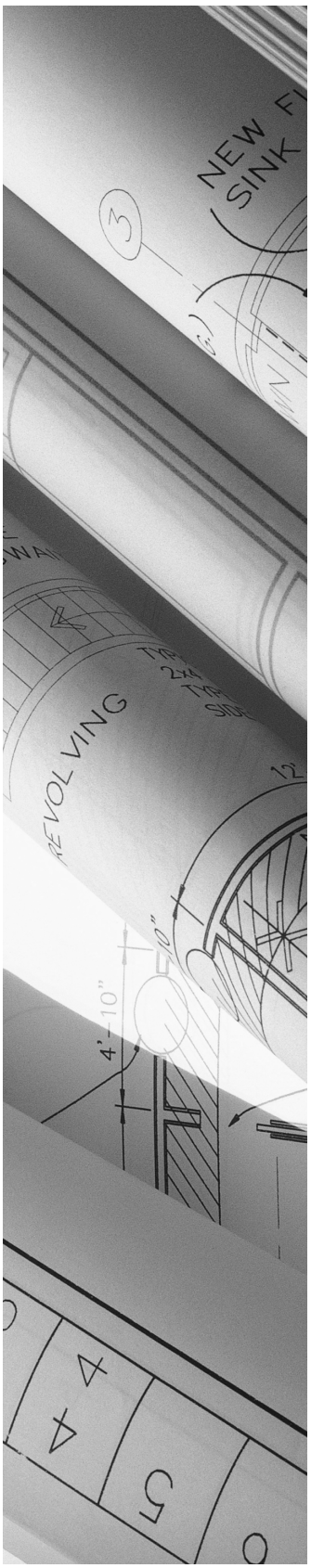

MINIMIZING RISK

A Blueprint for Death Penalty Reform in Texas

TEXAS DEFENDER SERVICE
Houston and Austin, Texas

Acknowledgements

Many people worked tirelessly on this project. TDS would like to extend our enormous thanks to Patrick Atkinson, Jacqui Cadman, Nicholas Chandler, Kelly Gier, Kirsten Jacobvitz, Melissa Hamilton, Georgina Kirkham, Elizabeth Melia, Caroline Meyers, Jill Meyers, Jessica Roberts, Deborah Fitzgerald Fowler, and Natalie Wortley.

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Texas Defender Service: Who We Are

Texas Defender Service (TDS) is a nonprofit organization established in 1995 by experienced Texas death penalty attorneys. There are four aspects of our work, all of which aim to improve the quality of representation provided to persons facing a capital sentence. These four components are: (a) direct representation; (b) consulting, training, case-tracking, and policy reform at the post-conviction level; (c) consulting, training, and policy reform focused at the trial level; and, (d) systemic research and report publication.

Direct Representation of Death-Sentenced Prisoners

Attorneys at TDS represent a limited number of prisoners on Texas' Death Row in their post-conviction proceedings, primarily in federal court, and strive to serve as a benchmark for quality of representation of death-sentenced inmates. TDS seeks to litigate cases that have a broad impact on the administration of capital punishment in Texas. TDS represents several inmates who received stays of execution from the U.S. Supreme Court because of potential mental retardation.

Consulting, Training, and Case-Tracking

Founded in 1999, the Post-Conviction Consulting and Tracking Project serves several critical purposes. First, the project has developed, and maintains, a system to track Texas capital cases to ensure that all death row prisoners have counsel. Such tracking ensures that no prisoner on Texas' Death Row loses his right to appeal based on an attorney's failure to file a timely motion seeking appointment in federal court. At least two prisoners were executed without any federal review of their cases prior to the implementation of TDS' tracking project. Second, the project identifies issues and cases appropriate for impact litigation. Third, TDS develops sample pleadings and brief banks to be distributed both on request and through a national website. Fourth, TDS recruits, consults, and provides training for *pro bono* and appointed attorneys representing

prisoners on Texas' Death Row. And fifth, TDS identifies, and intervenes when possible, in cases of system failure or attorney abandonment.

Capital Trial Project

The Trial Project was inaugurated in May of 2000. The goal of the project is to provide resources and assistance to capital trial lawyers, with a particular emphasis on the early stages of capital litigation and the crucial role of thorough investigation, preparation, and litigation of a case for mitigation, or a sentence less than death. The impact of the project is steadily growing. In 2004, life sentences were returned in 26 cases in which the Trial Project was involved. This is almost four times the number of life sentences obtained in the first year of the project.

The Trial Project helps lawyers by recruiting mitigation specialists to work on the case, identifying and preparing expert witnesses, consulting extensively with trial counsel (including extensive brainstorming sessions), researching and writing evidentiary matters, and producing case-specific pleadings. The number of successful outcomes in these death penalty cases is unusual and may be fairly attributed to the assistance provided by the Trial Project.

Contents

Preface

Prompted by serious questions about the accuracy of the capital punishment system, on January 31, 2000, Governor Ryan imposed a moratorium on capital punishment in Illinois.[1] Since reinstatement of the death penalty in 1977, 13 innocent men had been wrongly convicted of capital murder and sentenced to death, exceeding by one the number of inmates who had been executed in the State of Illinois.[2] The number of exonerations in Illinois has continued to grow since imposition of the moratorium, and now stands at 18.[3]

The case of Anthony Porter, an innocent man who came within two days of execution, played a pivotal role in Governor Ryan's decision to impose a moratorium.[4] In September 1998, when Ryan, an ardent supporter of the death penalty, was running for governor, Anthony Porter was scheduled to be executed.[5] Two days prior to the execution, Porter's lawyers won a temporary stay of execution in the courts based on Anthony Porter's 51 IQ and doubts about his competency to be executed. It was only after the stay of execution that investigative journalism students, turned loose on Porter's case by their professor David Protess, uncovered evidence that proved Porter's innocence. By February, a videotaped statement by the real killer had been presented in court, and Anthony Porter was freed after nearly 17 years on death row.[6]

Governor Ryan signed off on one execution after Porter walked off death row, a decision he said he agonized over.[7] Within three months, two more inmates were exonerated, one by DNA evidence, and one when a jailhouse informant's testimony was discredited.[8] Stories of the Death Row Ten — ten Black men convicted on the basis of confessions extracted through torture, were reg-

1 Report of the Commission on Capital Punishment, Governor's Commission on Capital Punishment, at 1 April 15, 2002, *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html (hereinafter Illinois Commission Report).

2 Steve Mills and Ken Armstrong, *Governor to Halt Executions*, CHIC. TRIB., January 20, 2000.

3 http://www.law.northwestern.edu/wrongfulconvictions/ (last visited April 1, 2005).

4 Illinois Commission Report, *supra* note 1, at 1.

5 Bruce Shapiro, *A Talk with Governor George Ryan,* NATION, January 8, 2001.

6 *See* Congressional testimony of George Ryan before the Senate Judiciary Committee, June 12, 2002.

7 Steve Mills and Ken Armstrong, *Governor to Halt Executions*, CHIC. TRIB., January 20, 2000.

8 Bruce Shapiro, *A Talk with Governor George Ryan,* NATION, January 8, 2001.

ularly covered in the press around that time.[9] And in the fall of 1999, the Chicago Tribune published an examination of all 285 Illinois death-row cases since reinstatement of the death penalty in 1977, concluding that "bias, error, and incompetence riddle the death penalty system."[10] The Tribune's investigation found that at least 33 inmates had been represented at trial by an attorney who had been disbarred or suspended, that at least 35 black inmates had been convicted by an all-white jury, and that about half of the State's capital cases had been reversed for a new trial or sentencing hearing.[11]

Shortly after imposing the moratorium in January of 2000, Governor Ryan appointed a Commission on Capital Punishment (hereinafter the Illinois Commission), consisting of legal experts on all sides of the issue, including prosecutors, defense attorneys, former judges, and civil lawyers, to study the problem.[12] The Illinois Commission was charged with a thorough evaluation of the Illinois system of capital punishment, including its failures, and with proposing reforms to ensure the fair and accurate administration of the death penalty in Illinois.[13]

The Illinois Commission's work encompassed two years of intensive study.[14] The full Commission convened at least once a month for a full day, and formed subcommittees designed to conduct in-depth evaluations of different phases of the capital justice system.[15] Public hearings were held in both Springfield and Chicago in August, September, and December of 2000; and private meetings were conducted with representatives of surviving family members of homicide victims, with some of the 13 exonerees, and with individuals who had specific proposals designed to improve the system of capital justice.[16]

The Commission also studied a broad range of materials, which included the review of reports issued by other governmental organizations that had studied the problem, intensive examination of the cases of all 13 exonerees, a broad review of all 250 death penalty cases in Illinois, examination of research studies on victim issues, a review of death penalty laws in every other death penalty jurisdiction in the country, solicitation of views from various experts in particular areas of concern (including police practices and eyewitness testimony), and an analysis of efforts in other jurisdictions to correct problems related to capital justice.[17]

9 Steve Mills and Ken Armstrong, *A Tortured Path to Death Row: The Failure of the Death Penalty in Illinois*, CHIC. TRIB., November 17, 1999.
10 Steve Mills and Ken Armstrong, *Governor to Halt Executions*, CHIC. TRIB., January 20, 2000.
11 *Id.*
12 Illinois Commission Report, *supra* note 1, at *(v)-(vii).*
13 *Id.* at 1.
14 *Id.* at 2.
15 *Id.*
16 *Id.*
17 *Id.* at 2-3, 5-7.

On April 15, 2002, the Illinois Commission released a comprehensive report covering every stage of the death penalty process. The Commission's Report proposed 85 specific recommendations for reform.

Since the publication of the Illinois Commission's Report, the Illinois Legislature has enacted a significant number of the recommendations issued by the Commission. Between rules governing capital cases issued by the Illinois Supreme Court prior to publication of the report, and bills passed by the State Legislature, more than a third of the recommended reforms have been enacted.[18] While key elements remain outstanding, the following significant action has been taken:

Recording in-custody interrogations

In cases which potentially trigger the death penalty, the police are now required to make an audio or video recording of the entire interrogation session, and unrecorded statements are presumably inadmissible unless one of nine exceptions applies. Exceptions include that recording was not feasible, that the suspect refused to speak if recorded, or that an unrecorded statement is proven to be voluntary and reliable.[19]

Eyewitness lineup and photo spread identification procedures

(a) Lineups must now be photographed or otherwise recorded, and the results, together with pictures shown to witnesses in photo spreads, must be disclosed to defense counsel prior to trial. (b) Witnesses must sign a form acknowledging that the suspect may not be in the lineup or photo spread and that the witness is not obligated to make an identification and should not assume the person administering the showing knows which is the suspect. (c) Suspects should not appear substantially different from the "fillers" in the array.[20]

Exculpatory evidence

Police must give the prosecutor all information "that would tend to negate the guilt of the accused," and all investigative and law enforcement agencies are directed to "adopt policies to ensure compliance with these standards."[21]

Jailhouse snitch testimony

In capital cases, when the prosecution intends to introduce snitch testimony, the trial judge must conduct a pretrial hearing "to determine whether the testi-

18 Twenty-three of 85 recommendations were implemented, and eight recommendations consisted of endorsements of recent Illinois Supreme Court rule changes, for a total of 31 of 85 recommendations in effect in Illinois. For a list of recommendations of the Illinois Governor's Commission on Capital Punishment that have been implemented, *see* Edwin Colfax, *Status of Action on Recommendation of the Illinois Governor's Commission on Capital Punishment, available at* http://www.law.northwestern.edu/depts/clinic/wrongful/documents/GCCPStatus.htm (last visited April 1, 2005).

19 Thomas P. Sullivan, *Capital Punishment Reform—What's Been Done and what Remains to Be Done,* 92 ILL. B.J. 200 at 201-202, April 2004.

20 *Id.* at 201 and 203.

21 *Id.* at 201.

mony of the informant is reliable . . . . If the prosecution fails to show by a preponderance of the evidence that the informant's testimony is reliable, the court shall not allow the testimony to be heard at trial."[22]

Access to DNA & other forensic testing

(a) If a convicted defendant alleges actual innocence and requests the court to order fingerprint or forensic testing, including DNA comparisons, of evidence that was not subject to testing at the time of trial, the court may do so if identity was the issue at trial, the evidence has not been altered, and the result of the testing has the scientific potential to produce relevant new evidence, even though the results may not completely exonerate the defendant. (b) Prior to trial, the court is authorized to order a database search comparing DNA evidence to the defendant's genetic profile or other forensic evidence or DNA databases.[23]

Two additional mitigating circumstances

A jury must consider (in addition to the five mitigating factors already a part of Illinois death penalty law) evidence of the defendant's history of extreme emotional or physical abuse and reduced mental capacity.[24]

Certification and training of trial judges

The Illinois Supreme Court has provided additional training in capital cases to trial judges, but has not yet required certification of judges for capital cases, or appointed a committee of judges to provide resources to certified judges.[25]

Limitations on capital punishment

The death penalty may not be imposed if the only evidence of guilt is the uncorroborated testimony of a jailhouse snitch or an accomplice. The death penalty may not be imposed on a defendant who is mentally retarded.[26]

Review authority of the Illinois Supreme Court

The Illinois Supreme Court may overturn a death sentence and substitute a term of imprisonment "if the court finds that the death sentence is fundamentally unjust as applied to the particular case." Proportionality review has not yet been enacted.[27]

The Illinois Legislature has to date not enacted several key recommendations, including reduction of the number of eligibility factors from 20 to five; a statewide commission review of all prosecutorial decisions to seek the death penalty in order to ensure uniformity; an independent statewide forensic lab; override of the death penalty in cases in which the trial judge disagrees with the

22 *Id.* at 202-03.
23 *Id.* at 201 and 203.
24 *Id.*
25 *Id.* at 203.
26 *Id.*
27 *Id.* at 203-04.

jury's verdict; collection of data about first-degree murder prosecutions to facilitate future studies; and application of the reforms to non-capital cases.[28]

This report analyzes the Illinois Commission's recommendations in the context of the Texas system of capital justice. This report exactly parallels the organization and structure of the Illinois Commission Report, setting forth each of the 85 recommendations verbatim and analyzing both the reasoning of the Illinois Commission and its applicability to the Texas system of capital punishment.

The vast majority of the recommendations for reform (78 of 85) set forth in the Illinois Commission Report apply with equal force to the death penalty system in Texas. In a few instances (seven of 85), Texas statutes or procedures render the recommendation unnecessary in Texas.

Illinois' experience with capital punishment — and its sobering failures — has been attributed to procedural inadequacies that have come to light as a result of the Illinois Commission's Report. Texas employs a system that is substantially similar to that of Illinois, with important exceptions that render our system far less reliable than that of Illinois. The State of Texas has no statewide public defender's office, and fewer resources allocated to state post-conviction proceedings.[29] Because of broad-based inadequacies of representation in state court, an alarming number of death penalty cases in Texas are propelled through the court system without any meaningful review whatsoever.[30] Moreover, DNA testing is more difficult for Texas inmates to obtain: the Texas Court of Criminal Appeals has issued a restrictive interpretation of Texas' DNA statute, requiring convicted inmates to prove that "a reasonable probability exists that DNA tests would prove his or her innocence" in order to obtain testing.[31] And with regard to sentencing, Texas relies on jury predictions of future dangerousness that have been proven inaccurate by empirical studies and unreliable by scientific research.[32]

Illinois has identified 18 wrongful convictions of innocent men to date, a number that exceeds the number of executions in Illinois.[33] The State of Texas has executed 340 people in the modern death penalty era, some 28 times the number executed by Illinois, yet the number of exonerations lags behind that of Illinois, standing at nine.[34] There is a significant risk that innocence cases in Texas are not being discovered, and that innocent persons both reside on death row and could be wrongly executed in a system of capital punishment that often es-

28 *Id.* at 201-04.

29 *See generally* Chapters 7 & 13, *infra.*

30 *See* Texas Defender Service, *Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals* (2002), *available at* http://www.texasdefender.org.

31 Kutzner v. State, 75 S.W.3d 427, 438 (Tex. Crim. App. 2002).

32 *See* Texas Defender Service, *Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness* (2004), *available at* http://www.texasdefender.org.

33 http://www.law.northwestern.edu/wrongfulconvictions/ (last visited April 1, 2005).

34 *See* Appendix One.

capes governmental scrutiny and meaningful judicial review.[35] Certainly, the procedures that put capitally-charged individuals at risk in Illinois were no worse than the procedures that are currently implemented in Texas. In important ways, even the old Illinois provisions were preferable to those in Texas.

In an encouraging move, in March 2005, Texas Governor Rick Perry established a nine-member Criminal Justice Advisory Council with an array of powers to review issues in the criminal justice system. While it remains unclear whether the Council will be an independent, balanced Council with the ability to gather evidence and investigate individual cases plagued with injustices that are emblematic of systemic deficiencies, the Council is charged with considering issues such as police investigations, forensic testing, and court appeals. The Council will make recommendations regarding necessary reforms to be delivered to the Governor and Texas Legislature prior to the 2007 Legislative Session. The Illinois Commission Report and this Report provide a starting point for the Texas Council.

This Report attempts to apply the lessons that Illinois has learned to a system that is subject to minimal governmental scrutiny in Texas, and to propose a series of reforms that would reduce the risk of wrongful convictions or arbitrary death sentences.

[35] *See, e.g.,* Steve Mills and Maurice Possley, *Texas Man Executed on Disproved Forensics*, CHIC. TRIB., December 9, 2004.

Minimizing Risk: An Executive Summary

There is palpable risk that innocent people are being sent to death row in Texas because the criminal justice system evades sufficient scrutiny, lacks meaningful judicial review, and is rife with sweeping inadequacies in the rules and procedures relating to capital trials. Identifying these problems is not enough. Other states have implemented reforms, including improving counsel standards, recording in-custody interrogations, and improving eyewitness and photo spread identification procedures, which have proven effective in minimizing risk of wrongful conviction.

In an encouraging move, in March 2005, Texas Governor Rick Perry established a nine-member Criminal Justice Advisory Council with an array of powers to review issues in the criminal justice system. The Council is charged with advising the Governor on procedures that are needed to meet advances in technology, methods of ensuring that law enforcement investigation procedures are accurate, processes to provide for public safety and confidence in convictions, and changes in law necessary to improve the criminal justice system. The Council will make recommendations regarding necessary reforms to be delivered to the Governor and Texas Legislature prior to the 2007 Legislative Session.

This report analyzes the Illinois Commission's 85 recommendations in the context of Texas' criminal justice system, and provides a framework for meaningful review, particularly as it applies to the capital punishment system. It should be considered by the Council as it undertakes its assigned and serious mission. This report reveals critical needs and identifies viable solutions. Like Illinois, Texas can take steps to make these reforms a reality.

The study — a comprehensive comparison of the "best practices" recommended by the Illinois Commission on Capital Punishment to existing procedures in Texas — found that Texas does not comply with 80% of the safeguards of the criminal justice system embodied in these model practices that are applicable to Texas. Our findings reveal an urgent need for death penalty reform in nine specific areas to reduce the risk of wrongful convictions and arbitrary death sentences.

Texas has executed 340 people in the modern death penalty era, 28 times the number executed by Illinois, yet its nine exonerations lag far behind those of Illinois. Texas is at unacceptable risk for wrongful conviction and execution, an especially troubling fact given its status as the undisputed leader in executions among the 38 states with the death penalty. There is both unnecessary risk and compelling evidence that innocence cases in Texas are not being discovered and that innocent persons are incarcerated even on death row.

Illinois' experience with capital punishment — and its sobering failures — has been attributed to procedural inadequacies that have come to light as a result of the Illinois Commission's Report. Texas utilizes a death penalty system that is substantially similar to that of Illinois, with important exceptions that render our system *far less reliable* than that of Illinois. Notable failures in the Texas system include:

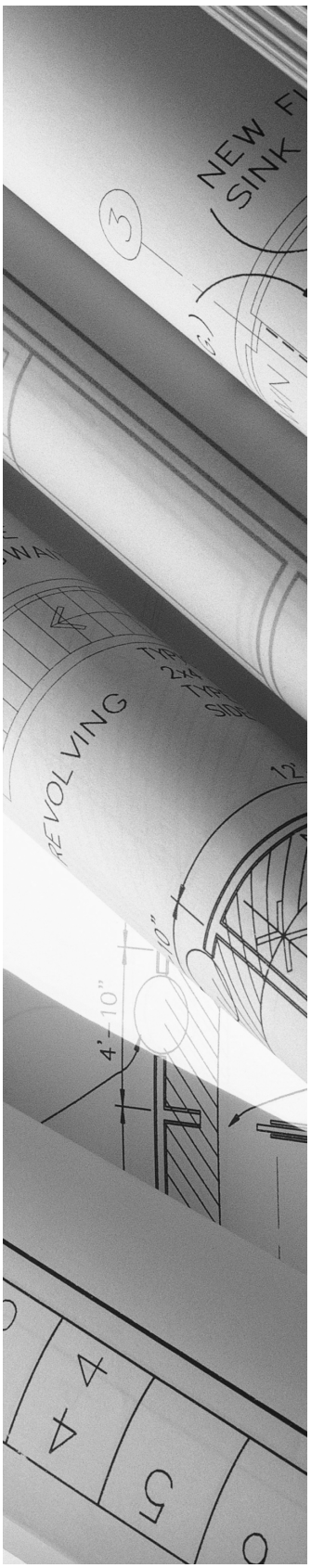
- The absence of uniform police and prosecutorial investigative procedures including eyewitness identification procedures, videotaping of interrogations, and use of jailhouse informants
- Deficiencies in accessibility and reliability of forensic evidence
- Excessive prosecutorial discretion in charging decisions resulting in racial and geographic disparity
- Excessive number of death penalty eligibility factors and over-reliance on the murder during the course of a felony eligibility factor
- The prevalence of under-qualified or resource-starved defense attorneys
- The absence of a statewide public defender's office
- Scant allocation of resources and lack of competent counsel in state post-conviction proceedings
- An unreliable capital sentencing scheme, which does not weigh aggravating and mitigating factors but instead hinges on the speculative "future dangerousness" inquiry
- The absence of a life-without-parole sentencing option

In 2000, prompted by serious questions about the accuracy of the capital punishment system and a string of wrongful convictions, the Governor of Illinois imposed a moratorium on capital punishment in Illinois. Shortly after doing so, he appointed a Commission on Capital Punishment, consisting of legal experts on all sides of the issue, including state and federal prosecutors, defense attorneys, former judges, and civil lawyers, to study the problems in the state's administration of the ultimate punishment.

After two years of intensive study and comprehensive consideration of a broad range of materials and cases, the Illinois Commission released a comprehensive report covering every stage of the death penalty process and proposing 85 specific recommendations for reform designed to increase the reliability and fairness of every stage of the process.

Since the publication of the Illinois Commission's Report, the Illinois Legislature has adopted approximately one-third of the reforms recommended and it continues to consider the implementation of other reforms. Specifically, Illinois has improved its procedures in the following areas:

- Recording in-custody interrogations
- Eyewitness lineup and photo spread identification procedures
- Access to exculpatory evidence
- Limitations on jailhouse snitch testimony
- Access to DNA and other forensic testing
- Two additional mitigating circumstances
- Certification and training of trial judges
- Limitations on capital punishment
- Broader authority of the Illinois Supreme Court to review death sentences



MINIMIZING RISK

Introduction

". . . Texas death row is bulging with unprecedented numbers of inmates. But this accelerated form of justice comes at a price. The rest of the country should heed the warning of the Texas experience before it embarks on a wholesale expansion of the death penalty."[36]

History of the Texas Death Penalty

In 1972, the U.S. Supreme Court found the death penalty, as applied, unconstitutional in part because of the unfettered discretion afforded to juries in capital cases.[37] It struck all existing death penalty statutes, holding that their provisions allowed for arbitrary and discriminatory results. One justice compared the process to a "lottery,"[38] and another to being "struck by lightning."[39] The modern death penalty era began in 1976, when the Supreme Court permitted states to resume capital punishment.[40] After this decision, Texas, among other

36 Richard C. Dieter, *The Future of the Death Penalty in the U.S.: A Texas-sized Crisis* (May 1994) *available at* http://www.deathpenaltyinfo.org.

37 The five Supreme Court justices voting to invalidate all state and federal capital punishment statutes then in existence explained their reasoning in separate opinions. *See* Furman v. Georgia, 408 U.S. 238, 253 (1972) (Douglas, J., concurring) (condemning a "system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants . . . should die or be imprisoned" and that provides "no standards" for selecting the penalty"); *id.* at 295 (Brennan, J., concurring) (observing that juries "make the decision whether to impose a death sentence wholly unguided by standards governing that decision"); *id.* at 308 nn. 8-9, 310 (Stewart, J., concurring) (characterizing the "broad sentencing leeway" afforded juries by states' challenged death penalty statutes as resulting in "legal systems that permit . . . [the death penalty] to be so wantonly and so freakishly imposed"); *id.* at 313 (White, J., concurring) (tracing the arbitrariness in the infliction of the death penalty to the unlimited sentencing discretion of judges and juries under the statutes at issue); *id.* at 365 (Marshall, J., concurring) (commenting that the commitment to the "untrammeled discretion of the jury the power to pronounce life or death in capital cases . . . was an open invitation to discrimination") (internal quotation marks and citation omitted).

38 Furman v. Georgia, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

39 *Id.* at 309 (Stewart, J., concurring).

40 *See, e.g.*, Jurek v. Texas, 428 U.S. 262, 276 (1976) (plurality) (upholding Texas' revised death penalty statute).

states, drafted new capital punishment provisions and attempted to provide greater structure to the sentencing process by delineating factors to guide jury decision-making.[41] Texas was among the first states to rewrite its death penalty law, enacting legislation the year after the Supreme Court's ruling in *Furman*.[42]

Texas' revised capital punishment statute allows for the death penalty upon conviction for ten separate homicide offenses, including murder during the course of a burglary, robbery, or sexual assault; murder for hire; the murder of a police officer; and the murder of a child under the age of six.[43] If a capital case goes to trial, the proceedings are divided into two stages. In the first stage of the trial, the "guilt-innocence" phase, the jury decides whether the defendant committed the capital crime charged. Should the jury deliver a guilty verdict, the trial proceeds to the second stage, the "sentencing" phase.[44]

The sentencing phase of capital trials in Texas is unique. In most states, the jury is presented with both aggravating evidence and mitigating evidence and is asked to determine whether the defendant should be sentenced to life or death based on that evidence.[45] Aggravating evidence includes testimony from surviving victims, prior convictions, and prior bad acts. Mitigating evidence consists of evidence about the defendant's background and upbringing, his character, and his mental health.[46] In Texas, however, the jury is not asked to determine an appropriate sentence; it is instead presented with two or three yes-or-no questions known as "special issues:" Whether the defendant presents a future danger, whether the defendant intended the victim's death (this question is relevant only in cases of accomplice liability), and whether the mitigation in the case is sufficient to justify a sentence less than death.[47] If the jury

41 *See* Act of June 14, 1973, 63rd Leg., R.S., ch. 426, art. 3, § 1, 1973 TEX. GEN. LAWS 1122, 1125 (amended 2001) (codified as amended in TEX. CRIM. PROC. CODE ANN. Art. 37.071 (Vernon 2001)) (articulating sentencing procedure designed to constrain sentencing jury's discretion). *See generally* Michael Kuhn, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUS. L. REV. 410 (1973-1974) (discussing the Texas Legislature's attempts in enacting revised death penalty legislation to remedy the constitutional defects identified in *Furman*).

42 House Bill 200, the revised capital punishment statute, was passed by the Texas House of Representatives on May 10, 1973. TEX. H.R. JOUR. 3363 (1973). The Texas Senate approved an amended version on May 23, 1973. TEX. S. JOUR. 1743 (1973). After the Conference Committee resolved the differences, House Bill 200 was approved by both legislative bodies and became effective on June 14, 1973. *See* Act of June 14, 1973, 63rd Leg. R.S., ch. 426, arts. 1-3, 1973 Tex. Gen. Laws 1122-29 (codified as amended in scattered sections of TEX. CRIM. PROC. CODE and TEX. PENAL CODE).

43 TEX. PENAL CODE ANN. § 19.03 (Vernon 1994). The Illinois Commission's method of counting eligibility factors has been adopted for purposes of consistency in this report. Other methods may yield a slightly higher or slightly lower number of factors.

44 TEX. CRIM. PROC. CODE ANN. § 37.071 (Vernon 2001).

45 Stephen Hornbuckle, *Capital Sentencing Procedure: A Lethal Oddity in the Supreme Court's Case Law*, 73 TEX. L. REV. 441, 447-50 (1994); Clemons v. Mississippi, 494 U.S. 738 (1989); Williams v. Calderon, 52 F.3d 1465, 1477-78 (9th Cir. 1995) (discussing the difference between states that require juries to weigh aggravating evidence against mitigating evidence in order to determine a sentence, and those that require juries to consider both the aggravating evidence and mitigating evidence and impose an appropriate sentence); Flamer v. State, 68 F.3d 736, 745-50 (3rd Cir. 1995).

46 *Id.*

47 TEX. CRIM. PROC. CODE ANN. § 37.071(b) & (e) (Vernon 2001).

answers "yes" to the first two questions and "no" to the last question, the defendant is automatically sentenced to death.[48]

Texas' focus on future dangerousness has been the subject of widespread criticism.[49] Expert psychiatrists are often called upon by the State to offer an opinion as to the likelihood that the defendant will commit future acts of violence. Lay jurors, quite naturally, are swayed by the opinion of an "expert,"[50] though empirical and scientific research demonstrates unequivocally that such predictions are widely inaccurate. The American Psychiatric Association maintains that "the unreliability of psychiatric predictions of long-term future dangerousness is . . . an established fact within the profession."[51] Still, experts paid by the prosecution routinely offer opinions based on, at best, a perfunctory meeting with the defendant[52] and, at worst, consideration of a purposefully-skewed hypothetical fact pattern submitted by the prosecution and no evaluation of the defendant himself. In some cases, courts have admitted testimony by witnesses not qualified to give it.[53] In others, the defendant's race has colored the expert's predictions.[54] And yet trial

A death penalty sentencing scheme that relies on jurors to assess future dangerousness in order to determine when death is an appropriate sentence, when experts agree that trained professionals cannot accurately make such assessments, renders the foundation of Texas' sentencing scheme arbitrary.

48 TEX. PENAL CODE ANN. § 19.03(g) (Vernon 2004).

49 An analysis of the shortcomings of the "future dangerousness" inquiry is beyond the scope of this report. *See generally* Texas Defender Service, *Deadly Speculation supra* note 32.

50 The seminal study in this line of inquiry is Stanley Milgram's Yale study in which persons posing as scientists were able to secure compliance with their requests at a much higher rate than laypersons. *See generally* Stanley Milgram, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1983). Recent research in this area includes Daniel A. Krauss and Bruce D. Sales' study, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCH. PUB. POL. & L. 267 (2001), which found that psychological expert testimony regarding the defendant's future dangerousness in a mock trial strongly affected jurors' decisions on sentencing. The study concluded that the U.S. Supreme Court "may have taken an incorrect view concerning the constitutionality of dangerousness predictions in *Barefoot* when they stated that 'we are not persuaded . . . that the fact finder and the adversary system will not be competent to uncover, recognize, and take due account of its shortcomings.'" *Id.* at 305.

51 *See* Brief of Amicus Curiae Am. Psychiatric Ass'n, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080).

52 *See, e.g.,* Randall Dale Adams, et al., ADAMS V. TEXAS 64 (1991), describing the twenty-minute meeting in which the state-paid expert asked Adams to draw shapes on a paper, asked him two questions, and left.

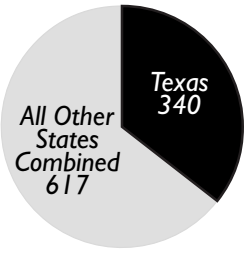
53 Texas courts even permit lay witnesses to speculate about a defendant's likelihood of future dangerousness. *See* East v. State, 702 S.W. 2d 606 (Tex. Crim. App. 1985), in which the court allowed an acquaintance of the defendant to proffer her opinion that the defendant would be a threat to society. *See also* Esquival v. State, 595 S.W. 2d 516, 527 (Tex. Crim. App. 1980); Cass v. State, 676 S.W. 2d 589 (Tex. Crim. App. 1984).

54 *See* testimony of Dr. Walter Quijano, stating that black men would be more likely to be violent in part because of race, in the following cases: State v. Blue, (Tex. Crim. App. 1996) (No. 72, 106); Broxton v. State, 909 S.W.2d 912 (Tex. Crim. App. 1995) (No. 924926); State v. Buck, (Tex. Crim. App. 1999) (No. 72.810). *See also* Saldano v. State, 70. S.W.3d 873, 884-5 (Tex. Crim. App. 2002); Garcia v. State, 57 S.W.3d 436, 438-40 (Tex. Crim. App. 2001), and State v. Michael Gonzales, (Tex. Crim. App. 1998) (No. 72, 317), in which Dr. Quijano testified that Hispanic men would be more violence-prone based in part on their race. In some cases Quijano's testimony was proffered by the defendant.

judges, charged by the U.S. Supreme Court to be "gatekeepers" of the evidence,[55] fail to protect the jury from this highly speculative testimony. An independent study carried out by TDS found that experts predicting a defendant's future dangerousness were proven wrong in 95% of the 155 cases reviewed.[56] Moreover, a death penalty sentencing scheme that relies on jurors to assess future dangerousness in order to determine when death is an appropriate sentence, when experts agree that trained professionals cannot accurately make such assessments, renders the foundation of Texas' sentencing scheme arbitrary.

Texas is the undisputed leader in executions among the 38 states with death penalty statutes. The number of executions in Texas dwarfs that of all other states and comprises over one-third of all U.S. executions in the modern era.[57] Texas has executed more than three times as many people as Virginia, the state with the second-highest total.[58] Further, Texas' pace shows little sign of slackening. In 2004, Texas led the nation with 23 executions, well over a third of the total number of executions in the United States and three times more than any other state.[59] Currently, 443 men and women reside on Texas' Death Row, with a steady stream of between 25 and 40 new death sentences being handed down each year.[60]

Executions Since 1976



Methodology

This report analyzes the Illinois Commission's recommendations in the context of the Texas system of capital punishment. This report parallels the organization and structure of the Illinois Commission Report, setting forth each of the 85 recommendations verbatim and analyzing both the reasoning of the Illinois Commission and its applicability to the Texas system of capital punishment. The determination of the degree to which Texas adopts or implements the Illinois recommendations was made by comparing the recommendation to Texas statutes or administrative provisions that apply to the entire state in a uniform way.

If there is a Texas statute or administrative provision which contains the same or sufficiently similar measures as the Illinois recommendation, Texas law is deemed to comply with the Illinois recommendation. An analysis of the actual practices or implementation of said provisions is beyond the scope of this report.

55 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993).
56 *See* Texas Defender Service, *Deadly Speculation*, *supra* note 32.
57 Death Penalty Information Center, *Number of Executions by State Since 1976*, *available at* http://www.deathpenaltyinfo.org/dpicreg.html.
58 *Id.*
59 *Id.*
60 *See* Texas Department of Criminal Justice, *Offenders on Death Row, available at* http://www.tdcj.state.tx.us/stat/offendersondrow.htm.

If the Texas statute or administrative provision contains a portion of the Illinois recommendation, Texas law is deemed to comply "in part" with the Illinois recommendation.

In cases in which there is no matching Texas statutory or administrative provision, for purposes of this comparison, Texas law is deemed not to comply with the recommendation from the Illinois Commission. We recognize, however, that even if no statutory or administrative provision is on point, it is probable that some local or county provisions or policies, whether formal or informal, exist which would comport with the model practice embodied in the Illinois Commission recommendation.

Due to the uniquely severe consequences of capital punishment, it is imperative that the safeguards memorialized in the Illinois Commission Report be adopted and implemented in a uniform, consistent, and statewide manner. Haphazard, inconsistent, informal, or arbitrary implementation of these provisions does not serve to make Texas' application of capital punishment more reliable or accurate as a whole.

2 *Police and Pretrial Investigations*

"Tunnel vision is insidious. It can affect an officer, or, indeed, anyone involved in the administration of justice with sometimes tragic results. . . . Anyone, police officer, counsel or judge can become infected by this virus." [61]

The Illinois Commission recommended improvements to police policies and pretrial investigations in order to heighten reliability and accuracy. Recognizing the critical importance of the early efforts to identify suspects, preserve evidence, and solve crime, the Commission urged recommendations in four areas: general police practices, custodial interrogations, eyewitness identification procedures, and law enforcement training.[62] The Commission recognized that "police efforts to investigate crime and collect evidence represent the very foundation of the criminal justice system."[63] For this reason, the Commission suggested changes which would reduce mistakes caused by lax procedures and under-qualified or over-worked personnel.

61 *See* Manitoba Commission of Inquiry, *Report of the Commission of Inquiry Regarding Thomas Sophonow* (September 2001), *available at* http://www.gov.mb.ca/justice/sophonow/toc.html.
62 Illinois Commission Report, *supra* note 1, at 19.
63 *Id.*

Recommendation 1

After a suspect has been identified, the police should continue to pursue all reasonable lines of inquiry, whether these point towards or away from the suspect.

The Commission included this reform to remind police agencies of their obligation to investigate crime rather than attempt to build cases against targeted individuals. Law enforcement personnel should take all necessary steps to avoid "tunnel vision" — which often occurs in cases in which police believe a certain suspect committed the crime. This belief precludes the fair consideration of other suspects or explanations. Such bias contributed to many of the wrongful convictions in Illinois,[64] but such bias is not unique to law enforcement agencies in Illinois. Tunnel vision, which may be caused or exacerbated by the pressure to solve crime quickly, is a potential problem for all police departments.

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Texas has no similar statutory provision which would mandate this policy on a statewide, consistent basis. However, the need for thoughtful implementation of this policy and the dangers of the lack of such a policy is reflected in the wrongful conviction of Clarence Brandley, in which police and prosecutors presupposed the outcome and allowed "tunnel vision" to cause the conviction of an innocent man.

Clarence Brandley was released in 1990 after spending nearly ten years on death row for a crime he did not commit. When Cheryl Ferguson, a white high-school girl, was found murdered, police soon came to believe that one of the school janitors was responsible for the crime. Brandley — the only black janitor — was targeted. Police and prosecutors pursued Brandley with a clear and single-minded disregard for the facts. Police and prosecutors then engaged in misconduct, threatening witnesses, ignoring evidence pointing to other suspects, and participating in secret meetings about witness testimony.[65]

The judge who reviewed Clarence Brandley's conviction and death sentence found that the conduct of the police and state investigators was "so impermissibly suggestive that false testimony was created, thereby denying . . . due process of law and a fundamentally fair trial. . . . [Brandley] did not receive a fair trial, was denied the most basic fundamental rights of due process of law, and did not commit the crime for which he now resides on death row. . . . The court unequivocally concludes that the color of Clarence Brandley's skin was a substantial factor which pervades all aspects of the State's capital prosecution. . . . In the 30 years this court has presided over matters in the judicial system, no case has presented a more shocking scenario of the effects of racial

[64] *Id* at 20.
[65] NICK DAVIES, WHITE LIES: RAPE, MURDER, AND JUSTICE TEXAS STYLE, 399 (Pantheon 1991).

prejudice, perjured testimony, witness intimidation, an investigation the outcome of which was predetermined, and public officials who, for whatever motives, lost sight of what is right and just."[66]

Recommendation 2

1. The police must list on schedules all existing items of relevant evidence; including exculpatory evidence, and their location.
2. Record-keeping obligations must be assigned to specific police officers or employees, who must certify their compliance in writing to the prosecutor.
3. The police must give copies of the schedules to the prosecution.
4. The police must give the prosecutor access to all investigatory materials in their possession.

After reviewing cases in which police agencies failed to disclose all evidence to the prosecution, the Commission recommended that law enforcement agencies be required to inventory all evidence along with its location. This provision is designed to improve communications between law enforcement agencies as well as communications between specific law enforcement agencies and the prosecution. It will also ensure that the defense is provided access to all appropriate evidence, including that which is exculpatory in nature. Texas has no similar provision and therefore, if there is any compliance with these safeguards, it is in a haphazard, jurisdiction-by-jurisdiction way. An official policy governing state, county, and local law enforcement would ensure consistency, and improve record-keeping and communication.

Recommendation 3

In a death eligible case, representation by the public defender during a custodial interrogation should be authorized by the Illinois legislature when a suspect requests the advice of counsel, and when there is a reasonable belief that the suspect is indigent. To the extent that there is some doubt about the indigency of the suspect, police should resolve the doubt in favor of allowing the suspect to have access to the public defender.

This provision is recommended to encourage and facilitate access to counsel earlier in the process. Pursuant to *Miranda*,[67] a defendant has a right to be represented by counsel before being subjected to an in-custody interrogation.

In most cases in Illinois, the Public Defender's office represents indigent defendants charged with capital crimes. The Commission believed that the Public Defender's office should be notified when a defendant who is likely to qualify for their services has requested counsel at the interrogation stage. Essentially, this provision seeks to enable representation at this stage prior to a judicial determination of indigence to protect the rights of defendants and minimize the

[66] MICHAEL RADELET, HUGO BEDAU, & CONSTANCE PUTNAM, IN SPITE OF INNOCENCE, 134 (Northwestern University Press 1992).

[67] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

incidence of false confessions. Texas has no similar provision, and in fact, has no statewide public defender office. However, even without a statewide public defender office, Texas could implement a similar policy and allow in-custody defendants facing interrogation regarding potential capital murder charges to have access to counsel.

Recommendation 4

Custodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should not include merely the statement made by the suspect after interrogation, but the entire interrogation process.

Gary Gauger, one of the 13 men released from Illinois' death row, allegedly confessed to a crime in spite of his innocence. Others were later indicted and prosecuted for the double murder for which Gauger had been sentenced to death.[68] Commission members supported the mandatory videotaping of confession in light of cases in which law enforcement claimed that a person confessed, though it was later proven that another actually committed the crime.[69]

Videotaping confessions can be beneficial for a number of reasons, including evaluating interrogation techniques and deterring police from engaging in inappropriate techniques.[70] Taped interrogations provide a powerful tool for law enforcement and prosecutors as well. It represents the best evidence of what actually transpired in an interrogation and often establishes that police tactics did not include deception or abuse. Thomas Sullivan, a member of the Illinois Commission conducting follow-up research regarding the implementation of this recommendation, found: "Recording creates a permanent account of exactly what occurred and prevents disputes about the treatment of suspects and about what was said and done during the session."[71] Sullivan also found that the great majority of police departments that have adopted practices to record custodial interrogations support continuing the practice.[72] More than 260 police departments in 41 states across the country, including some in Texas, have embraced recording these interrogation sessions and many have found a dramatic drop in the number of motions to suppress statements filed in subsequent criminal actions and an increase in the

"Recording creates a permanent account of exactly what occurred and prevents disputes about the treatment of suspects and about what was said and done during the session."

— Thomas Sullivan, member, Illinois Commission

68 Ray Quintanilla and Meg Murphy, *17 Indicted in Trail of Violence by Biker Gang,* CHIC. TRIB., JUNE 11, 1997.

69 Illinois Commission Report *supra* note 1, at 24.

70 Welsh S. White, *False Confessions and the Constitution: Safeguards against Untrustworthy Confessions,* 32 HARVARD C.R.-C.L. L. REV., 105 (1997).

71 Thomas P. Sullivan, *Recording Custodial Interrogations: The Police Experience,* FED. LAW. (January 2005).

72 *Id.*

number of guilty pleas in these cases.[73] Sullivan's survey revealed that these recordings also deter police officers who might resort to inappropriate interrogation methods or attribute inaccurate statements to the defendant.[74]

While a majority of Commission members urged mandatory videotaping, a minority of Commission members believed that videotaping statements, while important, should not be mandatory.

Texas has no provision mandating the videotaping of interrogations of suspects. The Texas rule provides that no oral statement of an accused made as a result of a custodial interrogation is admissible unless an electronic recording is made of the statement.[75] However, written statements, made after a custodial interrogation, either written or signed by the accused are admissible, regardless of whether the interrogation itself or any previous discussions with law enforcement were taped. Thus, the interests to be served by videotaping statements, including reducing disputes about the method and content of the interrogation, are not served by the Texas statute.

The interests to be served by videotaping statements, including reducing disputes about the method and content of the interrogation, are not served by the Texas statute.

Recommendation 5

Any statements by a homicide suspect which are not recorded should be repeated to the suspect on tape, and his or her comments recorded.

Recognizing that in some cases it is impractical to electronically record statements, the Commission recommended that statements made should be repeated on tape.[76] In that situation, police will have strong evidence that the suspect in fact made those statements and police will have evidence that is helpful to the jury or judge in determining the accuracy and reliability of out-of-court statements. Texas has no requirement that unrecorded statements be repeated to a suspect on tape and therefore is not fully ensuring that statements alleged to have been made by suspects are accurate and reliable.

73 *Id.* at 20-22.
74 *Id.* at 22.
75 TEX. CODE CRIM. PROC. ANN. § 38.22 (Vernon 2001).
76 Illinois Commission Report, *supra* note 1, at 28.

Recommendation 6

There are circumstances in which videotaping may not be practical, and some uniform method of recording such interrogations, such as tape recording, should be established. Police investigators should carry tape recorders for use when interviewing suspects in homicide cases outside the station, and all such interviews should be audiotaped.

The Commission sought to establish a procedure by which statements could be preserved and recorded in situations in which suspects are not at the police station and videotaping is impractical. It concluded that tape recordings are an effective and simple way to make a clear record of the suspect's statements. Texas has no such provision. Police officers in Texas are thus not required by state statute to either carry tape recorders or use tape recorders for interviews conducted outside the police station.

Recommendation 7

The Illinois Eavesdropping Act (720 ILCS 5/14) should be amended to permit police taping of statements without the suspects' knowledge or consent in order to enable the videotaping and audiotaping of statements as recommended by the Commission. The amendment should apply only to homicide cases, where the suspect is aware that the person asking the questions is a police officer.

The Illinois Commission included this provision to allow police departments the ability to record the statements of a suspect made during an interrogation without violating state wiretap rules. Texas explicitly authorizes the taping of statements without a suspect's knowledge in a police interrogation setting. However, Texas does not limit this authority only to homicide cases. [77]

Recommendation 8

The police should electronically record interviews conducted of significant witnesses in homicide cases where it is reasonably foreseeable that their testimony may be challenged at trial.

The Commission concluded that "experience in Illinois teaches that the statements of certain witnesses ought to be recorded by police, so that, if the witness' account 'evolves,' the judge and jury can observe the original version."[78] An accurate record of witness statements would help resolve questions about dubious witness testimony or changes in witness memory over time. Texas has no similar provision and requires no taping of significant witness statements.

[77] TEX. CODE CRIM. PROC. ANN. § 38.22 (Vernon 2001).
[78] Illinois Commission Report, *supra* note 1, at 30.

Recommendation 9

Police should be required to make a reasonable attempt to determine the suspect's mental capacity before interrogation, and if a suspect is determined to be mentally retarded, the police should be limited to asking nonleading questions and prohibited from implying that they believe the suspect is guilty.

A majority of Commission members urged the implementation of a provision which places a duty on law enforcement to ascertain whether the suspect is mentally vulnerable and therefore susceptible to falsely confessing. One scholar notes that: "Mental health experts have long been aware of the risk that a mentally retarded suspect's eagerness to please authority figures will lead him to confess falsely."[79] The Commission urged police to make a "reasonable attempt" to consider problems with interrogating someone with mental capacity limitations. The Commission does not recommend automatic evidence exclusion in cases in which police have failed to comply with this provision. Texas has no similar provision and thus police are not required to engage in any determination of the suspect's mental capacity.

Recommendation 10

When practicable, police departments should ensure that the person who conducts the lineup or photospread should not be aware of which member of the lineup or photospread is the suspect.

"The fallibility of eyewitness testimony has become increasingly well-documented in both academic literature and in courts of law."[80] These concerns led the Commission to adopt six recommendations regarding procedures in police-conducted eyewitness identifications. The typical practice of eyewitness identifications falls into two categories: photospreads (a group of photographs) and lineups (a live lineup of several persons including a suspect).

The fallibility of eyewitness testimony has become increasingly well-documented in both academic literature and in courts of law.

The Commission recommended that the person conducting the photospread or lineup be unaware of the identity of the actual suspect to decrease the chances that the administrator may signal his knowledge to the eyewitness. The Commission neither recommended this procedure be mandatory, nor advocated that a failure to comply should result in the automatic exclusion of the identification.

The Commission also sought to reduce the instances in which the administrator of the photospread or lineup would confirm the eyewitness' identification, which might increase the witness' confidence in the identification.[81] This "double-blind" procedure — neither the witness nor the administrator of the photospread or lineup knows in advance who is the suspect — will increase the

79 *See* White, *supra*, note 70, at 123. *See also*, Recommendation 53, *infra* at 72.
80 Illinois Commission Report, *supra* note 1, at 31.
81 *Id.*

reliability of eyewitness identifications. A minority of Commission members believed that this procedure should be mandatory and felt that this "blind" procedure is critical to the accuracy of the identification process.

Texas has no similar provision embodied in statewide statute or administrative procedures and in fact, puts no limitations at all on police-guided eyewitness identification procedures.

Recommendation 11

1. Eyewitnesses should be told explicitly that the suspected perpetrator might not be in the lineup or photospread, and therefore they should not feel that they must make an identification.
2. Eyewitnesses should also be told that they should not assume that the person administering the lineup or photospread knows which person is the suspect in the case.

The Commission included these statements to increase the reliability of identifications and discourage "relative judgment" identifications in which eyewitnesses might pick the person who looks most like the perpetrator of the crime.[82] The Commission sought to discourage identifications made merely because the eyewitness believes one is expected. While certainly some law enforcement agencies caution eyewitnesses in this way, Texas has no statewide, mandatory provision which would ensure that each eyewitness about to view a lineup or photospread is explicitly aware that the suspect might not be included.

Recommendation 12

If the administrator of the lineup or photospread does not know who the suspect is, a sequential procedure should be used, so that the eyewitness views only one lineup member or photo at a time and makes a decision (that is the perpetrator or that is not the perpetrator) regarding each person before viewing another lineup member or photo.

The Commission recommended this procedure to minimize the chances that the eyewitness would select the person who most resembles the perpetrator of the crime. Because the witness is not in a position to make such "relative judgments," the identifications are more reliable. A minority of the Commission urged caution about implementing this procedure without additional study because it represents a significant change from the methods currently adopted by most law enforcement agencies. Because Texas places no uniform restrictions on the procedures for lineups or photospreads, Texas does not comply with this recommendation. In light of the number of false eyewitness identifications, many of which are the result of such "relative judgments," Texas is at risk for erroneous eyewitness identifications. These failures both contribute to wrongful convictions and allow the real perpetrators of crime to go unpunished.

[82] Illinois Commission Report, *supra* note 1, at 31.

Recommendation 13

Suspects should not stand out in the lineup or photospread as being different from the distractors, based on the eyewitnesses' previous description of the perpetrator, or based on other factors that would draw attention to the suspect.

The Commission recommends that non-suspect "fillers" be chosen who resemble the physical description given by the witness as opposed to those who simply resemble the suspect. This practice represents "good police procedure" aimed at improving identification accuracy. While some Texas law enforcement agencies may adopt this guideline either formally or informally, Texas has no similar provision that is embodied in a statute or statewide administrative procedure. Thus, the compliance with this safeguard is not uniform or guaranteed.

Recommendation 14

A clear written statement should be made of any statements made by the eyewitness at the time of the identification procedure as to his or her confidence that the identified person is or is not the actual culprit. This statement should be recorded prior to any feedback by law enforcement personnel.

Research demonstrates that jurors are more concerned with the level of confidence expressed by the witness during testimony than with the circumstances in which the identification was conducted and made.[83] The Commission made this recommendation in an attempt to prevent erroneous convictions based on incorrect identifications. It would require an expression of confidence from the witness at the time of the initial identification, including any expressions of uncertainly the witness may feel. Texas has no similar provision and requires no contemporaneous writing of the eyewitness statements.

Recommendation 15

When practicable, the police should videotape lineup procedures including the witness' confidence statement.

The Commission believed that recorded procedures could only aid the decision makers in resolving issues regarding eyewitness identifications. While recording, in and of itself, does not reduce the chances for faulty eyewitness identifications, the Commission recommends taping of the process from beginning to end. Texas has no similar provision but could benefit by including a statewide policy to require recording of witness' statements relating to their level of confidence in the identification. That addition would serve to increase the accuracy and reliability of the adversarial process during which such identifications are at issue.

[83] Wells, *infra* note 291, at 635-36.

Recommendation 16

All police who work on homicide cases should receive periodic training in the following areas, and experts on these subjects should be retained to conduct training and prepare training manuals on these topics:

1. The risks of false testimony by in-custody informants ("jailhouse snitches").
2. The risks of false testimony by accomplice witnesses.
3. The dangers of tunnel vision or confirmatory bias.
4. The risks of wrongful convictions in homicide cases.
5. Police investigative and interrogation methods.
6. Police investigating and reporting of exculpatory evidence.
7. Forensic evidence.
8. The risks of false confessions.

The Commission recommended that law enforcement officers receive training in all these areas, and made the same recommendation for prosecutors and defense attorneys, because it is in these areas that many mistakes are made. Additional or new training "should have the effect of improving the overall quality of justice, as well as diminishing the likelihood that errors will be made which result in wrongful conviction."[84] While some Texas law enforcement agencies may very well provide training on some or all of these issues, Texas has no similar provisions to ensure the *mandatory* training of *all* Texas law enforcement officers in these categories.

Recommendation 17

Police academies, police agencies, and the Illinois Department of Corrections should include within their training curricula information on consular rights and the notification obligations to be followed during the arrest and detention of foreign nationals.

The Commission recommended this provision to ensure compliance with treaty obligations to which the United States is a party. A foreign national arrested in the United States has the right to contact his consulate pursuant to the Vienna Convention on Consular Relations.[85] Pursuant to this Convention, to which at least 165 nations have committed, local authorities are required to inform foreign nationals upon their arrest of their right to contact their consulate. Local authorities are also obligated by the terms of this Convention to allow for communication between the foreign national and the consulate.

In March 2004, the International Court of Justice (ICJ) determined that the rights of numerous foreign nationals had been violated by the local authorities in various states.[86] The ICJ ruled that local authorities had not complied with the provision regarding when a foreign national is entitled to access

84 Illinois Commission Report, *supra* note 1, at 41.
85 Vienna Convention on Consular Relations, Article 36, (1963).
86 Mexico v. U.S.A., General List No. 128, (2004).

to his or her consulate and found that in those cases, consular officials were unable to provide assistance in a timely manner at the early stages of a capital case.[87] The ICJ found violations of the Vienna Convention provisions in numerous Texas cases.

In recent developments, the Bush administration has pulled out of the Optional Protocol to the Vienna Convention on Consular Relations, which gives the ICJ the authority to adjudicate whether foreign nationals have been deprived of their right to seek consulate assistance. The U.S. remains a party to the treaty itself. This withdrawal came only a short time before the U.S. Supreme Court was to consider the effect of the ICJ's finding that 51 Mexican foreign nationals' right to consular assistance was violated.[88] At the time of this report's printing, it is unclear what affect the administration's decision to abandon the Optional Protocol will have on the case being heard by the U.S. Supreme Court.

Ironically, the U.S. was the first party to the Convention to invoke the protections of the Optional Protocol and authority of the ICJ when it successfully sued Iran for the taking of 52 U.S. hostages in 1979.[89]

There are currently 27 foreign nationals facing death in Texas.[90] Texas has no statutory provision regarding adherence to the Vienna Convention and does not require mandatory law enforcement training regarding consulate notification rights or procedures. To the contrary, Texas officials have repeatedly expressed their opinion that the Convention is either inapplicable to the State of Texas or unenforceable.[91]

Recommendation 18

The Illinois Attorney General should remind all law enforcement agencies of their notification obligations under the Vienna Convention on Consular Relations and undertake regular reviews of the measures taken by state and local police to ensure full compliance. This could include publication of a guide based on the U.S. State Department manual.

The Commission included this recommendation because it felt the Attorney General could provide "improved leadership" in the area of ensuring compliance with the Vienna Convention on Consular Relations.[92] The Commission

87 *Id.*

88 Medellin v. Dretke, No. 04-5928 (2005).

89 Charles Lane, *U.S. Quits Pact used in Capital Cases,* WASH. POST, March 10, 2005.

90 *See* Death Penalty Information Center, *Reported Foreign Nationals under Sentence of Death in the U.S.* (November 2004) *available at* http://www.deathpenaltyinfo.org/article.php?did=198&scid=31#jurisdiction.

91 *See, e.g.,* Statement of Robert Blake, spokesman for Texas Governor Rick Perry, "While Governor Perry respects the world court to have its opinion, the fact remains that the court has no jurisdiction or standing in Texas." *See* Editorial, *Miranda Offers Simple Fix to Consular Rights Problem*, AUSTIN AMER. STATESMAN, April 16, 2004; Statement of George W. Bush, "Texas did not sign the Vienna Convention, so why should it be subject to it?" Heather Wokusch, *From Texas to Abu Ghraib: The Bush Legacy of Prisoner Abuse*, COMMON DREAMS, May 10, 2004.

92 Illinois Commission Report, *supra* note 1, at 42.

positively noted that the Office of the Attorney General in Texas has promulgated a guide relating to consular notification modeled on the U.S. State Department's publication and urged the Illinois Attorney General to follow Texas' lead. The 67-page guide includes suggested steps for law enforcement officials to take when they believe an individual they have arrested is a foreign national.[93]

While the Texas Attorney General has taken important strides to remind law enforcement agencies of their obligations pursuant to the Vienna Convention, it does not regularly review steps taken by individual police agencies to gauge their level of compliance, thus missing an opportunity to appropriately enforce the mandatory provisions of the Convention.

Recommendation 19

The statute relating to the Illinois Law Enforcement Training and Standards Board, 50 ILCS 705/6.1a should be amended to add police perjury (regardless of whether there is a criminal conviction) as a basis upon which the Board may revoke certification of a peace officer.

Recognizing a need to correct unethical conduct by police officers, the Commission urged that perjury on the part of a police officer should be the basis of revocation of that officer's certification, a prerequisite to law enforcement employment. It recommended this regardless of whether the perjury resulted in a criminal conviction. While all Illinois police departments maintain rules forbidding false testimony or the submission of false police reports, the Commission wanted to address concerns about whether police departments were sufficiently enforcing these internal rules. It therefore recommended that the independent board in Illinois charged with setting training standards and certifying police officers have the express power to de-certify a police officer upon a finding that the officer committed perjury in a criminal case.[94]Texas has a mandatory revocation system instituted by the Texas Commission on Law Enforcement Officer Standards and Education which is triggered if a police officer is convicted of committing aggravated perjury.[95] The mandatory revocation requires a judgment from a court that the officer has been convicted of aggravated perjury, defined as making a false statement during or in connection with an official proceeding.[96] While the Illinois Commission recommendation would allow for the revocation of an officer's certification regardless of whether there was a criminal conviction, Texas requires a court judgment reflecting a perjury conviction.

[93] Attorney General of Texas Greg Abbott, *Magistrate's Guide to the Vienna Convention on Consular Notification, available at* http://www.oag.state.tx.us/AG_Publications/pdfs/vienna_guidebook.pdf.

[94] Illinois Commission Report, *supra* note 1, at 42.

[95] Texas Commission on Law Enforcement Officer Standards and Education, *Commission Rules, available at* http://www.tcleose.state.tx.us/Commission_Rules/January%201%202005%20Rules%20w%20Occupations%20Code%201701.pdf.

[96] *Id.*; TEX. PEN. CODE ANN. § 37.03(a)(1) (Vernon 1994).

3 DNA and Forensic Testing

"DNA is the guilty man's worst enemy and the innocent man's best friend. But no matter how powerful a weapon DNA may be in a police detective's crime fighting arsenal, it is useless if there is no money to test the evidence once it has been collected from the crime scene."

— Senator Joe Biden,
Ranking Member, Judiciary Subcommittee on Crime[97]

This chapter focuses on the important issue of forensic testing, and specifically on the forensic value of DNA testing. The Illinois Commission recommended the establishment of an independent testing laboratory, the establishment of a comprehensive DNA database, access to that database by criminal defendants in appropriate cases, and adequate funding for forensic testing in capital cases. The State of Texas is on the road to establishing a comprehensive DNA database, but is in dire need of an independent system of forensic laboratories, as has recently been demonstrated by costly scandals in Houston's forensic lab. And though a statute was recently enacted to provide defendants access to forensic evidence for testing, the restrictive interpretation of that statute by the Court of Criminal Appeals has prevented access in cases of possible innocence. Finally, funding remains an issue for indigent defendants seeking forensic testing in capital cases, and a source of funding for that purpose should be established.

[97] Press release, Senator Joe Biden, (October 2003) (on file with author).

Recommendation 20

An independent state forensic laboratory should be created, operated by civilian personnel, with its own budget, separate from any police agency or supervision.

A significant majority of the Illinois Commission believed that "the overall quality of forensic services would be improved if the laboratory personnel were truly independent."[98] The Commission cited public confidence in the integrity of forensic work done on behalf of the State as an important policy interest supporting this recommendation.[99] The quality and professionalism of state forensic testing has been the subject of increasing debate, and highly publicized cases have questioned the integrity of convictions based in part on state forensic testing. The Commission discussed the Oklahoma crime lab scandal, which required an extensive investigation, and resulted in the reversal of a capital case. The establishment of an independent laboratory would "promote more confidence on the part of both prosecution and defense that results have been fairly and completely analyzed and honestly reported."[100]

Texas does not have an independent state forensic laboratory. Currently Texas' forensic services are supplied by the Department of Public safety from 13 locations throughout the state.[101] The director of the Department of Public Safety, a division of the Executive Branch of the state government, monitors and maintains these facilities.[102] The budget for the laboratories is not independent, and any money collected for the purpose of DNA analysis is deposited in the state treasury.[103]

The dangers of not having an independent forensic laboratory in Texas have been highlighted in recent problems that have discredited the Houston crime laboratory. In December 2002, the Houston Crime Lab's DNA section was shut down, due to unreliable DNA test results caused by improper training of staff members, potential contamination of samples resulting from a leaky roof, and possible mishandling of evidence.[104] As of August 2003, more than 379 DNA cases were selected for retesting at a cost expected to exceed 1.5 million dollars.[105] In August 2004, an internal investigation discovered 280 boxes of evi-

98 Illinois Commission Report, *supra* note 1, at 52.

99 *Id.*

100 *Id.*

101 *See* http://www.txdps.state.tx.us/criminal_law_enforcement/crime_laboratory/.

102 TEX. GOV'T CODE § 411.144(a) & (b) (Vernon 1995), provides "The director [of the Department of Public Safety of the State of Texas] by rule shall establish procedures for a DNA laboratory or criminal justice or law enforcement agency in the collection, preservation, shipment, analysis, and use of a blood sample or other specimen for forensic DNA analysis in a manner that permits the exchange of DNA evidence between DNA laboratories and the use of evidence in a case. (b) The DNA laboratory shall follow the procedures set forth by the director and the FBI."

103 *Id.* at § 411.145(b).

104 *See* Special to the Chronicle, *Hot Topic: HPD Crime Lab*, HOUS. CHRON., *See also* Anna Werner, *D.A. finally backs pardon for Sutton,* 11 News, *available at* http://www.khou.com/crimelab/stories/khou030627_mh_sutton.34027b99.html.

105 *See* Doug Miller, *HPD's discredited crime lab proves to be costly headache*, 11 News, *available at* http://www.khou.com/crimelab/stories/khou040422_ds_CrimeLabCosts.afaf0e56.html.

dence that had been improperly stored, which included such items as body parts, a fetus, and blood-stained clothing, potentially affecting 8,000 cases processed between 1979 and 1991.[106] Authorities estimated that it would take a year to sort and catalogue the evidence found.

Not until January 2005 was an independent investigation into those cases authorized, when the Texas Rangers were brought in to review the material. Even so, the primary responsibility of the Texas Rangers was to oversee the cataloging of the material, as opposed to an actual review of the cases themselves.[107] The degree of the Houston crime lab problems led Houston Police Chief Harold L. Hurtt to urge a pause in executions of Harris County cases. "I think it would be very prudent for us as a system, that is, a criminal justice system, to delay further executions until we've had an opportunity to reexamine evidence that played a particular role in the conviction of an individual that was sentenced to death," Hurtt urged in the fall of 2004 in the face of a string of Harris County executions.[108] Joining in the call for caution, Senator John Whitmire, Dean of the Texas Senate and Chairman of the Senate Committee on Criminal Justice, called the Harris County system "broken."[109]

"I think it would be very prudent for us as a system, that is, a criminal justice system, to delay further executions until we've had an opportunity to reexamine evidence that played a particular role in the conviction of an individual that was sentenced to death."

— Harold L. Hurtt
Houston Police Chief

The case of Josiah Sutton is emblematic of the scope of the crime lab problems. Sutton was convicted of rape and had served four and a half years of a 25-year sentence based on DNA evidence that had been earlier analyzed at the Houston Laboratory.[110] When the evidence was retested, the results revealed that Sutton was not guilty of committing the crime.

Problems with state-run crime labs are not unique to Houston. Paul C. Gianelli, a law professor at Case Western Reserve University, has reported that "although scientific evidence is far superior to other types of evidence . . . it is also subject to abuse. Too many experts in the criminal justice system manifest a police-prosecution bias, a willingness to shade or distort opinions to support

106 Roma Khanna, *Police Turn Up Hundreds of Boxes of Evidence from Crime Lab*, HOUS. CHRON., Aug. 26, 2004.

107 *Id. See also,* Steve McVicker & Roma Khanna, *Independent Review Sought for HPD Crime Lab*, HOUS. CHRON., Sept. 2, 2004; Roma Khanna, *Rangers to Review Crime Lab,* HOUS. CHRON., January 25, 2005.

108 Sylvia Moreno, *Problems in Houston Lead to Call for a Moratorium on Executions*, WASH. POST, October 2, 2004.

109 Kris Axtman, *Growing Introspection in Death-Penalty Capital,* CHRISTIAN SCI. MONITOR, November 16, 2004.

110 *See* http://www.innocenceproject.org.

the state's case."[111] The Illinois Commission acknowledged the importance of scientific evidence in criminal investigations, and emphasized the importance of public confidence in forensic science. This can only be achieved by creating crime laboratories that operate independently from law enforcement.

Peter Neufeld, co-founder of the Innocence Project, outlined the problems of state-run crime laboratories: "standards are voluntary and set up by crime lab directors themselves, too few labs follow the standards, and the overwhelming majority of these labs are too closely connected to police departments or prosecutors."[112] In fact, Houston's former Chief of Police, Clarence Bradford, supports the establishment of independent laboratories to ensure unbiased results.[113]

Though Texas has established an accreditation process for forensic laboratories throughout the state, and all laboratories must be accredited by 2005, the accreditation process is still within the domain of the Department of Public Safety and is not independent.[114]

Recommendation 21

Adequate funding should be provided by the State of Illinois to hire and train both entry-level and supervisory-level forensic scientists to support expansion of DNA testing and evaluation. Support should also be provided for additional up-to-date facilities for DNA testing. The State should be prepared to outsource by sending evidence to private companies for analysis when appropriate.

The Illinois Commission recommended an increase of funding for forensic scientists regardless of whether an independent laboratory was established within the state. DNA technology is constantly improving, resulting in a higher demand for pre-trial DNA testing.[115] As a result, a tremendous backlog of cases had formed at the Illinois State Laboratory, as personnel struggled to keep up with the increased requests and to update their own training. The Commission observed that the backlog was not unique to Illinois and existed nationwide.[116]

Texas, like Illinois, has a backlog of DNA cases at its forensic laboratories. In 1999, Texas had a backlog of 18,400 cases — a greater backlog than the 15,500 cases in Illinois the same year.[117] As a result of this tremendous backlog, the Justice Department granted funding to the State of Texas, in order to reduce the number of cases still in need of testing. As of March 2003, however,

111 *See* Paul C. Gianelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA J. SOC POL'Y & L. 439, 442-69 (1997).

112 *Crime Laboratories under Microscope — Independent Oversight, Separation from Justice Departments Suggested*, ASS'T PRESS, July 6, 2003.

113 Bruce Nichols, *Houston's Police Chief Calls for Independent DNA Labs*, DALLAS MORNING NEWS, June 21, 2003.

114 TEX. GOV'T CODE § 411.0205(b) (Vernon 2003).

115 Illinois Commission Report, *supra* note 1, at 55.

116 *Id.* "The latest report from the Bureau of Justice Statistics, released in January 2002, indicated that in the year 2000, 81% of DNA laboratories across the country reported backlogs. The backlog of cases in 2000 was 16,081, as compared to 6,800 in 1997."

117 Shelia McLaughlin, *DNA Test Backlog May Ease*, THE CINCINNATI ENQUIRER, Feb. 25, 2001.

there remained a backlog of 1,100 cases.[118] After the Houston Police Department Crime Laboratory scandal, the Texas House of Representatives General Investigating Committee learned from James Bolding, supervisor of the Houston lab, that the funding was still insufficient, and had been one source of the problems underlying the scandal.[119] Another source of problems was inadequate training and education for the staff. This highlights the necessity of ensuring that all staff at forensic laboratories are trained in the most current scientific procedures for dealing with DNA and other forensic evidence.

As a result of the Houston Crime Laboratory scandals, the Department of Public Safety has instituted an accreditation process.[120] While this is an important first step, the accreditation process is not independent, and is run by the Department of Public Safety. Additional procedures and funding are needed to ensure that the problems that have pervaded the Houston Crime Laboratory are addressed. It is also necessary to increase funding to reduce the backlog of cases that have developed because of the problems at the Houston Lab.

Texas does have a statutory provision that allows the director of the Department of Public Safety to contract with a laboratory, state agency, private entity, or institution of higher education for services to perform DNA analysis for the department.[121] Therefore, Texas complies with that portion of the Commission's recommendation.

Recommendation 22

The Commission supports Supreme Court Committee Rule 417, establishing minimum standards for DNA evidence.

Illinois Supreme Court Committee Rule 417 mandates the disclosure of all information necessary for a full understanding of DNA test results in all felony prosecutions, post-trial, and post-conviction proceedings. The Commission noted that this "mandates discovery not only of DNA test results, but of underlying technical data."[122] Rule 417 requires the proponent of DNA evidence to divulge all relevant materials to the adverse party. The purpose of the

118 Ian McCann, *Crime Lab to Expand in FW*, DALLAS MORNING NEWS, May 15, 2003.

119 *See* Press Release, Texas House of Representatives, (March 13, 2003), *available at* http://www.house.state.tx.us/news/release.php?id=176.

120 TEX. GOV'T CODE § 411.0205 (Vernon 2003), which provides: "(b) The director by rule shall establish an accreditation process for crime laboratories, including DNA laboratories, and other entities conducting forensic analyses of physical evidence for use in criminal proceedings. (c) The director by rule may exempt from the accreditation process established under Subsection (b) a crime laboratory or other entity conducting a forensic analysis of physical evidence for use in criminal proceedings if the director determines that: (1) independent accreditation is unavailable or inappropriate for the laboratory or entity or the type of examination or test performed by the laboratory or entity; (2) the type of examination or test performed by the laboratory or entity is admissible under a well-established rule of evidence or a statute other than Article 38.35, Code of Criminal Procedure; and (3) the type of examination or test performed by the laboratory or entity is routinely conducted outside of a crime laboratory or other applicable entity by a person other than an employee of the crime laboratory or other applicable entity."

121 *Id.* at §411.144.

122 Illinois Commission Report, supra note 1, at 56.

rule is "to produce uniformly sufficient information to allow a proper, well-informed determination of the admissibility of DNA evidence and to ensure that such evidence is presented completely and intelligibly."[123]

In Texas, a district attorney has a constitutional duty to turn over facts that are capable of establishing the innocence of the accused.[124] However, Texas does not have a law requiring the disclosure of all evidence pertaining to a full understanding of DNA test results, and, absent such law, such requests are routinely denied by the Court of Criminal Appeals.[125]

Recommendation 23

The federal government and the State of Illinois should provide adequate funding to enable the development of a comprehensive DNA database.

The Illinois Commission recommended the development of a comprehensive DNA database as "part of a nationwide effort to enable law enforcement to solve 'cold' cases in which there is little or no information to help identify a suspect other than DNA evidence."[126] They believed that the database would be a useful tool in identifying potential suspects much more quickly than had been done previously.

Since September 1995, Texas laws have mandated that the Department of Public Safety maintain a DNA database for the State.[127] The director of the Department of Public Safety is charged with recording DNA data and establishing and maintaining a "computerized database that serves as the central depository in the state for DNA records."[128] The Texas provision establishes that all adults who have been sent to the Texas Department of Criminal Justice, and who have been convicted of murder, aggravated assault, burglary of a habitation, or any offense that requires the inmate to register as a sex offender provide at least one blood sample for the purpose of creating a DNA record for the state database.

The Texas database is linked to the national DNA identification index system (CODIS). The Department of Public Safety and other police laboratories present DNA profiles of inmates or suspects to the CODIS laboratory in Austin. These profiles are then uploaded into the state and national CODIS databases. According to the April 14, 2004, press release from the Department of Public Safety, in 2003, the number of Texas offenders in the CODIS database was 166,426.[129] It is the Department of Public Safety that acts as the "Texas point-of-

123 *Id.*

124 TEX. CODE CRIM. PROC. ANN. § 2.01 (Vernon 1981).

125 *See, e.g.*, Skinner v. State, 122 S.W.3d 808, 811-12 (Tex. Crim. App. 2003), in which the Court held: "We think the [DNA lab] report is unambiguous, and without more, we will not compel the clinic to turn over its notes."

126 Illinois Commission Report, *supra* note 1, at 56.

127 TEX. GOV'T CODE § 411.142(a) (Vernon 2001).

128 *Id.* at § 411.148(a).

129 Press release, Department of Public Safety (April 14, 2004), *available at* http://www.txdps.state.tx.us/director_staff/public_information/pr041404.htm.

entry into the state and national CODIS systems."[130] The Department of Public Safety Director, Thomas Davis Jr., stated that "[f]ederal grants have allowed DPS and other police agencies to complete more DNA profiles to input into the system."[131] Texas therefore substantially complies with Recommendation 23.

Recommendation 24

Illinois statutes should be amended to provide that in capital cases, a defendant may apply to the court for an order to obtain a search of the DNA database to identify others who may be guilty of the crime.

The Commission recommended this provision in order to allow a defendant access to information that could not only exonerate him or her, but also could provide evidence as to the person actually responsible for committing the crime.[132] The Commission acknowledged the reliability that is associated with DNA evidence, and therefore believed a defendant should be able to use the database to prove that someone else perpetrated the crime.

The Texas provision states that the principal purpose of the DNA database is to assist federal, state, or local criminal justice or law enforcement agencies in the investigation or prosecution of offenses.[133] This does not create a right for a defendant to have access to the database to aid his or her defense. Texas, therefore, currently has no provision granting a capital defendant access to the state or national DNA databases.

Recommendation 25

In capital cases, forensic testing, including DNA pursuant to 725 ILCS 5/116(3), should be permitted where it has the scientific potential to produce new, noncumulative evidence relevant to the defendant's assertion of actual innocence, even though the results may not completely exonerate the defendant.

The Commission unanimously recommended that a defendant be able to obtain post-conviction DNA testing more easily. It recognized the significant number of people exonerated through DNA testing and concluded that "where actual innocence is involved, the better practice is to afford a defendant every reasonable opportunity to establish facts that could lead to his or her exoneration."[134]

Texas has no provision to allow for post-conviction forensic testing that is not DNA evidence. Texas' post-conviction DNA testing statute states that:

> (a) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the mo-

130 *Id.*
131 *Id.*
132 Illinois Commission Report, *supra* note 1, at 57.
133 TEX. GOV'T CODE § 411.143(a) (Vernon 1994).
134 *Id.*

> tion. (b) The motion may request forensic DNA testing only of evidence described by Subsection (a) that was 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, but: (1) was not previously subjected to DNA testing: (A) because DNA testing was: (i) not available; or (ii) available, but not technologically capable of providing probative results; or (B) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing; or (2) although previously subjected to DNA testing, can 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.[135]

A court may only order forensic DNA testing if a defendant is able to show a reasonable probability that he or she would not have been convicted if exculpatory results had been obtained by DNA testing. This standard is stricter than the proposed Illinois standard, as it requires a defendant to present evidence that there is a reasonable probability of actual innocence.[136]

In addition, a court may only order forensic DNA testing if identity was or is an issue in the case.[137] This prerequisite in some cases denies a defendant the right to post-conviction DNA testing if someone at trial testified categorically that the defendant was the perpetrator.[138] This restriction was not suggested in the Illinois recommendations, and fails to take into account the inaccuracy of eyewitness identifications. Of the first 70 exonerations achieved by the Innocence Project, 61 cases involved mistaken identification.[139]

It is important to note, however, that the law with regard to the right to post-conviction DNA testing of evidence is limited not only by statute, but also by poor interpretation of the statute and its modifications in 2003. In the original DNA statute passed in 2001, a convicted person was required to establish by a preponderance of the evidence that "**a reasonable probability exist[ed]** that the person would not have **been prosecuted or** convicted if exculpatory results had been obtained through DNA testing."[140] That language caused confusion in the courts and, in *Kutzner v. State,* the court further confused the issue by holding that "[T]he Legislature intended . . . Article 64.03(a)(2)(A) to mean a reasonable probability exists that exculpatory DNA tests will prove a convicted person's innocence. This does not . . . require convicted persons to prove their innocence before a convicting court may order DNA testing under Article

135 TEX. CODE CRIM. PROC. ANN. § 64.01 (Vernon 2003).
136 *Id.* at § 64.03(a)(2)(a).
137 *Id.*
138 *See, e.g.,* Morris v. State, 110 S.W.3d 100 (Tex. App. Eastland 2003).
139 *See* http://www.innocenceproject.org.
140 TEX. CODE CRIM. PROC. ANN. § 64.03(a)(2)(A) (Vernon 2001) (emphasis added).

64.03. It merely requires convicted persons to show a reasonable probability exists that exculpatory DNA tests would prove their innocence."[141]

Subsequently, the Legislature changed that statutory language to say that "the convicted person establishes by a preponderance of the evidence that . . . the person would not have been convicted if exculpatory results had been obtained through DNA testing."[142] Nevertheless, even since passage of the revised language in 2003, Texas courts still rely on and apply the erroneous *Kutzner* standard, and some did so even while acknowledging that the statute had changed.[143] The Legislature's attempt to ameliorate the result of *Kutzner* has not had the intended effect. Therefore, Texas sets the bar too high regarding access to post-conviction testing and does not comply with the Commission's recommendation.

Recommendation 26

The provisions governing the Capital Litigation Trust Fund should be construed broadly so as to provide a source of finding for forensic testing pursuant to 725 ILCS 5/116-3 when the defendant faces the possibility of a capital sentence. For non-capital defendants, provisions should be made for payment of costs of forensic testing for indigents from sources other than the Capital Litigation Trust Fund.

Illinois' Capital Litigation Trust Fund was created by the Capital Crimes Litigation Act, which aimed to advance fairness in the judicial system's treatment of capital crimes. The Fund provides state monies to aid the prosecution and defense of capital crimes. The statute provides funding to perform forensic testing on evidence that potentially could contribute to a defendant's claim of actual innocence. The Commission agreed with the Illinois Supreme Court that the statute should be interpreted broadly so that a defendant is able to obtain DNA testing even if the results will not completely exonerate him or her. Texas does not have an analogous source of state funds that could be used for forensic testing in capital cases, and should therefore implement funding for that purpose.

141 75 S.W.3d 427, 438-39 (Tex. Crim. App. 2002).
142 TEX. CODE CRIM. PROC. ANN. § 64.03(a)(2)(A) (Vernon 2003).
143 *See, e.g.,* Flores v. State, 150 S.W.3d. 750 (Tex. Crim. App. 2004).

4 *Eligibility for Capital Punishment*

"To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

—Justice John Marshall Harlan[144]

This chapter examines the statutory criteria for death eligibility. Constitutional law prohibits mandatory death penalty statutes, and requires that states narrow the class of persons convicted of murder who are eligible for the ultimate penalty of death.[145] The Illinois Commission analyzed the Illinois death penalty scheme, the cases of persons sentenced to death, and the public policy objectives of the death penalty. The Commission found that the Illinois death penalty statute was both over- and under- inclusive, and recommended that the statute be narrowed from 20 eligibility factors to five specific factors, in order to further the clearly articulated public policy goals established by the Commission. Though the Texas statute is not as broad as the statute in Illinois (Texas has ten eligibility factors), it similarly fails to further the public policy interests articulated by the Commission that justify capital punishment.

Not all persons convicted of murder are eligible for the ultimate penalty of death. The U.S. Supreme Court has held that sentencing schemes that do not channel the discretion of the sentencer but instead permit the death penalty for all murders, violate the Constitution.[146] "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must rea-

144 McGautha v. California, 402 U.S. 183, 204 (1971).
145 Roberts v. Louisiana, 428 U.S. 329 (1976); Woodson v. North Carolina, 428 U.S. 280, 303 (1976).
146 *Id.*

sonably justify the imposition of a more severe sentence on the defendant compared to others guilty of murder . . . statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition."[147]

Illinois, in response to the Supreme Court's directive, initially passed a capital murder statute identifying six eligibility factors.[148] Over the years, the number of eligibility factors burgeoned, and the current statute contains a list of 20 eligibility factors (including a course-of-felony factor that includes 15 possible felonies) that can result in the imposition of death. Similarly, Texas enacted a new capital murder statute in 1973, consisting of five eligibility factors.[149] Those included the murder of a peace officer or firefighter, murder during the course of a felony, murder for remuneration or for hire, murder during an escape, and murder of a correctional officer.[150] Over the last 30 years, the number of eligibility factors has doubled to include gang-related murders in prison, murder while serving a sentence for homicide, murder while incarcerated for life, murder of more than one person, and murder of a child under the age of six.[151]

Recommendation 27

The list of 20 eligible factors should be reduced to a smaller number.

The Commission unanimously found that Illinois statutory eligibility factors failed to adequately narrow the class of persons eligible for capital punishment as required by constitutional law, and failed to fulfill important public policy objectives of capital punishment. The Illinois capital punishment scheme "could make almost any first degree murder eligible for the death penalty."[152] Moreover, research conducted by the Commission showed that the vast majority of capital murder convictions in Illinois were prosecuted under one of *two* eligibility factors (multiple murder or course-of-felony murder), and as many as ten factors had *never been used at all*.[153] A unanimous Commission recommended that the eligibility factors be limited and rewritten to meet important public policy rationales. A majority of the Commission took this recommendation a step further, identifying a specific list of eligibility factors that meet important public policy objectives. Texas could similarly limit its eligibility factors to appropriately narrow the class of persons eligible for the death penalty.

147 Zant v. Stephens, 462 U.S. 872, 878 (1983).
148 Illinois Commission Report, *supra* note 1, at 66. Illinois' first post-Furman statute was invalidated in 1975, in Rice v. Cunningham, 61 Ill.2d 353 (1975). The subsequent 1977 statute contained seven eligibility factors. Ill. Rev. Stat. ch. 38, para. 9-1(a)(1) (1977).
149 Jurek v. Texas, 428 U.S. 262, 265 (1976).
150 *Id.*
151 TEX. PEN. CODE § 19.03 (West 2004).
152 Illinois Commission Report, *supra* note 1, at 72.
153 *Id* at 66.

Recommendation 28

There should only be five eligibility factors:

1. The murder of a peace officer or a firefighter killed in the performance of his/her official duties, or to prevent the performance of his/her official duties, or in retaliation for performing his/her official duties.
2. The murder of any person (inmate, staff, visitor, etc.), occurring at a correctional facility.
3. The murder of two or more persons as set forth in 720 ILCS 5/9-1(b)(3), as that provision has been interpreted by the Illinois Supreme Court.
4. The intentional murder of a person involving the infliction of torture. For the purposes of this section, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain.
5. The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under Illinois law, of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors, and investigators.

A majority of the Commission recommended that Illinois limit its eligibility factors to five specific crimes, a system designed to meet important and clearly defined public policy objectives. The Illinois Commission identified four public policy objectives underlying capital punishment: (1) to punish particularly heinous and shocking crimes; (2) to incapacitate persons with a demonstrated propensity to murder again; (3) to meaningfully punish persons serving a life sentence; and (4) to disburse the most serious punishment in circumstances of paramount state interest, such as in the case of murder of law enforcement officers and firefighters whose lives are at risk every day for the sake of public safety. Moreover, the Commission specifically rejected deterrence as a public policy rationale for the death penalty. "Clear statistical evidence that would support capital sentencing on [the basis of deterrence] is lacking; indeed, many academics suggest that existing studies tend to show that capital punishment is *not* a general deterrent to murder."[154] Hence, the majority of the Commission expressed the view that "general deterrence cannot be used to justify the death penalty."[155]

In addition, a majority of the Commission specifically recommended the exclusion of murder in the course of a felony as an eligibility factor, reasoning that

[154] Illinois Commission Report, *supra* note 1, at 68, citing the following studies: William C. Bailey and Ruth Peterson, *Murder, Capital Punishment and Deterrence: A Review of the Evidence and an Examination of Police Killings,* Vol 50 No. 1 J. SOC. ISSUES 53 (Summer 1994); Michael Radelet and Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts,* 87 J. CRIM. L. & CRIMINOLOGY 1, (Fall 1996); Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data,* 60 U .PITT. L. REV. 321 (Winter 1990).

[155] *Id* at 69.

it applied to 60% of capitally charged murders in Illinois, but bore little or no relationship to the public policy goals supporting capital punishment. The Commission cited, as an example, the case of a first offender who shot someone during the course of a felony, and reasoned that though every murder is serious, this was not the type of heinous crime that warranted the ultimate punishment of death.

The Texas capital murder statute has ten eligibility factors,[156] which is still double the number of eligibility factors recommended by the Commission. Moreover, the Texas capital murder statute fails to address some of the Commission's public policy rationales for the death penalty, while vastly over-producing death in cases of felony-murder and party liability.

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The Texas capital murder statute does not meet the Commission's first public policy objective, which is to punish particularly heinous or shocking murders with the death penalty. The Commission recommended adopting an eligibility factor of murder involving torture. This eligibility factor is based in part on a torture eligibility factor in effect in Illinois, and "heinous or wanton cruelty" eligibility factors in effect in Arkansas and New York. Texas currently does not have either a torture factor or a factor based on heinous or wantonly cruel conduct. Adoption of the recommended statutory scheme would serve to confine the death penalty to particularly heinous or shocking crimes.

The Texas statute does have factors that address the public policy objective of punishing the murder of law enforcement officers, correctional officers (if the individual is incarcerated), and firefighters.[157] The Illinois Commission's recommendations included eligibility factors that applied capital punishment to a broader array of individuals in the law enforcement and judicial community than the current Texas statute: not only police officers, firefighters, and correctional officers (when killed by an individual who is incarcerated for serious crimes), but also judges, jurors, prosecutors, witnesses, investigators, and any person within a penal institution. The Commission recognized that "there are some unique situations where a unique societal response is extremely important from a public policy point of view, and where paramount state interests have long been believed to exist."[158]

The Texas statute substantially addresses the Commission's third public policy objective: to provide meaningful punishment for individuals serving a life sentence. Texas' statute now provides for capital punishment for persons "serving a sentence of life imprisonment or a term of 99 years for an offense under

156 TEX. PEN. CODE § 19.03 (West 2004).
157 *Id.*
158 Illinois Commission Report, *supra* note 1, at 69.

Section 20.04 [aggravated kidnapping], 22.021 [aggravated sexual assault], or 29.03 [aggravated robbery]."[159] The Commission's recommended factor, which calls for the death penalty for any individual who commits a murder while incarcerated, is more inclusive.

Finally, the Texas statute also substantially addresses the Commission's last public policy objective: to punish those who have clearly demonstrated the propensity to commit murder more than one time.[160] The Illinois multiple murder eligibility factor is slightly more inclusive than the Texas multiple murder statute, in that the death penalty is imposed for the murder of more than one person in a single transaction, or in the case of a prior conviction for murder. Texas' statutory scheme requires that multiple murders be committed in a single transaction in order to be punishable by death, or, alternatively, that a person be incarcerated for a prior murder at the time of the crime.[161]

While Texas' scheme has fewer "extra" eligibility factors than Illinois, Texas' felony-murder factor accounts for a disproportionate number of prosecutions. In addition, murder for hire, murder during the course of a felony, murder during an escape, and murder of a child under six are factors that fail to advance public policy objectives identified by the Commission, yet they account for murder convictions in roughly 75% of Texas capital convictions.[162]

Texas' felony-murder eligibility factor accounts for 63% of capital murder convictions, in spite of the Illinois Commission's conclusion that it bears a dubious relationship to moral culpability or any other legitimate public policy rationale for the death penalty. In 62 cases decided on direct appeal by the Court of Criminal Appeals from 2002 through 2004, felony-murder accounted for 39 capital murder convictions.[163] Only three other eligibility factors were used more than once: multiple murder (9 cases, or 15%), child under six (five cases, or 8%), and peace officer (eight cases, or 12%).[164] Several eligibility factors were used only once, less than 2% of the time: murder of a correctional officer, murder while incarcerated for life, gang-related murder while incarcerated, and murder for remuneration.[165]

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159 TEX. PEN. CODE § 19.03(A)(6) (West 2004).

160 *Id.* at § 19.03(A)(7).

161 *Id.*

162 Texas Defender Service examined all direct appeals, both published and unpublished, of capital cases decided in Texas for three years, from January 1, 2002 to December 30, 2004, and determined the eligibility factors in 62 of 82 cases. List of cases is on file with the author.

163 *Id.*

164 *Id.*

165 *Id.* The numbers add up to more than 70 because some eligibility factors were used more than once.

Texas' course-of-felony eligibility factor has seven enumerated felonies, along with seven attempted felonies, for a total of 14.[166] However, Texas does not limit the applicability of this factor to persons who actually commit murder, permitting capital convictions based on party liability theory. This renders Texas' course-of-felony eligibility factor is far more arbitrary than that in Illinois, as accomplices may be held liable for the actions of their codefendants. Hence, not only can a first-offender who shoots a person during the course of a botched robbery be punished with death, but a person who goes along can be as well.

The Commission's recommended focused statutory scheme with five broad eligibility factors that achieve well-defined public policy objectives would serve the same purpose in Texas as it would in Illinois: It would reduce the arbitrary sentencing disparities that result from the current scheme. In fact, the recommendations, if implemented in Texas, would make the death penalty possible for a greater number of the most severe offenders, as identified by articulated public policy objectives established by the Illinois Commission, but would greatly reduce the number of arbitrary death sentences imposed on less culpable offenders. Of paramount importance in Texas is the exclusion of the course-of-felony eligibility factor, and of accomplice liability theory from the capital punishment arena. In addition, the Commission's recommendations assumed some provisions that do not exist in Texas, such as a life without parole sentencing option for the crime of capital murder.

[166] TEX. PEN. CODE § 19.03(A)(2) (West 2004).

5 *Prosecutors' Selection of Cases for Capital Punishment*

"When in Gregg v. Georgia the Supreme Court gave its seal of approval to capital punishment, this endorsement was premised on the promise that capital punishment would be administered with fairness and justice. Instead, the promise has become a cruel and empty mockery. If not remedied, the scandalous state of our present system of capital punishment will cast a pall of shame over our society for years to come. We cannot let it continue."

— U.S. Supreme Court Justice Thurgood Marshall[167]

"Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death, even with the narrower pool of death-eligible defendants selected according to objective standards."

— U.S. Supreme Court Justice Harry A. Blackmun[168]

This chapter focuses on the exercise of prosecutorial discretion in capital charging decisions. While the Illinois Commission recognized the value of granting discretionary authority to prosecutors to make decisions as to whether to seek the death penalty, the Commission recommended that a statewide set of written standards guide prosecutors in the decision-making process or, alternatively, that a mandatory system of statewide review be implemented in order to ensure the uniform application of the death penalty across the state. Statewide standards would serve the strong societal interest of ensuring the uniform application of laws in the state. Moreover, it would correct the geographic

[167] Speech at Annual Dinner in Honor of the Judiciary, American Bar Association, 1990, *quoted in* NAT'L. L. J., Feb. 8, 1993.

[168] Callins v. Collins, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting).

disparity now existent from county to county in both the method and the standard by which the decision to charge death is made. The recommendations made by the Commission apply with equal, and often greater, force in Texas. Texas leads the nation in geographic charging disparities. Harris County charges individuals with the death penalty at a rate greater than most states. Hence, statewide standards, or a mandatory statewide review commission, would restore equity and reduce the arbitrary geographic disparities prevalent in Texas.

Recommendation 29

The Illinois Attorney General and the Illinois State's Attorneys Association should adopt recommendations as to the procedures State's Attorneys should follow in deciding whether or not to seek the death penalty, but these recommendations should not have the force of law, or be imposed by court rule or legislation.

Though Commission members recognized the value of discretionary authority by prosecutors to seek the death penalty, the Commission also emphasized a strong societal interest in ensuring the uniform application of laws across the state. By unanimous vote, the Commission recommended that written protocols guiding (on a voluntary basis) both the method and the standards of capital charging decisions be promulgated statewide by the Attorney General and the State's Attorney's Association.

The voluntary review recommendation was based in part on a system of written protocols guiding prosecutorial discretion in the State of New Jersey. A majority of the Commission took this recommendation a step further, recommending a mandatory review commission composed primarily of prosecutors to review every death penalty charging decision in the State and issue a binding decision. The Commission's concerns about the lack of uniform procedures to guide prosecutorial decision-making would apply with equal force in Texas. No written protocols standardizing the methods or procedures for death penalty charging decisions exist in Texas.

Recommendation 30

The death penalty sentencing statute should be revised to include a mandatory review of the death eligibility undertaken by a statewide review committee. In the absence of legislative action to make this a mandatory scheme, the Governor should make a commitment to setting up a voluntary review process, supported by the presumption that the Governor will commute the death sentences of defendants when the prosecutor has not participated in the voluntary review process, unless the prosecutor can offer a compelling explanation, based on exceptional circumstances, for the failure to submit the case for review.

The statewide review committee would be composed of five members, four of whom would be prosecutors. The committee would develop standards to implement the legislative intent of the General Assembly with respect to death eligible cases. Membership of the committee, its terms, and scope of powers are set forth in the commentary below.[169]

This recommendation was designed to establish uniformity in the application of capital punishment from county to county across the state. Such a review committee would be responsible for reviewing and approving death penalty eligibility decisions made by individual prosecutors throughout the state.[170] The Commission noted that though a few Illinois counties had a formal review process in place for determining which cases would be capitally charged, many did not. Moreover, the process and the standards applied varied widely depending on the District Attorney. "Under present law, the elected state's attorney of each of the 102 counties in Illinois has the discretion to decide when and where to seek the death penalty. Each prosecutor is free to adopt any standard or no standards at all in making such a decision and a prosecutor may decide to seek the death penalty in every case or decline to seek it in all cases. The current Illinois practice provides no safeguards that address this problem, and the lack of well-defined standards has been a frequent criticism of the scheme."[171] The Commission noted, for example, that Cook County (where Chicago is located) had a lower incidence of capitally charged crimes than surrounding counties by a statistically significant number.[172]

The Commission based its recommendation in part on the system of review in effect for the federal death penalty. Under that system, U.S. Attorneys must obtain written approval from the Attorney General of the United States prior to seeking the death penalty. U.S. Attorneys must submit written materials explaining their request for death penalty approval to the Department of Justice. There, the Capital Case Unit reviews the submissions of the prosecutors, as well as materials submitted by the defense, and evaluates claims of racial

169 The Illinois Commission recommended specific selection criteria and terms of appointment for each member of the Review Commission. Illinois Commission Report, *supra* note 1, at 84-5.
170 *Id.* at 85.
171 *Id.* at 87.
172 *Id.* at 88.

discrimination in the administration of the death penalty.[173] Such a system instituted in the state system would help guard against arbitrary charging disparities from county to county.

Charging disparities resulting from prosecutorial discretion are far more pronounced in Texas than in Illinois or any other state, largely because of charging practices in Harris County, Texas. Though Harris County is a single jurisdiction among thousands in death penalty states, it has accounted for nearly ten percent of the 944 executions in the United States since 1977.[174] If Harris County were a state, it would rank third behind Texas and Virginia in total executions in the modern death penalty era.[175] Harris County's disproportionately large death row representation is widely attributed to the charging practices of Johnny Holmes, elected district attorney from 1981 to 2000, who believed in capitally charging all death eligible cases with sufficient evidence.[176]

Charging disparities resulting from prosecutorial discretion are far more pronounced in Texas than in Illinois or any other state, largely because of charging practices in Harris County, Texas.

In Harris County, the difference between life and death often has little to do with the moral weight of the crime. Instead, it has everything to do with how easy a death sentence is to secure. For the last 20 years, local prosecutors have operated under a simple principle: If the facts of the case add up to capital murder and there is a good chance that a jury will return the death penalty, they seek the death penalty.[177] Former District Attorney Johnny Holmes expressed his charging policy this way: "If 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."[178] The elected district attorney who replaced Johnny Holmes, Chuck Rosenthal, has continued to pursue aggressive capital charging policies.[179]

173 U.S. Dep't of Justice, *United States Attorney's Manual,* Section 9-10.020-050 *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/.

174 As of January 1, 2005, there had been 944 executions in the United States during the modern death penalty era. Three hundred thirty-six were executed in Texas, and 80 in Harris County, for some 8.47%. Death Penalty Information Center, *Execution Database*, *available at* http://www.deathpenaltyinfo.org/getexecdata.php. *See also* Mike Tolson, *A Deadly Distinction*, HOUS. CHRON., Feb.5, 2001.

175 Mike Tolson, *A Deadly Distinction*, HOUS. CHRON., Feb.5, 2001.

176 *Id.*

177 *Id.*

178 *Id.*

179 In Rosenthal's first two years in office, 14 of 55 inmates sent to death row in Texas were from Harris County, some 25%. In Holmes' last two years in office, 20 of 82 inmates sent to death row in Texas were from Harris County, some 24%. *See* http://www.tdcj.state.tx.us/stat/deathrow.htm (last visited March 22, 2005).

The disproportionately large number of Texas executions is another accident of geography.[180] A recent *Houston Chronicle* article attributed the disparate execution rate in Texas, compared to that of other states, to the following seven factors:[181]

- The Texas capital murder statute leans toward the imposition of death
- A decentralized system of setting execution dates in district court
- A streamlined state appellate system, which seldom overturns a capital case
- An extremely conservative federal appellate system
- A history of ample budgets for the district attorney's office
- An adequate number of courts, with all but two judges former Harris County prosecutors
- An under-funded and sometimes under-qualified capital defense bar.

Significant charging disparities exist within Texas as well. Consider the charging rates of the three most populous counties of the State. As of January 1, 2005 Harris County had 159 inmates on death row, while Dallas County had 49 inmates on death row, and Bexar County (where San Antonio is located) had 37 inmates on death row.[182] FBI statistics from 2002 show that the per capita rate of murder in each of the three cities is similar: Houston had 8.4 murders per 100,000 people, Dallas had 7.8, and San Antonio had 7.3.[183] Houston had 8% more murders than Dallas, but 324% more death row inmates, and 15% more murders than San Antonio, but 430% more death row inmates. Even accounting for population differences does little to assuage the geographic disparities. According to the 2000 census, Harris County had 3.4 million people, while Dallas and Bexar Counties had a combined population of 3.6 million people.[184] Still, Harris County has almost twice as many people on death row as Dallas and Bexar Counties combined.

A recent empirical study of the factors used by Texas district attorneys in selecting capital cases demonstrates the lack of uniformity in charging decisions. In a 2003 study,[185] questionnaires were mailed to 249 of the 254 elected district attorneys in Texas, asking the elected officials to identify the factors considered in deciding whether to seek the death penalty in their jurisdictions. Responses

180 California has more inmates on death row than Texas (638 in California, 443 in Texas as of January 1, 2005), but has executed only 11 as of April 1, 2005, compared to Texas' 340. NAACP Legal Defense and Educational Fund, "*Death Row U.S.A.*" (Fall 2004) *available at* http://www.deathpenaltyinfo.org/ (last visited February 1, 2005); Death Penalty Information Center, *Execution Database*, *available at* http://www.deathpenaltyinfo.org/getexecdata.php (last visited February 1, 2005).

181 Mike Tolson, *A Deadly Distinction*, HOUS. CHRON., Feb.5, 2001.

182 Texas Department of Criminal Justice, *Offenders on Death Row*, *available at* http://www.tdcj.state.tx.us/stat/deathrow.htm (last visited January 24, 2005).

183 Federal Bureau of Investigation, *FBI Uniform Crime Reports by Metropolitan Statistical Area*, *available at* http://www.fbi.gov/ucr/ucr.htm#cius (last visited January 24, 2005).

184 U.S. Census Bureau, Population 2000, *available at* http://quickfacts.census.gov/qfd/states/48000.html.

185 Lena G. Roberts, *All Over the Map . . . How an Accident of Geography Turns Texas' Death Penalty Scheme Into Lethal Lottery* (April 2003) (unpublished study on file with author).

were obtained from 79 counties. Of those, only three counties had written protocols for capital charging decisions. Responding counties cited the following factors as relevant to the charging decision (percentages refer to the number of counties citing the given charging factor):

Characteristics of the crime itself	86.1%
History or criminal record of the defendant	66.6%
Future dangerousness	63.8%
Age of the defendant	41.6%
Financial resources	38.8%
Characteristics of the victim	36.1%
Characteristics of the defendant	33.3%
Input from the victim's family	30.5%
Relationship between the defendant and the victim	30.5%
Age of the victim	30.5%
Public interest in the crime	25.0%
Input from law enforcement	25.0%
Moral considerations	22.2%
Media attention	22.2%
Defendant's degree of participation	8.3%
Mitigating circumstances	8.3%
Likelihood that a jury will assess death penalty	8.3%
Strength of the case on guilt	5.5%

The results of this study illustrate the varying standards that different district attorneys apply to capital charging decisions in Texas, leading to disparate charging practices.

Broad prosecutorial discretion not only results in geographic disparities, but also in racial disparities. Though 71% of Texas' population is white, only 31.5% of death row inmates are white. African Americans, on the other hand, represent only 11.5% of the state's population, but 40.3% of Texas' death row.[186]

In 1990, the U.S. General Accounting Office (GAO) published research into death penalty sentencing based on studies carried out in all death penalty states. The GAO found that in 82% of the studies the race of the victim was found to influence the likelihood of being charged with capital murder or receiving a death sentence.[187] This discrimination manifested itself in a disproportionately large number of death sentences being meted out on defendants in cases involving white victims.

[186] Texas Department of Criminal Justice, *Gender and Racial Statistics of Death Row Offenders, available at* http://www.tdcj.state.tx.us/stat/racial.htm; 2000 Census data is *available at* http://quickfacts.census.gov/qfd/states/48000.html.

[187] U.S. General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities,* at 5 (February 1990).

More recent research confirmed the continued viability of this trend. Across the U.S., prosecutors demonstrate a reluctance to seek death in cases involving black victims, confirming the "traditional racially discriminatory view in which black life is valued less highly than white life or in which the white dominated social structure is less threatened by black-victim homicides."[188] Prosecutors' eagerness to seek the death penalty for murderers of white victims has been widely reported, with a plethora of accompanying reasons. Among them, it has been suggested that prosecutors are more likely to seek the death sentence when it is easier to obtain[189] — the "white dominated social structure" will be more likely to convict when the victim is white. A pro-death penalty commentator even acknowledges that "the notion that prosecutors and judges are less willing to expend the scarce resources of the criminal justice system to convict and execute the murderers of blacks is all too plausible. In fact, it is clearly the case."[190] The similarity in racial composition of the prosecutor and victim populations has also been noted,[191] as has the political incentive for a prosecutor to do all he or she can for a victim from a wealthy white family.[192]

". . . the notion that prosecutors and judges are less willing to expend the scarce resources of the criminal justice system to convict and execute the murderers of blacks is all too plausible. In fact, it is clearly the case."

— John C. McAdams

Over 80% of the individuals executed on death row between 1977 and 1998 killed a victim who was white, even though blacks and whites were the victims of murder at essentially the same rate in this period.[193]

Studies demonstrate that the Texas capital judicial system is markedly prone to racial discrimination. The problem is more pronounced in the exercise of prosecutorial (as opposed to jury) discretion and is manifested to a greater degree in the race of the victim than that of the defendant.[194] Professors Sorensen and Marquart have concluded that in Texas "[c]ases involving white victims are twice as likely to result in conviction than Hispanic-victim cases and five times as likely

188 John Blume et al., *Explaining Death Row's Population and Racial Composition*, 1 J. EMPIRICAL LEGAL STUD. 165, 197 (2004).

189 *Id.*

190 John C. McAdams, *Racial Disparity and the Death Penalty*, 61 LAW & CONTEMP. PROBS. 153 (1998).

191 Jeffrey J Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811 (1998). In February 1998, Texas had 137 elected District Attorneys who are white, 11 who are Hispanic and no elected District Attorneys who are black.

192 Richard C. Dieter, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides* (June 1998), *available at* http://www.deathpenaltyinfo.org/article.php?did=404&scid=45.

193 Amnesty International, *Killing with Prejudice: Race and the Death Penalty in the USA,* (April 30, 1999). *available at* http://www.amnestyusa.org/abolish/reports.do.

194 Sheldon Eckland-Olson, *Structured Discretion, Racial Bias, and the Texas Death Penalty*, 69 POL. SCI. Q. 853, 858-61, 871 (1988).

to result in conviction than cases involving black victims."[195] Such a discrepancy prompted them, too, to note the "devaluation of the lives of black victims."[196]

More recent research reiterates what Sorensen and Marquart established. A 1998 study based on information collected from Dallas, Tarrant, Harris, and Bexar Counties concluded that "[k]illers of whites are always over-represented among death sentences" and that "disparities based on the race of the victim remain regardless of the level of case seriousness."[197]

Such observations are borne out in the figures. Ten percent of death row inmates executed in Texas post-Furman were executed for killing a black victim.[198] Figures supplied by the Texas Department of Public Safety for 1994-2003 show, however, that around 35% of murder victims in Texas are black.[199] A study of prosecutorial practice in Montgomery County revealed that, though 31% of the 55 murders committed between 1995 and 1999 involved non-white victims, only two of those cases were even prosecuted, neither leading to a death sentence, while 90% of the cases involving white victims went to trial.[200] Texas could curtail such charging disparity by instituting a statewide review committee as recommended by the commission.

Recommendation 31

The Commission supports Supreme Court Rule 416(c)[201] requiring that the state announce its intention to seek the death penalty, and the factors to be relied upon, as soon as practicable but in no event later than 120 days after arraignment.

The Commission unanimously supported the Illinois Supreme Court's recent enactment of Rule 416(c), reasoning that "[e]arly disclosure of the decision to seek the death penalty, and the eligibility factors to be relied on, provide the defense with a reasonable opportunity to formulate a defense."[202] Moreover,

195 Jonathan Sorensen and James W Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743 (1990-91).

196 *Id.*

197 Deon Brock et al., *Arbitrariness in the Imposition of 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 (2000).

198 Thirty-three out of 336 inmates executed. Death Penalty Information Center, *Executions by State, available at* http://www.deathpenaltyinfo.org.

199 Figures collated from Texas Crime Reports for 1994 to 2003.

200 Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty* (2000), *available at* http://www.texasdefender.org/links/html.

201 Supreme Court Rule 416(c), which took effect on March 1, 2001, provides as follows: "Notice of Intention to Seek or Decline Death Penalty — The State's attorney or Attorney General shall provide notice of the State's intention to seek or reject imposition of the death penalty by filing a Notice of Intent to Seek or Decline Death Penalty as soon as practicable. In no event shall the filing of said notice be later than 120 days after arraignment, unless for good cause shown, the court directs otherwise. The Notice of Intent to seek imposition of the death penalty shall also include all of the statutory aggravating factors enumerated in Section 9-1(b) of the Criminal Code of 1961 (720 ILCS 5/9-1 (b)) which the State intends to introduce during the death penalty sentencing hearing."

202 Illinois Commission Report, *supra* note 1, at 89.

early disclosure has important ramifications in terms of funding, staffing, and various new procedural safeguards provided for by Illinois Supreme Court rule.

In Texas, there are no notice or disclosure requirements in effect. Early disclosure requirements would have no effect on the appointment of counsel, as the Texas Fair Defense Act requires the "presiding judge of the district court in which a capital felony case is filed [to] 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."[203] An early notice and disclosure requirement would prevent the prosecutor from amending a non-capital charge to a capital charge more than 120 days after arraignment without good cause. And assuming the enactment of the Commission's Recommendations, an early disclosure requirement would trigger additional procedural safeguards applicable only to capital cases.

[203] TEX. CODE CRIM. PROC. ANN. §. 26.052(e) (West 2004).

6 *Trial Judges*

"Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us." [204]

This chapter explores the role that trial judges play in capital murder trials. The chapter makes specific recommendations to ensure that trial judges are effective arbiters in the capital judicial process. The recommendations include increasing and improving training opportunities for trial judges hearing capital cases, improving access to developing case law, improving research support for these trial judges, and establishing a statewide resource committee for judges hearing capital cases.

The Illinois Report states "efforts to reform the death penalty process in Illinois have focused primarily on the role of prosecutors and defense lawyers."[205] Similarly, Texas' interest in the problems plaguing capital trials have focused on lawyers. Although there has been criticism of certain trial judges in the capital trial process, none of this criticism has led to demands for systemic improvements in the role of judges in capital cases. Rather, the criticism leveled has centered on individual judges' incompetence and corruption, not only in Texas and Illinois, but other states as well.[206] In making the following recommendations, the Illinois Commission recognized the need for systemic improvements regarding the training, education, and performance of trial judges.

204 TEX. RULES OF COURT, Code of Judicial Conduct Preamble (2004).
205 Illinois Commission Report *supra* note 1, at 93.
206 *See* Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1855-58 (1994).

Recommendation 32

The Illinois Supreme Court should give consideration to encouraging the Administrative Officer of the Illinois Courts (AOIC) to undertake a concerted effort to educate trial judges throughout the state in the parameters of the Capital Crimes Litigation Act and the funding sources available for defense of capital cases.

The Commission included this recommendation stressing the importance of the correct handling of capital trials from the very start. Citing various sources, the Commission noted that an analysis of death penalty case reversals indicates that many cases are reversed due to avoidable trial court error.[207] Knowledge by trial court judges of additional sources of funds would help ensure that defense counsel is adequately funded and help eliminate some of those errors.

As stated by the Texas Court of Criminal Appeals on its website, "most of the money used to operate the courts within the Texas Judicial System is provided by the counties or cities, with a more limited amount of funds provided by the State."[208] This system of allocating funds precludes the establishment of uniform state guidelines about funding sources. This jurisdictional funding problem leads to disparate results. As stated by Cynthia Orr, then-president of the Texas Criminal Defense Lawyers Association, "[s]o what we end up with is if you're in some poor county that doesn't have the resources that Harris County has and doesn't have the judges and manpower and staff to see that a training program is implemented, then you can catch as catch can. . . . Some jurisdictions, they're all ramped up to handle death penalties on a whole different level."[209]

With the enormous discretion in funding and appointment of counsel, the commitment to equal justice is potentially compromised. According to a report prepared for the American Bar Association:

> Each of Texas' 254 counties organizes and funds its own indigent defense delivery system. In 2001 the Texas legislature enacted the Texas Fair Defense Act, which created the Task Force on Indigent Defense to assist local government in improving the delivery of indigent defense services, including providing some financial assistance. . . . Very few [counties] have public defender programs. In the other counties counsel are appointed by local judges off of a list of attorneys deemed qualified to accept capital case appointments. . . . Compensation rates for court appointed counsel are established by district court judges, and vary from county to county.[210]

207 Illinois Commission Report *supra* note 1, at 94.

208 http://www.cca.courts.state.tx.us/.

209 *See* Cynthia Orr, *Death and Texas: The Future of the Ultimate Punishment*, 19 TEXAS LAWYER, No. 27 at 11.

210 Spangenberg Group, *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, a State-by-State Overview* (2003), at 19-20.

Texas does not presently have any alternate funding for capital cases. Judges are under pressure to manage the expenses associated with a capital case and as such, may hesitate to approve adequate funding. It is particularly harmful to financially starve a capital case because such deficits may amount to court error that leads to reversal.[211]

In just under half of the states which permit imposition of the death penalty, state statutory law grants to the trial court judge the authority to appoint counsel and authorize "compensation," or more commonly, "reasonable compensation," in capital trial cases. In Texas, compensation rates typically vary from county to county, and often vary from judge to judge and from case to case.

Recommendation 33

The Illinois Supreme Court should be encouraged to undertake more action as outlined in this report to ensure the highest quality training and support are provided to any judge trying a capital case. The commission also supports initiatives which contemplate that capital case training will occur prior to the time a judge hears a capital case. The Supreme Court should be encouraged to consider going further and requiring that judges be trained before presiding over a capital case.

The Illinois Commission unanimously supported the Illinois Supreme Court's efforts to ensure that trial judges throughout the state receive training on capital cases. The Commission maintains that only the most qualified and best-trained judges should hear capital cases. Making such training mandatory as opposed to optional provides a strong statement that the importance of a well-trained judiciary hearing capital cases cannot be overstated.

Currently, Texas has no formal training mechanism for judges trying capital cases.[212] Although judges can receive training from the American Bar Association's judicial division, there is no mandatory training specific to the adjudication of capital cases.[213]

The Texas Judicial Council has no committee on capital punishment. The main judicial training centers, the Texas Justice Court Training Center and the Texas Center for the Judiciary, do not have any training that specifically addresses capital punishment.[214] These omissions send judges the implicit message that capital cases are no different than other cases and do not merit any special time or effort.

A lack of procedures, coupled with largely unfettered discretion, potentially allows unscrupulous judges to exploit their authority. For example, the State Bar

211 A gross example of the practice that emerges from lack of funding guidelines is the case of Federico Martinez-Macias who was represented by a lawyer paid under $12 an hour. *See* Martinez-Macias v. Collins, 979 F. 2d 1067 (5th Cir. 1994).

212 Rules of Judicial Education, effective September 1, 2002, promulgated by the Court of Criminal Appeals Judicial and Court Personnel Training Program.

213 *Id.* at Rule 11 (regarding statutorily mandated training).

214 *Id.*

of Texas formed the Committee on Legal Services to the Poor in Criminal Matters in 1994 and charged it with the task of gathering data. It sent out a survey in which nearly half of judges surveyed (46.4%) reported that their peers sometimes appoint counsel because they have a reputation for moving cases along quickly, regardless of the quality of the defense they provide. Nearly four in ten report judges appointing a lawyer because he is a friend, while one-third report that whether an attorney is a political supporter or has contributed to the appointing judge's campaign is a consideration.[215] Though training targeted toward judges presiding over capital cases will not eliminate such behavior, it may increase sensitivity of judges to the complexities of capital cases, and result in judges appointing only those attorneys who are expert in such representation. In other words, the more judges know and understand how difficult, time consuming, and important decent representation is to a defendant the more likely judges will appoint those attorneys able to provide that type of defense.

Recommendation 34

In light of the changes in Illinois Supreme Court rules governing the discovery process in capital cases, the Supreme Court should give consideration to ways the Court can ensure that particularized training is provided to trial judges with respect to implementation of the new rules governing capital litigation, especially with respect to the management of the discovery process.

Unanimously supported by the Illinois Commission, this recommendation is targeted toward new discovery rules enacted by the Illinois Supreme Court governing capital litigation, such as discovery depositions. The Commission is concerned that judges who hear primarily criminal cases may have less familiarity with deposition procedures and resolution of disputes.

This provision is largely inapplicable to Texas given that there have been few if any changes to existing discovery laws. Refer instead to Recommendation 35 and other commentary on recommendations regarding ongoing training for judges hearing capital cases in Texas.

[215] Catherine Greene Burnett, *In Pursuit of Independent, Qualified and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595 (2001).

Recommendation 35

All judges should receive periodic training in the following areas, and experts on these subjects be retained to conduct training and prepare training manuals on these topics:

1. The risk of false testimony by "jailhouse snitches";
2. The risks of false testimony by accomplice witnesses;
3. The dangers of tunnel vision;
4. The risks of wrongful convictions in homicide cases;
5. Police investigative and interrogation methods;
6. Police investigating and reporting of exculpatory evidence;
7. Forensic evidence; and
8. The risks of false confessions.

Recommendation 35 was included after the Commission noted that the eight articulated areas of concern cover areas where capital cases can "go painfully wrong."[216] Training in the risks associated with these areas of concern can help avoid what the Commission referred to as "tunnel vision," citing the example of the crediting of police testimony without rigorous examination.

In Texas, these topics are not the subject of mandated training.[217] Rather, Texas mandates training only in matters related to guardianships, family violence, ethics, diversions, and punishment enhancement because of bias or prejudice.[218] None of these topics directly relate to capital punishment.

Recommendation 36

The Illinois Supreme Court and the AOIC, should consider development of and provide sufficient funding for statewide materials to train judges in capital cases, and additional staff to provide research support.

The development and funding for statewide materials suggested in Recommendation 36 would help ensure that judges have the tools to support them in what the Commission acknowledges is a difficult task. Especially important, according to the Commission, would be a statewide bench manual targeted specifically at capital cases.

Texas has not implemented any of the specific suggestions under this recommendation, such as the development of a statewide bench manual targeted specifically at capital cases, or increasing staffing levels and access to computerized legal research and support training for judges on how to use these research tools.

Texas does not appear to have any computerized research databases designed for judges who are trying capital cases, such as the one existing in New York. This lack of a comprehensive source of information reinforces the problem of disparate

216 Illinois Commission Report, *supra* note 1, at 96.
217 *See, e.g.,* TEX. GOV'T CODE ANN., Chap. 22, (Vernon Supp. 2002).
218 *Id.*

knowledge bases among members of the bench. In order for trials to be conducted in a consistent manner, it is crucial that all judges be trained using a similar methodology. Providing judges with the tools to deepen their knowledge and broaden the scope of their expertise will reduce the number of costly errors and enhance public confidence in the administration of the death penalty.[219]

Recommendation 37

The Illinois Supreme Court should consider ways in which information regarding relevant case law and other resources can be widely disseminated to those trying capital cases, through development of a digest of applicable law by the Supreme Court and wider publication of the outline of issues developed by the State Appellate Defender or the State Appellate Prosecutor and/or Attorney General.

The Commission suggested that the Illinois judiciary could, by leveraging some of its existing resources, create a digest of applicable law for capital cases, and ensure wider publication of issues and relevant state and federal case law. The Commission noted that since the reinstatement of the death penalty in Illinois, the state had seen over 250 individuals sentenced to death, resulting in a myriad of cases. By creating, for example, a special section on the Illinois Supreme Court website specifically for capital cases, the commission noted that issues of particular concern could be easily highlighted.

The Texas Court of Criminal Appeals, under the Texas Judiciary Online, does publish court decisions on its website.[220] But there is no designated area of the website devoted to capital cases. It also lists the Court's training policies and rules of judicial education and administration. Unfortunately, there is no explicit mention of capital cases within these policies and rules. If the rules set out to guide judges are any indication, it appears that in Texas, death is not viewed differently from other run-of-the-mill cases.

Recommendation 38

Certification of Judges

The Illinois Supreme Court should consider implementing a process to certify judges who are qualified to hear capital cases either by virtue of experience or training. Trial court judges should be certified as qualified to hear capital cases based upon completion of specialized training and based upon their experience in hearing criminal cases.

The Illinois Commission maintains that, like attorneys, judges should be certified to hear capital cases. Citing the complexity of capital cases, the Illinois Commission looked to New York's system wherein judges are designated based on their experience and attendance at judicial training sessions to hear

219 *See* Jan Jarboe Russell, *If This Nation Can't Fix Capital Punishment, Then End It,* SAN ANTONIO EXPRESS-NEWS, February 17, 2002, at 1. ("In a previous study, Columbia University found that state and federal courts nationwide overturned death penalties in 68 percent of all capital cases.")

220 *See* http://www.cca.courts.state.tx.us/.

capital cases. This would, according to the Commission, help to avert many problems typically associated with capital trials.

Not only is there is no requirement that judges receive specialized training, there is no certification requirement in Texas regarding a judge's ability to hear capital cases. Considering the size of Texas, and time constraints on Texas judges, it is likely that some county judges would be inexperienced in dealing with a capital case and are likely to repeat errors in cases without having the benefit of new information. Thus, a certification process based on completion of specialized training would serve to improve the judge's familiarity with case law and issues specific to capital cases.

Recommendation 39

The Illinois Supreme Court should consider appointment of a standing committee of trial judges and/or appellate justices familiar with capital case management to provide resources to trial judges throughout the state who are responsible for trying capital cases.

Again citing the process in New York of maintaining a standing committee composed of judges with experience in capital litigation, the Illinois Commission envisions a group of individuals that can be called upon by any judge in the state who has been assigned a capital case.[221] This group could then provide research, forms, and advice as well as training materials as needed.

Texas has no such standing committee for the provision of resources to trial judges. The only standing organizations related to capital cases are the regional committees appointed to compile lists of attorneys qualified to accept capital case appointments in each of Texas' nine judicial regions. Each region has an administrative judge who appoints the committees for this purpose. Though this administrative judge oversees the process of compilation of the list, there is no formalized process for informing judges themselves about the specific and special issues unique to capital cases.

[221] Illinois Commission Report, *supra* note 1, at 100.

7 *Trial Lawyers*

"I have yet to see a death case among the dozens coming to the Supreme Court on the eve-of-execution stay applications in which the defendant was well represented at trial." [222]

— U.S. Supreme Court Justice Ruth Bader Ginsberg

"You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say." [223]

— Entire defense offered by a Texas attorney for his client, Jesus Romero, at a capital sentencing

In this chapter, the Commission, recognizing that "[p]roviding qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing, and execution of capital defendants,"[224] focused on issues relating to the qualification and experience of attorneys appointed at the trial level in capital cases, as well as funding and training for defense counsel. At the time the Commission considered these issues, the Illinois Supreme Court had recently adopted more stringent attorney qualification criteria. The Commission strongly approved these measures and made additional recommendations to improve the performance of defense attorneys in these cases.

Recommendation 40

The Commission supports new Illinois Supreme Court Rule 416(b) regarding qualifications for counsel in capital cases.

[222] Associated Press, *Ginsberg Backs Ending Death Penalty*, April 9, 2001.

[223] *See* Romero v. Lynaugh, 884 F.2d 871 (5th Cir. 1989) (Romero was executed in 1992), cited in: Marcia Coyle, Fred Strasser and Marianne Lavelle, *Trial and Error in the Nation's Death Belt: Fatal Defense*, NAT'L L.J., v.12, n.40, at 34, June 11, 1990.

[224] Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* (2001).

Recommendation 41

The Commission supports new Illinois Supreme Court Rule 701(b) which imposes the requirement that those appearing as lead or co-counsel in a capital case be first admitted to the Capital Litigation Bar under Rule 714.

Recommendation 42

The Commission supports new Illinois Supreme Court Rule 714 which imposes requirements on the qualifications of attorneys handling capital cases.

A full adversarial testing of the prosecution's evidence is essential to ensuring a fair and accurate outcome in any criminal case. The U.S. Supreme Court has held that "[t]he very premise of our adversary system is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[225] This premise is particularly crucial when the defendant faces death, a sentence that, once carried out, is irreversible. This goal can be achieved only if defendants receive consistent, quality representation that allows them to challenge the state's case and prepare and present their defense.

In 2000, the Illinois Supreme Court established a Committee to review attorney qualification criteria in capital cases. The Committee proposed standards it felt would "make it substantially less likely that capital trials will be marred by error resulting from an attorney's inexperience or lack of familiarity with capital trial procedures."[226] These criteria include the following:

1. Both attorneys appointed to a capital cases must be members of the Capital Litigation Bar;
2. Lead counsel must have tried to verdict no less than eight felony trials, at least two of which must have been murder trials, meet certain training standards, and have experience with expert, forensic, and medical evidence;
3. Co-counsel must have tried to verdict no less than five felony trials, meet certain training standards, and have experience with expert witnesses.

The requirements for admission to the Illinois Capital Litigation Trial Bar include that an attorney be a member in good standing with at least five years of criminal litigation experience, have substantial familiarity with the ethical and procedural rules applicable, have prior experience as lead or co-counsel in no fewer than eight felony jury trials which were tried to completion, at least two of which were murder prosecutions; and either have completed at least 12 hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme Court within two years prior to making application for admission; or have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health, pathology, and DNA profiling evidence.[227]

225 United States v. Cronic, 466 U.S. 648, 655-57 (1984).
226 Ill. Sup. Ct. Committee Supplemental Report, October 2000, at 5.
227 Article VII, Illinois Rules on Admission and Discipline of Attorneys, Rule 714.

While Texas provisions are in line with those of Illinois in some circumstances, such as the requirement that attorneys have experience with forensic evidence, other qualifications required for attorneys to take capital cases in Texas are deficient when compared to the appointment criteria established in Illinois. Illinois therefore has a greater chance of consistently ensuring quality representation in capital cases. Because of Texas' lax qualification criteria and enforcement of existing requirements, Texas is at increased risk for wrongful convictions.

Unlike Illinois, Texas has no requirement that attorneys be admitted to a Capital Litigation Bar, or any other specialized bar, in order to be eligible for appointments in capital cases. Rules governing trial lawyers' qualifications in Texas are controlled primarily by Article 26.052 of the Code of Criminal Procedure. As originally enacted in 1995, this article was the first step toward formalized statewide procedures for the appointment of qualified lawyers in capital cases. This legislation was intended to promote standards for capital counsel that would consistently produce competent representation. However, even after the enactment of Article 26.052, assignment of under-qualified, over-worked and/or underfunded counsel remained prevalent in death penalty cases across the state.[228]

Accordingly, in 2001, the Texas Legislature substantially amended Article 26.052 to address criticisms and examples of failures in individual cases regarding the quality of trial defense counsel. The 2001 legislation (hereinafter The Fair Defense Act or FDA) set forth specific issues the nine Texas Administrative Judicial Regions must address and enumerated minimum attorney qualification standards in some areas. The 2001 legislation was the first attempt in Texas to establish statewide attorney qualification criteria for capital cases.

Further, the FDA created the Task Force on Indigent Defense, a new state oversight agency, to monitor and improve indigent defense practices.[229] Among other things, the Task Force is specifically authorized to identify attorneys who do not meet performance or qualification standards that may be established by the Task Force for death penalty cases, and to disqualify those attorneys from appointment in capital cases.[230] However, since its creation in 2001, the Task Force has neither adopted performance or qualification standards nor disqualified any attorney. In fact, the Task Force has made little, if any, progress toward improving the quality of indigent defense in capital cases specifically.

The FDA mandates responsibilities with respect to attorney qualifications to the nine administrative judicial regions and the individual counties. Under the FDA, the judicial regions must adopt regional standards for capital attorneys. The FDA set minimum parameters for these standards, which include that the attorney:

228 *See generally* Texas Appleseed Fair Defense Project, *The Fair Defense Report: Analysis of Indigent Defense Practice in Texas,* at 93-121 (2000).
229 *See generally* TEX. GOV'T CODE Chap. 71 (Vernon 2002).
230 *Id.* at §71.060(c).

1. Be a member of the State Bar of Texas;
2. Exhibit proficiency and commitment to providing quality representation to defendants in death penalty cases;
3. Have at least five years' experience in criminal litigation;
4. Have tried to verdict as lead counsel a significant number of felony cases, including homicide trials and other trials punishable as second or first-degree felonies or capital felonies;
5. Have trial experience in the use of and challenge to mental health or forensic expert witnesses;
6. Have experience in investigating and presenting mitigating evidence at the punishment phase of a death penalty trial; and
7. Have participated in continuing legal education courses or other training relating to criminal defense in death penalty cases.

The second component of the FDA qualification scheme requires that each attorney applying to be on the appointment list be approved by a majority of the judges who hear criminal cases at that court level. Attorneys, therefore, must be approved by a majority of the county judges and also must be on the regional appointment list.

While upon first glance one might reach the conclusion that the Texas qualification criteria appear to be on par with or even more stringent than those in Illinois, critical implementation issues linger in Texas. These unresolved questions reveal that Texas has much work to do before the provisions put on paper by the 2001 Legislature translate into actual practice and improved attorney performance in cases.

Texas' Lack of Meaningful Development of Attorney Qualification Criteria and Lack of Compliance with Fair Defense Act Provisions

In promulgating the Fair Defense Act attorney qualification standards, the Legislature intended that the local selection committees use them as a starting point for the development of meaningful qualification standards.[231] The FDA imposes on regions and counties the responsibility to adopt meaningful and practical standards in some areas in which the Legislature has provided only general parameters for attorney qualifications though many regions and counties have not yet done so. Further, despite having substantial time to bring procedures into compliance with the FDA requirements, many Texas counties have failed to fully adopt and, in some cases, have affirmatively contravened the mandatory attorney qualification provisions.

[231] This legislative intent is evident, if for no other reason, from the fact that the Legislature created the local selection committees and charged them with developing qualification standards in the first place. If the minimum qualification requirements set forth in Article 26.052 had been deemed self-executing or otherwise sufficient on their own, there is no reason why the Legislature would have considered it necessary for the local selection committees to take further action with respect to adopting standards.

In 2003, the Equal Justice Center and Texas Defender Service undertook an evaluation to measure the degree to which Texas regions and counties were in compliance with the FDA requirements regarding capital cases.[232] This 2003 report, which reviewed the capital defense plans from the 33 most active death penalty counties in Texas, reveals widespread non-compliance with FDA terms and massive failure to meaningfully define FDA provisions. The report concluded:

> Another matter warranting attention is the regions' failure, in most cases, to assume the responsibility given them by the FDA to take the initiative in improving trial-level representation in death penalty cases. In general, even those regions whose standards include all of the FDA's explicit minimum qualification requirements have failed to fulfill their responsibility to develop criteria that meaningfully address other issues that the FDA mandates be included in the regional standards. Only one region has adopted qualification standards that articulate a specific minimum continuing legal education requirement for death penalty attorneys, or how many felony trials constitute "a significant number" so as to qualify an attorney to receive a first-chair appointment in a capital case. Furthermore, no region has tackled the issue of what an attorney must do in order to "exhibit proficiency and commitment to providing representation to defendants in death penalty cases," for example, by establishing a formalized and meaningful peer review process or by utilizing performance-based measures to evaluate the quality of representation provided by attorneys seeking capital appointments. Performance-based measures, which are not seen in any of the regional standards, are essential to any evaluation of whether attorneys who meet objective experience requirements actually provide quality representation in individual cases. Rather than taking a leadership role in developing qualification standards for attorneys in capital cases, as article 26.052 created them to do, the local selection committees in many of the administrative judicial regions at best have parroted the language of article 26.052, without filling in the specific details necessary for their standards to have any real meaning. The Legislature plainly intended for the regional selection committees to fill in such details, otherwise there would have been nothing for the regional committees to do and no point in assigning them responsibility for developing regional standards. Moreover, on certain issues, simply parroting the statutory language fails to state any meaningful standard. For example, by itself, "a significant number" of trials could mean anything from two trials to 20 or more. "Exhibit proficiency and commitment" is even more meaningless without responsible elaboration. As a consequence, the regional qualification standards

[232] Equal Justice Center and Texas Defender Service, *Texas Death Penalty Practices: Quality of Regional Standards and County Plans Governing Indigent Defense in Capital Cases* (2003).

> fail to provide any practical tool for screening attorney qualifications, or to materially inform the public of the standards to which attorneys who seek appointments in death penalty cases are being held. Moreover, such regional qualification standards do not provide counties within the region sufficient guidance on the issue of capital attorney qualifications, but instead leave counties in a situation in which they have to correct the regional standards' deficiencies in order to achieve bare compliance with the FDA. With a few encouraging exceptions, the regional qualification standards represent a failure to comply with the FDA and a missed opportunity to improve the quality of representation available to defendants who are facing the death penalty.[233]

Further, it should be remembered that even if Texas was in complete compliance with the Fair Defense Act, the standards embodied therein are not the ultimate statements of what is required to ensure quality representation for death penalty defendants. Texas' noncompliance with the FDA is even more troubling when viewed in light of the fact that the Texas requirements enumerated in the FDA themselves are far short of the standards recommended by the ABA and referenced as reasonable by the U.S. Supreme Court.[234]

Until Texas adopts and enforces meaningful performance standards, effective, quality representation cannot be consistently assured.[235]

Recommendation 43

The office of the State Appellate Defender should facilitate the dissemination of information with respect to defense counsel qualifications under the proposed Supreme Court process.

In Illinois, the State Appellate Defender office is charged with providing support to capital trial lawyers in most counties.[236] It is also responsible for maintaining and disseminating information regarding qualified attorneys for lead and co-counsel appointments. Texas has no similar defense agency charged with or adequately funded to assist capital trial lawyers.

Recommendation 44

The Commission supports efforts to have training for prosecutors and defenders in capital litigation, and to have funding provided to ensure that training programs continue to be of the highest quality.

The Commission included this recommendation because it recognized the importance of adequate attorney training opportunities. Not only is the area

233 *Id.* at 26-27 (internal citations omitted).
234 *See, e.g.,* Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003); Strickland v. Washington, 466 U.S. 668, 688 (1984); and Williams v. Taylor, 529 U.S. 362, 396 (2000).
235 *Id.* at 63.
236 *See* 725 ILCS 105/10(b)(5).

of capital defense changing rapidly, its complexity and high stakes necessarily require that attorneys practicing in the area be aware of the demands which will be placed on them when they take on a capital case. Perhaps most important in the area of training is the ability to learn from the experiences of other attorneys who have handled capital cases. Networking among attorneys on these cases is especially crucial.

Beginning in 2001 with the passage of the Fair Defense Act, Texas appropriates roughly $1.25 million per year for criminal defense lawyer training that is distributed through grants made by the Texas Court of Criminal Appeals.[237] This amount represented nearly four times the amount set aside per year prior to 2001,[238] and includes, but is not limited to, attorney training regarding capital litigation.

While the amount of funding might seem adequate for defense attorney trainings, criticism has been leveled at the Court for its choice of programs it deems qualified for access to the funds. For example, in 2002, the Court awarded a grant of nearly $225,000 to a small legal organization set up by an attorney with an extensive history of personal financial problems, which included bankruptcy and IRS liens.[239] The legal organization, titled "Dave's Bar Association," applied for the funds to host weekly lunches and sponsor an annual seminar in Hawaii.[240] The presiding judge of the Court of Criminal Appeals, Sharon Keller, admitted that she was unaware of the attorney's history of financial malfeasance, but defended the grant stating, "I don't know that I would have thought it [the financial information] was relevant if I had known."[241] Further, the Court has placed what some defense attorneys believe to be unreasonable limitations on the expenditures of the funds, causing undue restrictions on attorneys' ability to attend quality training seminars. For example, at times, the Court has resisted or prohibited the use of funds for out-of-state training seminars and has questioned "bring your own case" formats, which would allow attorneys to brainstorm the facts of their cases with the training course instructors.[242]

Recently, Judge Patrick Higginbotham of the U.S. Court of Appeals for the Fifth Circuit called on Texas to pay more than "lip service" to providing individuals facing the death penalty with a fair trial.[243] Urging the availability of more resources for attorney and judge training, Judge Higginbotham, writing with Mark Curriden of Vinson & Elkins, noted that "the Supreme Court and lower courts have overturned 165 Texas death penalty convictions or sentences since

237 TEX. GOV'T CODE § 56.003 (Vernon 2003), *See also* Mary Alice Robbins, *CCA Judges Giveth and Taketh Away Grant Funds,* TEXAS LAWYER, September, 2003.

238 TEX. GOV'T CODE § 56.003 (Vernon 2003).

239 David Pasztor, *Judge's Choice of Grant Recipients Raises Hackles,* AUSTIN AMER. STATESMAN, November 20, 2002.

240 *Id.*

241 *Id.*

242 Correspondence on file with author.

243 Judge Patrick Higginbotham and Mark Curriden, *Capital Defendants Deserve a Competent Judicial System,* DALLAS MORNING NEWS, January 23, 2005.

capital punishment was reinstated three decades ago. The cases include instances in which defense attorneys slept through trial, came to court intoxicated, or did very little work on their clients' behalf. There are cases in which prosecutors withheld evidence or allowed witnesses to fabricate testimony. And there are cases in which judges misinterpreted the law, mishandled jury selection, or issued flawed jury instructions." They highlighted the programs of the Center for American and International Law, which provides quality training for defense attorneys, judges, and prosecutors.

Prosecutors are eligible for similar amounts of state money to develop and present training courses.[244]

Texas has made important strides toward ensuring the funding and availability of quality defense attorney training programs. Texas should continue to move in a positive direction regarding this issue and lift unnecessary restrictions on state-funded programs. It should further ensure that only legitimate defense bar organizations are eligible for these state funds.

Recommendation 45

All prosecutors and defense lawyers who are members of the Capital Trial Bar who are trying capital cases should receive periodic training in the following areas, and experts on these subjects should be retained to conduct training and prepare training manuals on these topics:

1. The risks of false testimony by in-custody informants ("jailhouse snitches");
2. The risks of false testimony by accomplice witnesses;
3. The dangers of tunnel vision or confirmatory bias;
4. The risks of wrongful conviction in homicide cases;
5. Police investigative and interrogation methods;
6. Police investigating and reporting of exculpatory evidence;
7. Forensic evidence; and
8. The risks of false confessions.

Continuing legal education on the topics enumerated in Recommendation 45 is integral to protecting the innocent from wrongful conviction. The dangers of "jailhouse snitch" testimony, police and prosecutorial misconduct, and false confessions are clear when one reviews the list of those freed from death row because one or more of these factors caused the conviction.[245] The vibrant adversarial proceeding envisioned by the Constitution cannot be realized without trial lawyers being aware of potentially devastating issues in their cases and properly trained to discover and correct these systemic failures. The Illinois

244 TEX. GOV'T CODE § 56.003.

245 *See generally* Death Penalty Information Center, *Cases of Innocence 1973-Present (*updated March 15, 2005), *available at* http://www.deathpenaltyinfo.org/article.php?scid=6&did=109 and Center on Wrongful Convictions, *The Snitch System: How Snitch Testimony sent Randy Steidl and Other Innocent Americans to Death Row* (Winter 2004-05), *available at* http://www.law.northwestern.edu/wrongfulconvictions/documents/SnitchSystemBooklet.pdf.

Commission unanimously recommended attorney training on these issues feeling that "[i]t is not enough to train counsel in the 'best' way to do something; it is important that both prosecution and defense be exposed to the potential pitfalls that have occurred in cases where injustices have occurred."[246]

The Texas FDA requires only that each attorney included on the regional list of capital-qualified attorneys present proof every year that he or she has successfully completed the State Bar of Texas' continuing legal education requirements, including training which *relates to the defense of death penalty cases.*[247] *The FDA also mandates that attorneys complete additional training in death penalty defense within two years of placement on the regional list, and once a year thereafter.*[248] The local selection committee must remove from the regional list any attorney who fails to present such proof. However, some Texas administrative judicial regions and many active death penalty counties do not include this provision in their FDA-mandated county plan delineating their indigent defense policies.[249]

Further, Texas does not *require* attorney training on any of the subjects listed in Recommendation 45, though no statute or administrative rule prohibits attorneys from attending training on these topics. The inherent danger, however, is that an attorney appointed to a capital case may not have *ever* attended training on one or more of these issues, which may be the crucial issue in that case.

246 Illinois Commission Report, *supra* note 1, at 111.
247 TEX. CRIM. PROC. CODE ANN. 26.052, (Vernon 2001).
248 *Id.*
249 Equal Justice Center and Texas Defender Service, *supra* note 232, at 39.

8 *Pretrial Proceedings*

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

— U.S. Supreme Court Justice George Sutherland[250]

This chapter focuses on pre-trial proceedings in capital cases, and recommends specific procedures to ensure fair and adequate disclosure of information prior to trial, with a particular emphasis on provisions designed to guard against the suppression of exculpatory evidence by the state, testimony by witnesses who have incentives to lie, testimony by jailhouse informants, and false confessions. Because the Illinois Supreme Court adopted a set of new rules aimed at redressing these problems in 2001, the Commission scrutinized the reforms, and issued recommendations that are composed in part of statements in support of the Supreme Court rules promulgated. Though the same problems addressed by the Illinois Supreme Court in 2001 exist in Texas, no analogous systematic set of reforms has been initiated by the Court of Criminal Appeals, or other State governmental entity. The system of capital punishment in Texas would therefore benefit from the adoption of virtually all the recommendations contained in this chapter.

[250] Berger v. United States, 295 U.S. 78, 88 (1935).

Recommendation 46

The commission supports new Illinois Supreme Court Rule 416(e) which permits discovery depositions in capital cases on leave of court for good cause.

The Illinois Supreme Court has adopted a rule that allows parties in capital cases to conduct depositions of potential witnesses with the trial court's permission, and upon showing of good cause.[251] In deciding whether to permit discovery depositions, a trial court is to consider the following factors: the consequences of not permitting depositions, the complexity of the case, the complexity of the testimony, and alternative avenues available for obtaining the sought information. The Illinois Supreme Court, in a commentary explaining the new rule, reasoned that "the extra effort is a reasonable price to pay to prevent mistakes that might otherwise force witnesses, victims, and survivors to endure a second trial," and that "the delay in capital trial caused by the new procedures, if any, is justified by the importance of an accurate trial result."[252]

Texas does not permit pretrial discovery depositions in capital cases.[253] The rationale underlying the permissive rules applies with equal force in Texas: "[T]aking the extra step to ensure a fair trial the first time is justified by moral and practical considerations. One capital case in which a retrial is avoided by better discovery procedures will offset the marginal increase in effort needed to comply with the new Rules in many others."[254]

[251] Rule 416 (e) Discovery Deposition in capital cases discovery depositions may be taken in accordance with the following provisions:
(i) A party may take the discovery deposition upon oral questions of any person disclosed as a witness pursuant to Supreme Court Rules 412 or 413 with leave of the court upon a showing of good cause. In determining whether to allow a deposition, the court should consider the consequences to the party if the deposition is not allowed, the complexities of the issues involved, the complexity of the testimony of the witness, and other opportunities available to the party to discover the information sought by deposition. However, under no circumstances may the defendant be deposed.
(ii) The taking of depositions shall be in accordance with rules providing for the taking of depositions in civil cases, and the order for the taking of a deposition may provide that any designated books, papers, documents, or tangible objects not privileged, be produced at the same time and place.
(iii) Attendance of defendant — a defendant shall have no right to be physically present at a discovery deposition.
(iv) Signing and filing of depositions — rule 207 shall apply to the signing and filing of depositions taken pursuant to this rule.
(v) Costs — if the defendant is indigent, all costs of taking depositions shall be paid by the county wherein the criminal charge is initiated. If the defendant is not indigent the cost shall be allocated as in civil cases.

[252] Illinois Commission Report, *supra* note 1, at 117.

[253] TEX. CRIM. PROC. CODE § 39.10 (West 2004) provides for pretrial depositions in case of the unavailability of a witness, but not for the purpose of discovery.

[254] Illinois Commission Report, *supra* note 1, at 166, quoting Illinois Supreme Court Special Committee on Capital Cases Supplemental Findings and Recommendations, October 2000.

Recommendation 47

The commission supports the provisions of new Illinois Supreme Court Rule 416(f) mandating case management conferences in capital cases.

The Illinois Supreme Court should consider adoption of a rule requiring a final case management conference in capital cases to ensure that there has been compliance with the newly mandated rules, that discovery is complete and that the case is fully prepared for trial.

The Illinois Supreme Court has promulgated a rule requiring a case management conference within the first few months of a capital case, in which trial counsel for the defense personally appears. The Illinois Commission recommended an additional mandatory final case conference prior to trial in order to ensure that all pretrial discovery provisions have been complied with, and that the case is ready for trial.

No formal rules govern case conferences in Texas, and judges take an ad hoc approach to capital case management. The rationale behind the Commission's recommendations applies with equal force in Texas: "A great many trial problems can be avoided by active and interested judicial management. Preventing extreme or inappropriate conduct by either the prosecution or defense, ensuring the proper admission of evidence, and managing the progress of the case in both the guilt and sentencing phase, are all within the purview of the trial judge."[255]

Case management conferences are particularly important in light of the recommended requirement that the State file a certificate of disclosure prior to trial (discussed below).

Recommendation 48

The commission supports Illinois Supreme Court Rule 416(g), which requires that a certificate be filed by the state indicating that a conference has been held with all those persons who participated in the investigation or trial preparation of the case, and that all information required to be disclosed has been disclosed.

The Illinois Supreme Court has promulgated a rule requiring the State to certify that it has affirmatively sought compliance with its obligations of disclosure under *Brady v. Maryland* from all agencies and individuals participating in the investigation and preparation of a capital case. Though constitutional law has long required all state agencies to disclose exculpatory material, cases continue to surface in post-conviction and habeas proceedings in which either the prosecution itself, or agencies involved in the investigation of the case, have withheld exculpatory evidence, undermining the reliability of convictions and sentences. A formal certification process would emphasize the importance of interagency communication on the subject of exculpatory evidence, and would provide a dead-

[255] *Id.* at 117.

line for such communication. The Commission has supplemented this rule with a recommendation that the Supreme Court clearly define exculpatory evidence.

Texas requires no similar certification by the state that it is in compliance with its obligations regarding exculpatory evidence.

Recommendation 49

The Illinois Supreme Court should adopt a rule for defining "exculpatory evidence" in order to provide guidance to counsel in making appropriate disclosures. The commission recommends the following definition:

Exculpatory information includes, but may not be limited to, all information that is material and favorable to the defendant because it tends to:

1. Cast doubt on defendant's guilt as to any essential element in any count in the indictment or information;
2. Cast doubt on the admissibility of evidence that the state anticipates offering in its case-in-chief that might be subject to a motion to suppress or exclude;
3. Cast doubt on the credibility or accuracy of any evidence that the state anticipates offering in its case-in-chief; or
4. Diminish the degree of the defendant's culpability or mitigate the defendant's potential sentence.

The purpose of issuing an explicit list of exculpatory evidence is to clarify the State's constitutional obligations. "It was the unanimous view of the Commission members that while prosecuting attorneys should certainly be familiar with *Brady v. Maryland* and its progeny, and their resulting responsibilities with respect to disclosure, the disclosure would be facilitated if the Supreme Court adopted a rule that clearly sets forth the definition of 'exculpatory evidence.' The definition is not intended to be all-encompassing, nor to pose additional burdens on the parties."[256] Texas does not have an analogous definition of "exculpatory evidence." The Texas Code of Criminal Procedure does demand that it is "the primary duty of all prosecuting attorneys . . . not to convict, but to see that justice is done," and, "not [to] suppress facts or secrete witnesses capable of establishing the innocence of the accused."[257] Yet capital cases in the State

256 Illinois Commission Report, *supra* note 1, at 120.
257 TEX. CRIM. PROC. CODE § 2.01 (West 2004).

of Texas have been plagued with state misconduct. A recent survey of published capital cases, for example, found 41 capital convictions in which state misconduct was documented.[258]

Numerous Texas cases reflect the need for the adoption of clear rules defining the State's obligation to disclose exculpatory evidence,[259] including the case of Delma Banks. Banks was convicted in 1980 of killing 16-year-old Richard Whitehead, and sentenced to death. The state's case against Banks consisted primarily of the testimony of Charles Cook, who testified that he had seen Banks with blood on his clothing, and that Banks had confessed to killing the victim. The prosecution suppressed a 73-page transcript of a rehearsal session the prosecutors had with Cook prior to trial. The transcript revealed that Cook was unable to keep his story straight and that the prosecutor repeatedly coached Cook. Nonetheless, at trial, Cook testified three times under oath that he had not discussed his testimony with anyone. The prosecution allowed Cook's false testimony to go uncorrected, and suppressed the transcript of the rehearsal for 19 years.[260]

It was not until Banks had spent 23 years on death row and came within hours of his scheduled execution that the U.S. stepped in, staying the execution. The Supreme Court ultimately accepted the case and reversed the Fifth Circuit's refusal to consider the misconduct claim. In a sharply worded 7-2 opinion written by Justice Ginsberg, the Court characterized the State's argument as being, "in effect, that 'the prosecution can lie and conceal and the prisoner still has the burden to . . . discover the evidence.'"[261] The Court condemned this approach, stating that "[a] rule . . . declaring a 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."[262]

Other practices utilized by some Texas prosecutors reveal the need for clear guidance with respect to making appropriate disclosures of exculpatory evi-

258 Texas Defender Service, *A State of Denial, supra* note 200, at 6. *See also* Center for Public Integrity, *Harmful Error: Investigating America's Local Prosecutors, available at* http://www.publicintegrity.org/pm/default.aspx. This study encompassed both capital and non-capital cases, and found the following with regard to Texas:
The Center's study of criminal appeals from 1970 to the present revealed 589 Texas appeals in which the defendant alleged prosecutorial error or misconduct. In 154, judges ruled a prosecutor's conduct prejudiced the defendant and reversed or remanded the conviction, sentence, or indictment. In 36, a dissenting judge or judges thought the prosecutor's conduct prejudiced the defendant. Out of all the defendants who alleged misconduct, five later proved their innocence.
Out of the 154 cases in which judges ruled a prosecutor's conduct prejudiced the defendant, 118 involved improper trial behavior such as improper statements during arguments or improper cross-examination of a witness, 17 involved discrimination in jury selection, nine involved the prosecution withholding evidence from the defense, four involved the prosecution goading defendant into a mistrial, three involved failing to correct or endorsing false testimony, and three involved pre-trial indictment issues.

259 *See, e.g., Ex Parte* Brandley, 781 S.W.2d 886 (Tex. Crim. App. 1985); Guerra v. Collins, 916 F.Supp. 620 (S.D. Tex. 1995); Cook v. State, 940 S.W.2d 623 (Tex. Crim App. 1996); *Ex Parte* Fierro, 934 S.W.2d 370 (Tex. Crim. App. 1996).

260 Banks v. Dretke, 540 U.S. 668 (2004).

261 *Id.* at 696.

262 *Id.*

dence. In a recent Harris County murder case, a prison inmate claimed to have evidence implicating a suspect other than the defendant.[263] Instead of disclosing this evidence to the defense, prosecutors used a questionable tactic to secure the presence of the witness by asking another judge to bring the prison inmate to Harris County on an unrelated case making it unlikely that the defense would discover the witness' transfer. The prosecution then interviewed the witness without notifying the defense of his statements. Assistant Harris County District Attorney Kelly Siegler saw nothing wrong with this procedure or lack of disclosure and stated: "We do it like this every day."[264]

Recommendation 50

Illinois law should require that any discussions with a witness or the representative of a witness concerning benefits, potential benefits, or detriments conferred on a witness by any prosecutor, police official, corrections officer, or anyone else, should be reduced to writing, and should be disclosed to the defense in advance of trial.

The Commission examined the 13 cases of wrongful convictions in Illinois, and found that a number of the cases involved undue reliance on the uncorroborated testimony of witnesses with something to gain.[265] Though the prosecution is constitutionally required to disclose evidence that a witness has something to gain for his or her testimony, a written requirement in advance of trial serves as a reminder of the importance of such disclosures, and may provide the defense additional time to investigate the reliability of such testimony. Texas has no requirement that such agreements be reduced to writing. The question of the existence of plea bargains or other witness benefits is a recurring issue in Texas prosecutions.[266]

Texas has had its own problems with unreliable capital convictions based in part on state witnesses with incentives to lie. One such case is that of Randall Dale Adams, who was convicted on the basis of such witness testimony and tainted eyewitness identification.[267] Adams was convicted in 1977 for the murder of Dallas police officer Robert Wood, and was sentenced to death. The prosecution's evidence against Adams consisted primarily of eyewitness testimony identifying

263 Andrew Tilghman, *Inmate Confessed to Slaying in Temple Case, Lawyer Says*, HOUS. CHRON., March 4, 2005.

264 *Id.*

265 Illinois Commission Report, *supra* note 1, at 8. Wrongful capital convictions in Illinois that involved state witnesses with something to gain included Verneal Jimerson and Dennis Williams (testimony of a codefendant); Joseph Burrows (testimony of an alleged accomplice who actually committed the murder); Steven Manning (testimony from a jailhouse informant); Rolando Cruz and Alex Hernandez (testimony of jailhouse informant).

266 Several Texas death row inmates were convicted based in part on testimony of accomplices or witnesses that infected the integrity of their court proceedings. *See, e.g.,* Spence v. Johnson, 80 F. 3d 989, 991-1006 (5th Cir. 1996); *Ex parte* Adams, 768 S.W.2d 281, 284-93; Buffington v. Copeland, 687 F. Supp. 1089, 1092 n.2, 1096 (W.D. Tex. 1988); Goodwin v. Johnson, 154 F.3d 253, 255-58 (5th Cir. 1998); Granger v. State, 653 S.W.2d 868, 872-78 (Tex. Crim. App. 1983); Granger v. State, 683 S.W.2d 387, 388-89 (Tex. Crim. App. 1984); Jackson v. Johnson, 194 F. 3d 641, 648-52 (5th Cir. 1999).

267 Banks v. Dretke, 540 U.S. 668 (2004).

Adams as the perpetrator, and the testimony of David Harris, a 16-year-old who was with Adams on the night of the murder and had been arrested in connection with the shooting. The eyewitness testified at trial that she had driven past the scene of the crime moments before the homicide, and had seen Adams driving the car from which Officer Woods was shot. She further testified that she had picked Adams' photo out of a photospread, and that the police had given her no help in so doing. In fact, it was later discovered that the eyewitness had given a description of the perpetrator that was inconsistent with Adams, that she had chosen someone other than Adams in a photospread, and that the police had told her who the "right" person was. In violation of the State's constitutional duty to disclose that exculpatory evidence and to alert the court of false testimony, the State stood silent and permitted the witness to lie to the jury.

The prosecution also relied on the testimony of the 16-year-old juvenile who later bragged to his friends that he had shot and killed a Dallas police officer. When the police heard of the comments, they arrested Harris, who then changed his story and blamed Adams for the shooting. At the time of the trial, Harris was facing two burglary charges, an aggravated robbery, and a revocation of juvenile probation. After Harris testified against Adams, all the charges disappeared. While Adams was sent to death row, Harris joined the Army, where his life of crime continued. Over the course of the next decade, Harris was sent to prison for a variety of charges, including burglaries, robbery, kidnapping, and eventually, capital murder. Harris was executed for an unrelated capital murder.

In time, Harris recanted his trial testimony, and testified that he had falsely accused Adams of shooting Officer Woods in order to escape the charges pending against him in furtherance of a deal he was offered by the detective on the case. Adams' death sentence was first commuted to life by the Governor in response to a request by the Dallas County District Attorney, and his case was later reversed by the Court of Criminal Appeals for prosecutorial misconduct. Charges against Adams were ultimately dismissed after Adams spent 12 years in prison.

Recommendation 51

Whenever the state may introduce the testimony of an in-custody informant who has agreed to testify for the prosecution in a capital case to a statement allegedly made by the defendant, at either the guilt or sentencing phase, the state should promptly inform the defense as to the identification and background of the witness.

The Commission issued this recommendation in response to the notoriously unreliable testimony of jailhouse informants, who frequently testify that the defendant, while awaiting trial in jail, admitted having committed the crime. In exchange for their testimony, they often receive leniency in their own cases. The Commission identified the unreliable testimony of jailhouse informants

as a factor in at least three of the 13 death row exonerations in Illinois.[268] Though the requirements of this recommendation are covered by the recommendation that the State disclose any deals with any witnesses (Recommendation 50, above), the Commission took this position "to make clear that it is particularly important that information with respect to the identification and background of in-custody informant witnesses be promptly provided to defense counsel whenever such witnesses are expected to testify."[269]

In addition, the Commission issued a recommendation that special pre-trial procedures be instituted to test the reliability of jailhouse informant testimony, and to provide the defense with adequate information prior to trial to investigate its reliability. Texas has no such provision.

Recommendation 52

1. Prior to trial, the trial judge shall hold an evidentiary hearing to determine the reliability and admissibility of the in-custody informant's testimony at either the guilt or sentencing phase.
2. At the pre-trial evidentiary hearing, the trial judge shall use the following standards:
   The prosecution bears the burden of proving by a preponderance of the evidence that the witness' testimony is reliable. The trial judge may consider the following factors, as well as any other factors bearing on the witness' credibility:
   a. The specific statements to which the witness will testify.
   b. The time and place, and other circumstances regarding the alleged statements.
   c. Any deal or inducement made by the informant and the police or prosecutors in exchange for the witness' testimony.
   d. The criminal history of the witness.
   e. Whether the witness has ever recanted his/her testimony.
   f. Other cases in which the witness testified to alleged confessions by others.
   g. Any other known evidence that may attest to or diminish the credibility of the witness, including the presence or absence of any relationship between the accused and the witness.
3. The state may file an interlocutory appeal from a ruling suppressing the testimony of an in-custody informant, pursuant to Illinois Supreme Court Rule 604.

This recommendation, adopted unanimously by the Commission, calls for concrete measures to address recurring problems associated with jailhouse informant testimony. Similar provisions adopted by Oklahoma's Supreme Court[270]

268 Illinois Commission Report, *supra* note 1, at 7-8.
269 *Id.* at 121.
270 Dodd v. State, 993 P.2d 778 (Okla. Crim. App. 2000).

were the subject of debate in the Illinois legislature in the spring of 2001 (prior to the Illinois Commission Report), and have since been enacted in Illinois.[271] Jailhouse informant testimony is a recurring problem in criminal cases across the country. In a recent study of 328 exonerations occurring between 1989 and 2004, 94 cases involved unreliable testimony from jailhouse informants.[272] The unreliability of such testimony is widely recognized.[273]

> The most dangerous informer of all is the jailhouse snitch who claims another prisoner has confessed to him. The snitch now stands ready to testify in return for some consideration in his case. Sometimes these snitches tell the truth, but more often they invent testimony and stray details out of the air.
>
> In the seamy world of jailhouse informers, treachery has long been their credo and favors from jailers their reward. Now lawyers must ponder whether fiction was often their method.[274]

The State of Texas' capital system of justice has not escaped the problem. Texas imposes no limitations on the admissibility of jailhouse informant testimony. Between 1976 and 2000, at least 43 Texas capital convictions involved the use of inherently unreliable jailhouse informant testimony.[275] Consider the case of Muneer Deeb, a former Texas death row inmate who was wrongly convicted based largely on the testimony of a jailhouse informant.[276]

Between 1976 and 2000, at least 43 Texas capital convictions involved the use of inherently unreliable jailhouse informant testimony.

Deeb was sentenced to death in 1985 for the contract murder of a woman in McLennan County, Texas, under a seemingly improbable scenario.[277] The prosecution theory of the crime was that the homicide victim had been mistakenly killed by three men Deeb had hired to kill one of his employees. The crime in no way resembled a professional hit: not only was the wrong woman killed, but

271 725 ILCS 5/115-21; *See also,* Thomas P. Sullivan, *Capital Punishment Reform: What's Been Done and What Remains to Be Done,* 92 ILL. B.J. 200 at 202 (April 2004).

272 S. Gross, et al., *Exonerations in the United States, 1989 through 2000,* at 23 (April 19, 2004) *available at* http://www.law.umich.edu/newsandinfo/exoneration-in-us.pdf.

273 *See, e.g.*, Gordon Van Kessel, *Report of the 1989-90 Los Angeles County Grand Jury, Investigation of the Involvement of Jail House Informants in the Criminal Justice System in Los Angeles County* (June 26, 1990); Gross, et al. *supra* note 272; Clifford Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 HASTINGS CONST. L.Q. 81, 93-97 (1994); Mark Curriden, *No Honor Among Thieves,* 75 A.B.A. J. 52, 54-56 (1989); Steve Mills, Ken Armstrong & Douglas Holt, *Flawed Trials Lead to Death Chamber, Bush Confident in System Rife with Problems,* CHIC. TRIB., June 11, 2000, at 1 (identifying 23 persons executed under Governor Bush's tenure whose cases involved jailhouse informants).

274 The Honorable Stephen S. Trott, *Words of Warnings for Prosecutors Using Criminals As Witnesses*, 47 HASTINGS L.J. 1381 (July/August, 1996).

275 Texas Defender Service, *A State of Denial, supra* note 200.

276 Deeb v. State, 815 S.W.2d 692 (Tex. Crim. App. 1991).

277 Bob Herbert, *In America; the Impossible Crime,* N.Y. TIMES, July 28, 1997; Deeb v. State, 815 S.W.2d 692 (Tex. Crim. App. 1991); Center on Wrongful Convictions, *Rumor on the Jailhouse Grapevine Led to Muneer Deeb's Death Sentence, available at* http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Tex_Deeb.htm.

the woman was raped and tortured before being killed, as were two of her friends. The plot on the woman's life was said to have been a scheme to defraud an insurance carrier. There was no evidence of such a payment, however, and other evidence of the hit was weak and circumstantial. None of the alleged co-conspirators testified — although each was charged with capital murder and, therefore, in a position to negotiate leniency in exchange for testifying against the purported mastermind of the plot. The prosecution relied on a jailhouse informant who shared a cell with one of Deeb's alleged co-conspirators, who testified that his cellmate had described the murder-for-hire scheme in detail.[278] Deeb's case was reversed on direct appeal based on the erroneous admission of a co-conspirator's hearsay statement.[279] Deeb was acquitted by a jury in his second trial.[280]

Recommendation 53

In capital cases, courts should closely scrutinize any tactic that misleads the suspect as to the strength and evidence against him/her, or the likelihood of his/her guilt, in order to determine whether this tactic would be likely to induce an involuntary or untrustworthy confession.

Police interrogation tactics that mislead a suspect as to the strength of the evidence against him or her are commonplace. The advent of DNA technology has made it possible to definitively identify wrongful convictions, and to determine their causes. To date, 123 factually innocent individuals across the nation have been exonerated by DNA evidence, and 27% of them involved false confessions.[281]

Juveniles and persons with mental illness or mental retardation are particularly vulnerable. In a study of all known exonerees, 44% of juveniles falsely confessed (compared to 13% of adults), as did 69% of persons with mental retardation or mental illness (compared to 11% of those without known mental disabilities).[282] A majority of all exonerees who falsely confessed were juvenile, or mentally impaired, or both.[283]

The Commission unanimously recommended close scrutiny of police interrogation tactics in which the police mislead or lie to suspects about the force of the evidence against them. Such tactics are both legal and commonly used: they constitute an element of interrogation methodology that is universally relied upon by law enforcement.[284]

278 *Id.*

279 Deeb v. State, 815 S.W.2d at 706. More information on this case is *available at* http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Tex_Deeb.htm.

280 Bob Herbert, *In America; the Impossible Crime,* N.Y. TIMES, July 28, 1997.

281 *See* Innocence Project, *Case Profiles, available at* http://www.innocenceproject.org/case/index.php (last visited Sept. 21, 2004) (providing a summary for each of the post-conviction DNA exonerations in the U.S.).

282 Gross et al., *supra* note 272.

283 *Id.*

284 Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World,* 82 N.C. L. REV. 891, 907-923 (March 2004).

Texas has no substantive limitations on the admissibility of confessions beyond those mandated by the Constitution, despite the fact that Texas' criminal and capital justice systems are plagued with convictions that are based on false confessions. In 1980, Mexican national Cesar Roberto Fierro was sent to death row for the murder of Nicolas Castanon, an El Paso cab driver. No physical evidence linked Fierro to the crime, and the only corroboration of his confession was provided by a mentally disturbed juvenile offender named Gerardo Olague. Fierro confessed to the crime after police officers told him that the Juarez police in Mexico, infamous for its widespread use of torture, had taken custody of his mother and other relatives and would not release them until he admitted his guilt. Fierro has maintained his innocence since that time, and says that the false confession, with details provided by investigators, was given to protect his family.[285]

In 1994, a Texas judge recommended a retrial after reviewing this new evidence and determining that there had been gross police misconduct. Two years later, the Texas Court of Criminal Appeals refused to follow that recommendation, but did unanimously agree that Fierro's confession was coerced and that lead detectives had committed perjury to conceal the truth.[286] Fierro has spent 24 years on death row, and faces execution in the near future.[287]

Today, Gary Weiser, the prosecutor in Fierro's original trial, says: "Had I known at the time of Fierro's suppression hearing what I have since learned about the family's arrest, I would have joined in a motion to suppress the confession. Had the confession been suppressed, I would have moved to dismiss the case unless I could have corroborated Olague's testimony. My experience as a prosecutor indicates that the judge would have granted the motion as a matter of course."[288]

Recommendation 54

The commission makes no recommendation about whether or not plea negotiations should be restricted with respect to the death penalty.

The Commission members decided not to make a recommendation as to plea bargains, despite the fact that the Illinois Supreme Court has reversed at least two cases where the death penalty was imposed even though the State Attorney had made an earlier promise not to seek the death penalty.[289] In declining to issue a recommendation, the Commission relied in part on the recommendation to mandate statewide review of prosecutorial decisions to

285 The Death Penalty Information Center, *Mexican Embassy Raises Questions of Innocence, Fairness in Case of Cesar Roberto Fierro, available at* http://www.deathpenaltyinfo.org/article.php?scid=6&did=263.

286 *Ex parte* Fierro, 934 S.W.2d 370, 391 (Tex. Crim. App. 1996).

287 Dinah L. Shelton, *Case Concerning Avena and Other Mexican Nationals*, 98 AM. J. INT'L L. 559, 566 n.4 (2004).

288 *Ex parte* Fierro, 934 S.W.2d at 391 (Tex. Crim. App. 1996).

289 People v. Brownell, 96 Ill. 2d 167 (Ill. S. Ct. 1983); People v. Walker, 84 Ill. 2d 512 (Ill. S. Ct. 1981).

seek the death penalty. Such a system, if adopted, would address the problem of potentially coercive plea negotiations.

Texas has no statute or rule regarding plea negotiations in death penalty cases.

9 The Guilt-Innocence Phase

"Innocent people are being sentenced to death. If these men dodged the executioner, it was only because of luck and the dedication of the attorneys, reporters, family members and volunteers who labored to win their release. They survived despite the criminal justice system, not because of it."

— Illinois Supreme Court Justice Moses Harrison II[290]

This chapter focuses on evidentiary issues that commonly arise in the guilt-innocence phase of criminal trials, and that present particular concern in the death penalty arena. The evidentiary issues addressed by the Commission in this chapter include eyewitness identification, testimony of in-custody informants, and unrecorded confessions. The Commission recommended cautionary instructions to the jury with regard to all three, as well as a case-by-case determination of the admissibility of expert testimony addressing the problems associated with eyewitness identification. The Commission also recommended the continued rejection of polygraph test results in capital trials. The evidentiary issues identified by the Illinois Commission are those that present problems in capital cases all over the country, including Texas. The State of Texas could benefit from all of the recommendations made by the Commission with respect to the problems associated with eyewitness identification testimony, witness testimony tainted by incentives, unrecorded confessions, and polygraph examination results.

290 Ken Armstrong & Steve Mills, *Death Row Justice Derailed: Bias, Errors and Incompetence in Capital Cases Have Turned Illinois' Harshest Punishment into its Least Credible,* CHIC. TRIB., Nov. 14, 1999.

Recommendation 55

Expert testimony with respect to the problems associated with eyewitness testimony may be helpful in appropriate cases. Determinations as to whether such evidence may be admitted should be resolved by the trial judge on a case by case basis.

The Commission unanimously recommended that judges determine the admissibility of expert testimony regarding the problems associated with eyewitness identification on a case-by-case basis. The Commission noted the growing body of literature addressing the unreliability of eyewitness identifications, and also recognized a competing view that such testimony should be viewed with skepticism.[291] Courts around the country have taken approaches that widely vary, from a *per se* ban on such testimony, to admissibility in appropriate cases.[292] The Commission recommended a midline approach, placing discretion in the hands of the trial court to determine the admissibility of such expert testimony on a case-by-case basis.

In Texas, expert testimony is generally admissible if it "will assist the trier of fact to understand the evidence or to determine a fact in issue."[293] In 1996, the Texas Court of Criminal Appeals squarely addressed the issue of the admissibility of expert testimony in *Jordan v. State*.[294] The Court held that the admissibility of expert testimony lies in the sound discretion of the trial judge, and is to be reversed on appeal only for abuse of discretion. The Court then ruled that in a case in which identity was the central issue (Mr. Jordan had an alibi placing him out of state at the time of the crime, yet two eyewitnesses selected him from photographic lineups after the crime), the trial court had abused its discretion by refusing to allow an expert for the defense testify regarding eyewitness fallibility.

Subsequent cases considering the admissibility of expert testimony on eyewitness identifications have applied the rule announced in *Jordan* and recommended by the Illinois Commission. Exclusion of expert testimony has been

291 *See, e.g.*, Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads,* 66 L. & HUM. BEHAV., 603 (1998); U.S. Dept. of Justice, *Eyewitness Evidence: A Guide for Law Enforcement* (October 1999) *available at* http://www.ncjrs.org/AlphaTitles.html.

292 State v. Coley, 32 S.W.3d 831, 838 (Tenn. 2000) ("We recognize that we are in the minority of jurisdictions which find such testimony per se inadmissible, rather than leaving the determination of admissibility to the discretion of the trial court. Nevertheless, we are convinced that a per se rule of exclusion is appropriate"); Johnson v. State, 272 Ga. 254 (2000) ("Where eyewitness identification of the defendant is a key element of the State's case and there is no substantial corroboration of that identification by other evidence, trial courts may not exclude expert testimony without carefully weighing whether the evidence would assist the jury in assessing the reliability of eyewitness testimony and whether expert eyewitness testimony is the only effective way to reveal any weakness in an eyewitness identification").

293 TEX. R. EVID. 702 (West 2004) provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."

294 928 S.W.2d 559 (Tex. Crim. App. 1996).

upheld on appeal, however, in cases in which the defendant admitted to being at the scene of the crime,[295] and in cases in which the expert's qualifications were insufficiently demonstrated.[296]

Indigent defendants in Texas who require funding from the state in order to hire an expert on eyewitness fallibility often face stringent standards and are denied funding. Some courts in Texas have held that a defendant is not entitled to state funding for an expert unless the State itself is hiring an expert on the subject of eyewitness identification,[297] which virtually never happens. Other courts have found that the defendant must show "there is a high risk of an inaccurate verdict absent access to the expert," a standard that was found not to have been met even when identity was the central issue of the case, with an alibi witness for the defense, and eyewitness identifications for the state.[298]

Though Texas complies with Illinois' recommendation on the admissibility of expert testimony on eyewitness identification, indigent defendants are often unable to secure funding from the state and are therefore denied access to expert testimony on eyewitness fallibility.

Recommendation 56

Jury instructions with respect to eyewitness testimony should enumerate factors for the jury to consider, including the difficulty of making a cross-racial identification. The current version of IPI is a step in the right direction, but should be improved.

IPI 3.15 should also be amended to add a final sentence which states as follows: Eyewitness testimony should be carefully examined in light of other evidence in the case.

The Illinois Commission unanimously recommended that cautionary instructions regarding the reliability of eyewitness identification currently in effect in Illinois be amended to reflect the growing body of research regarding its fallibility.[299] In Illinois, until the mid-1990s, juries were considered the sole judges of witness credibility, and jurors were not to be instructed regarding the factors to consider in assessing witness credibility.[300] Beginning in the early- to

295 Roundtree v. State, No. 13-97-567-CR, 1998 WL 34202277 (Tex. App. - Corpus Christi, Dec. 17, 1998) (not designated for publication).

296 Weatherred v. State, 15 S.W.3d 540 (Tex. Crim. App. 2000) (expert testimony on eyewitness identification properly excluded in capital case because trial counsel offered only expert's own testimony that he had carried out extensive research, and expert did not produce or name any of the studies, researchers, or writings in question).

297 Moore v. State, No. 01-01-00910, 2002 WL 31236343 (Tex. App. - Houston, Oct. 3, 2002) (not designated for publication).

298 Salinas v. State, No. 07-00-0093-CR. 2002 WL 1870249 (Tex. App. - Amarillo, Aug. 13, 2002) (not designated for publication) (finding that the trial court had not abused its discretion by refusing to fund an eyewitness expert even though identity was a central issue in the case).

299 *See* Wells et al, *supra* note 291, at 196.

300 Illinois Pattern Jury Instructions formerly did not enumerate factors for consideration, and the Commentary specifically advised against such an instruction. *See* Illinois Commission Report, *supra* note 1, at 129.

mid-90s, however, the Illinois Pattern Jury Instructions were modified to include a list of factors that a jury should consider in assessing the credibility of eyewitness testimony. That instruction, in its current form, reads as follows:

> IPI 3.15 Circumstances of Identification. When you weigh the identification testimony of a witness, you should consider all the facts and circumstances in evidence, including, but not limited to, the following: (1) the opportunity the witness had to view the offender at the time of the offense, or (2) the witness' degree of attention at the time of the offense, (3) the witness' earlier description of the offender, (4) the level of certainty shown by the witness when confronting the defendant or (5) the length of time between the offense and the identification confrontations.

The Commission deemed the instruction above an improvement, but encouraged further reform. The Commission surveyed jury instructions pertaining to eyewitness testimony in other states, and ultimately decided not to suggest specific reforms. The Commission noted, however, that several states instruct the jury to consider the consistency of the identification over time — prior failure to identify the defendant,[301] prior identification of another suspect,[302] the accuracy of any prior description,[303] and/or whether the defendant remained positive and unqualified after cross-examination.[304]

In addition, the Commission noted that New Jersey has an instruction applicable to cases in which there is a cross-racial identification:

> The fact that an identifying witness is not of the same race as the perpetrator and/or defendant, and whether that fact might have had an impact on the accuracy of the witness' original perception, and/or the accuracy of the subsequent identification. You should consider that in ordinary human experience, people may have greater difficulty in accurately identifying members of a different race.[305]

301 Kansas Pattern Instruction for Kansas Criminal 3d 52.20, Eyewitness Identification (PIK Crim.3d 52.20).

302 Maryland: MPJI-Cr 3:30 Identification of Defendant.

303 *Id.*

304 Oklahoma: OUJI-CR 9-16 Evidence-Eyewitness Identifications.

305 New Jersey Model Criminal Jury Charges: Identification — In Court, *available at* http://www.judiciary.state.nj.us.

The Commission unanimously recommended an additional cautionary instruction: "Eyewitness testimony should be carefully examined in light of the other evidence in the case."[306] The Commission expressed the view that "[i]n light of new information regarding the potential for mistaken eyewitness testimony and the drastic consequences if such mistakes are made in a capital case, the Commission believes a re-evaluation of the instructions with respect to eyewitness testimony is prudent."[307]

"In light of new information regarding the potential for mistaken eyewitness testimony and the drastic consequences if such mistakes are made in a capital case, the Commission believes a re-evaluation of the instructions with respect to eyewitness testimony is prudent."

— Illinois Commission

Reforms that were made in the mid-90s in Illinois have not yet been implemented in Texas. The state of the law in Texas is identical to the state of the law in Illinois prior to 1990: credibility determinations are deemed the sole province of the jury, and no comments on any aspect of the evidence, including eyewitness testimony, are permitted.[308] Defense requests for jury instructions that resemble the jury charge currently used in Illinois, or in the federal system, are resoundingly denied, both in trial courts and on appeal, as an improper comment on the weight of the evidence:[309]

> In Texas, unlike in federal courts, a judge may not comment on the weight of the evidence. "It is not proper for a charge to single out certain testimony, as this would constitute an improper comment on the weight of the evidence." The instruction requested by appellant in the instant case would constitute a comment on the weight of the evidence because it instructed the jury to focus particularly on [the eyewitness'] testimony.[310]

In order to implement necessary reform in Texas, the legislature should enact a bill requiring cautionary instructions in cases involving eyewitness identification testimony.

306 Illinois Commission Report, *supra* note 1, at 130-31.

307 *Id.* at 131.

308 Williams v. State, 1997 WL 431150, 3 (Tex. App. - Houston 1997) (opinion not designated for publication); Texas Criminal Jury Charges § 12:570: "Mistaken identity is not an affirmative defense. It is included within the terms of proof beyond a reasonable doubt that defendant committed the offense. In such case, the defendant would not be entitled to a separate defensive charge thereon." (citations omitted).

309 Texas Criminal Jury Charges § 12:570.

310 Williams v. State, 1997 WL 431150, 3 (Tex. App. - Houston 1997) (opinion not designated for publication).

Recommendation 57

The Committee on the Illinois Pattern Jury Instructions-Criminal should consider a jury instruction providing a special caution with respect to the reliability of the testimony of in-custody informants.

The Illinois Commission analyzed the dangers associated with jailhouse informant testimony in Chapter 8, and recommended pretrial assessment of the credibility of an in-custody informant's testimony. In this chapter, the Commission unanimously recommended a special jury instruction cautioning jurors about the credibility of in-custody informants.

The term "in-custody informant," as used by the Commission, is not limited to testimony by an incarcerated individual who has witnessed a crime. The term includes jailhouse informants, who present evidence of alleged statements or confessions by a defendant, often in return for some benefit. The Commission acknowledged that the information received from an incarcerated person may be valuable, reliable, and truthful, and therefore stopped short of excluding such testimony altogether. However, the Commission pointed out that the temptation to an incarcerated person to alleviate the harshness of his confinement by any means necessary is obvious and therefore such testimony should be carefully scrutinized and is inherently suspect. "In light of the frequency with which such testimony has appeared in the cases of those who were ultimately released from death row, the Commission believes that a special emphasis on this credibility issue is warranted."[311]

In cases in which accomplice testimony forms the basis of a conviction, Illinois courts currently instruct the jury as follows: " . . . the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case."[312] The Commission recommended that a similar instruction be given in all cases involving in-custody informant testimony.

The Commission cited with approval pattern jury instructions in effect in Maryland and Oklahoma. In Maryland, the jury is instructed to apply special caution in considering the testimony of any witness who testifies for the State as a result of a plea agreement, a promise that he will not be prosecuted, or a financial benefit.[313] This instruction is not limited to accomplices or in-custody informants. In Oklahoma, juries are instructed that the testimony of an informant who provides evidence against a defendant for benefit must be weighed with greater care than the testimony of an ordinary witness. The Oklahoma pattern jury instruction sets out five factors for the jury to consider:

> (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal ad-

311 Illinois Commission Report, *supra* note 1, at 132.
312 Illinois Pattern Instruction (IPI) 3.17.
313 Missouri Pattern Jury Instruction (MPJI-Cr) 3:30 Identification of Defendant.

> vantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.[314]

Texas currently does not have a cautionary instruction for in-custody informant testimony. Texas' only related instruction prohibits a conviction based on uncorroborated accomplice testimony.[315] As long as some corroborating evidence of the offense exists, a conviction is permitted. The jury is given no cautionary instruction regarding the credibility of an accomplice or jailhouse informant.

Texas, like Illinois, has had numerous death penalty convictions based at least in part on the testimony of jailhouse snitches. In a number of these cases, such testimony has subsequently been shown to have been false. For example, in June 1982, Johnny Dean Pyles shot and killed Officer Kovar in an empty parking lot. Pyles admitted shooting the officer but insisted that he did not see the person he shot, and fired only because he saw a flashlight and a gun pointed at him.[316] In order to obtain a capital murder conviction, the prosecution had to prove that Pyles knew that Kovar was a police officer. Pyles was transferred from solitary confinement to a five-man tank with two known jailhouse snitches. Both subsequently testified that Pyles had confessed to knowing that the person he was shooting was a police officer. One of the snitches was promised leniency in pending burglary cases in return for his testimony. Both have since admitted that they were instructed by police to elicit an admission from Pyles and that their testimony was untrue. A magistrate in federal court found that they had testified falsely.[317] Johnny Dean Pyles was executed on June 15, 1998.[318]

In 1987 David Stoker was convicted of the robbery murder of a convenience store clerk in Hale Center, Texas. His conviction was based largely on evidence provided by Carey Todd, a man prosecutors later described as a "low-life

314 Oklahoma Uniform Jury Instruction (OUJI-CR) 9-19 Evidence — Eyewitness identifications.

315 TEX. CRIM. PROC. CODE § 38.14 (West 2004): "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense."

316 Statement of Facts, Vol. II at 92-94, 170; Vol. III at 449, 515-19, 634-37, 660, State v. Pyles CCA No. 69,091 (1988).

317 For more information about the Johnny Dean Pyles case, *see* Pyles v. Johnson, 136 F.3d 986 (5th Cir. 1998); Pyles v. Johnson, 755 S.W.2d 98 (Tex. Crim. App. 1988); and case files in State v. Pyles (CCA No. 69,091) and Pyles v. Johnson (5th Cir. No. 97-10809). *See also* Texas Defender Service, *State of Denial, supra* note 200, at 22-23.

318 Texas Defender Service, *State of Denial, supra* note 200, at 22-23.

scum drug dealer."[319] Carey Todd provided the murder weapon to the police, telling them that he had gotten the gun from Stoker, and claimed that Stoker had confessed to killing the victim. In exchange for his testimony, the State dismissed drug charges pending against Todd in a neighboring county, and Todd collected a cash reward. At trial, Todd denied the existence of any deal, and denied collecting a reward for his role in "solving" the crime. A federal court of appeals judge observed during oral argument that it was just as likely that Carey Todd committed the crime as David Stoker. Stoker was executed on June 16, 1997.[320]

Texas should adopt jury pattern instructions on in-custody informant testimony. Like the Oklahoma instructions, these should not be limited to accomplice testimony.

Recommendation 58

IPI - Criminal - 3.06 and 3.07 should be supplemented by adding the italicized sentences, to be given only when the defendant's statement is not recorded:

You have before you evidence that the defendant made a statement relating to the offenses charged in the indictment. It is for you to determine [whether the defendant made the statement and, if so,] what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made. *You should pay particular attention to whether or not the statement is recorded, and if it is, what method was used to record it. Generally, an electronic recording that contains the defendant's actual voice or a statement written by the defendant is more reliable than a non-recorded summary.*

In Chapter 2 of the Report, the Commission recommended that interrogations of homicide suspects should be videotaped and audio-taped. After some discussion, the Commission decided *not* to recommend the exclusion of unrecorded statements. However, the Commission unanimously agreed that juries should be instructed to consider whether a confession was recorded in assessing the reliability of that evidence.

The admissibility of unrecorded confessions is governed in Texas by Article 38.22(3) of the Code of Criminal Procedure. According to that statute, "No 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 an electronic recording . . . is made of the statement." However, that section does not apply "to any statement which contains assertions of facts or circumstances that are found to be true and which conduce to establish the guilt of the accused, such as finding a secreted or stolen property or the instrument with

[319] Steve Mills, Ken Armstrong & Douglas Holt, *Flawed Trials Lead to Death Chamber: Bush Confident in System Rife with Problems,* CHIC. TRIB., June 11, 2000.

[320] For more information on David Stoker's case, *see id.* and the case files in Stoker v. State (CCA No. 70,031); Stoker v. Collins (N.D. Tex. 5:92-CV-148); and Stoker v. Scott (5th Cir. No. 94-11089).

which he states the offense was committed."[321] Decisional law has broadly interpreted that exception, rendering oral confessions admissible if *any* aspect of the defendant's statement is found to be true. Hence, "it is not necessary that all of the accused's oral statements be found to be true and conduce to establish his guilt; the oral confession is admissible in its entirety if only one of the assertions within the oral confession is found to be true."[322] Once the statement's admissibility has been established, no cautionary instruction to the jury relating to unrecorded confessions is advised.

False confessions, once believed to be aberrational, form the basis of a disturbing number of wrongful convictions. In Illinois, the Center for Wrongful Convictions has identified 42 wrongful murder convictions since 1970, and 14 (33.3%) involved suspects who had either falsely confessed, or cases in which the police claimed that the suspect had confessed.[323] Because of the powerful impact of a confession in any case, it is important for fact finders to be alerted to the potential unreliability of unrecorded confessions. False confessions are attributable to duress, coercion, intoxication, diminished capacity, ignorance of the law, mental impairment, fear of violence (threatened or performed), and threats of extreme sentences. Persons with mental impairments are especially vulnerable to aggressive interrogation tactics and often have learned to acquiesce as a coping device.

False confessions, once believed to be aberrational, form the basis of a disturbing number of wrongful convictions.

Though the Texas Legislature enacted a statute limiting the admissibility of unrecorded statements, the exception to that rule has eviscerated its effect. Texas should implement both the requirement that confessions be recorded, recommended in Chapter 2, and the cautionary instruction applicable to those cases in which recordings are not feasible.

Recommendation 59

Illinois courts should continue to reject the results of polygraph examination during the innocence/guilt phase of capital trials.

Illinois courts already reject the admission of polygraph examination results during the guilt/innocence phase on the grounds that they are insufficiently accurate and that jurors tend to give them undue weight.

A polygraph instrument measures changes in a range of physiological processes (such as breathing rate, pulse, blood pressure, and perspiration) that

321 TEX. CRIM. PROC. CODE § 38.22(3)(c) (West 2004).

322 Gunter v. State, 858 S.W.2d 430, 448 (Tex. Crim. App. 1993), cert. denied, 510 U.S. 921 (1993); Baldree v. State, 784 S.W.2d 676, 684 (Tex. Crim. App. 1989), cert. denied, 495 U.S. 940 (1990); Marini v. State, 593 S.W.2d 709, 713 (Tex. Crim. App. 1980); Hayes v. State, 502 S.W.2d 158, 159 (Tex. Crim. App. 1973).

323 Rob Warden, *The Role of False Confessions in Illinois Wrongful Murder Confessions Since 1970*, (2003) *available at* http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm.

occur when a suspect is being questioned. These changes are supposed to indicate whether the suspect is telling the truth. However, it is widely accepted that other psychological factors (such as test anxiety) can affect physiological responses. A 2003 report by America's National Academy of Sciences concluded that the type of polygraph tests used in criminal investigations "can discriminate lying from truth telling at rates well above chance but well below perfection."[324]

Texas strictly prohibits the use of polygraph results in all criminal proceedings.[325] Prosecutors are precluded from alluding to the existence of a polygraph test, and violations constitute reversible error.[326] Therefore, Texas complies with Recommendation 59.

[324] National Academy of Sciences, *The Polygraph and Lie Detection* (2003), *available at* http://www.nap.edu/books/0309084369/html/.

[325] *See* Nethery v. State, 692 S.W.2d 686 (Tex. Crim. App. 1985).

[326] Sparks v. State, 820 S.W.2d 924 (Tex. App. - San Antonio 1991).

10 Sentencing Phase

"[D]eath is a punishment different from all other sanctions in kind rather than degree. A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death . . . . Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development." [327]

Capital trials are bifurcated proceedings: a defendant's eligibility for the death penalty and his or her guilt is determined in the guilt phase of the trial, and whether or not the defendant will be sentenced to death is determined in the penalty phase of the proceeding. This chapter focuses on the sentencing proceeding. The Illinois Commission recommended expanded discovery provisions (already adopted in Illinois by the Supreme Court); the addition of two statutory mitigation factors; a defendant's right to allocution; jury instructions informing the jury of all alternative sentencing options; and the continued rejection of polygraph examination results. All of these recommendations are applicable to the system of capital punishment in Texas. In addition, Texas does not have any statutory mitigation factors, so the adoption of Illinois' five existing factors would be required to bring Texas into compliance with the Commission's recommendations.

[327] Woodson v. North Carolina 428 U.S. 280, 303-05 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) (citations omitted).

Recommendation 60

The Commission supports the new amendments to Supreme Court Rule 411, which make the rules of discovery applicable to the sentencing phase of capital cases.

The Commission unanimously supported Illinois Supreme Court Rule 411, and its March 1, 2001, amendment, which rendered expanded discovery rules applicable to the penalty phase of capital cases:

> Supreme Court Rule 411. Applicability of Discovery Rules
>
> These rules shall be applied in all criminal cases wherein the accused is charged with an offense for which, upon conviction, he might be imprisoned in the penitentiary. If the accused is charged with an offense for which, upon conviction, he might be sentenced to death, these rules shall be applied to the separate sentencing hearing provided for in Section 9-1(d) of the Criminal Code of 1961 (720 ILCS 5/9-1(d)). They shall become applicable following indictment or information and shall not be operative prior to or in the course of any preliminary hearing.

The Supreme Court Committee's Supplemental Report and Committee Comments emphasized that pretrial discovery of defense sentencing information is subject to constitutional and privilege-based limitations. Hence, the defense is not required to provide inculpatory information to the State, to provide information that would directly or indirectly provide an advantage to the State, or information that carries a "reasonable possibility of harm to the defense on the merits, even when there is not clear constitutional or privilege-based prohibition on disclosure.[328]

The Illinois Supreme Court reiterated these limitations on defense disclosure of penalty phase information in a recent case that was reversed because the defendant was required to submit to a psychiatric examination at the request of the State:

> We recognize . . . that in the context of a death penalty hearing, discovery will not necessarily be reciprocal. Whereas the defendant cannot be compelled to provide discovery unless the State makes reciprocal disclosures, disclosure of information by the prosecution does not automatically entitle the State to disclosure from the defense. Certain procedural safeguards embodied in our Constitution serve to limit discovery by the defendant to the State to the end that a defendant will not be sentenced to death by the use of evidence he unwittingly provides. . . . [329]

[328] Illinois Commission Report, *supra* note 1, at 139.

[329] *See* People v. Lee, 196 Ill.2d 368, 381 (Ill. S. Ct. 2001) (the case was tried prior to the enactment of Rule 411, but the opinion cited above was written subsequent to enactment) (internal citations omitted).

Because penalty phase hearings in Illinois, as well as in Texas, typically take place immediately after the guilt phase, the Commission suggested a 24-hour delay to deal with outstanding discovery issues.

Texas has not adopted expanded discovery provisions for capital cases.[330] The adoption of such provisions — including the taking of pre-trial and pre-sentencing hearing depositions — would enhance the truth-seeking function of capital trials, and would heighten accuracy in capital trials.

Recommendation 61

The mitigating factors considered by the jury in the death penalty sentencing scheme should be expanded to include the defendant's history of extreme emotional or physical abuse, and that the defendant suffers from reduced mental capacity.

During the sentencing phase of the Illinois capital punishment scheme, the prosecution presents evidence that supports the imposition of the death penalty, referred to generally as aggravating factors, and the defense presents evidence that supports the imposition of a sentence less than death, referred to generally as mitigation factors. The jury is then asked to determine whether to impose the death penalty. Illinois' capital punishment statute provides for the consideration of five statutory mitigating factors, and constitutional jurisprudence requires the consideration of "any other factor in mitigation that is supported by the evidence," and the jury is so instructed.[331] The five enumerated factors include:

1. the defendant has no significant history of prior criminal activity;
2. the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution;
3. the murdered individual was a participant in the defendant's homicidal conduct or consented to the homicidal act;
4. the defendant acted under the compulsion of threat or menace of the imminent infliction of death or great bodily harm;
5. the defendant was not personally present during commission of the act or acts causing death.

The Illinois Commission recommended the following additional factors:

6. Defendant's background includes a history of extreme emotional or physical abuse.
7. Defendant suffers from reduced mental capacity.

The Texas capital punishment scheme is far more obtuse. In the penalty phase, the prosecution presents evidence that supports a finding of "future dangerousness." Such evidence typically takes the form of prior criminal conduct,

330 *See* Chapter 8, *infra.*
331 People v. Hope, 168 Ill.2d 1, 43-44 (Ill. S. Ct. 1995).

and expert testimony that the defendant poses a future danger (often by an expert who has never evaluated the defendant). The defense presents evidence that supports the imposition of a sentence less than death. Such evidence may include mental illness or impairment, a history of emotional or physical abuse, substance abuse, a difficult or tormented childhood, extreme poverty, educational deprivation, abandonment, a lack of prior criminal history, and good character evidence. The court, however, does not define mitigation or instruct the jury to consider this type of evidence to support a sentence less than death.

The jury in Texas is then asked to answer "yes" or "no" to three questions, known as "special issues": (1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; (2) in cases in which the jury was permitted 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; and (3) 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 are sufficient mitigating circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.[332]

The Texas death penalty statute fails to define mitigation with a list of statutory mitigating factors at all. In order to comply with the Commission's recommendation, all seven mitigating factors should be enacted, along with the adoption of an instruction charging the jury to consider any mitigating factor supported by the evidence. Such explicit instructions would place the court's imprimatur on mitigating factors, impressing their importance upon a jury. More importantly, it would instruct the jury as to the significance of potentially "double-edged" evidence, helping to ensure that mitigators such as youth and mental illness are considered for their mitigating effect, and not as evidence of future dangerousness, or as evidence supporting a sentence of death.

Recommendation 62

The defendant should have the right to make a statement on his own behalf during the aggravation/mitigation phase, without being subject to cross-examination.

The Illinois Commission unanimously recommended that the defendant be granted the right of allocution in front of the jury, prior to sentencing phase deliberations. The right of allocution is deeply rooted in the traditions of Anglo-

[332] TEX. CRIM. PROC. CODE § 37.071 (West 2004).

American criminal justice.[333] As such, many states grant a capital defendant the right to make a statement prior to judgment, either by way of statutory law, decisional law, or constitutional law.[334] Such statements give a jury the opportunity to hear, in the defendant's own voice, an expression of the defendant's choice, including remorse, regret, sorrow, explanation, mitigation, or a plea for mercy.

Texas law does not permit allocution by the defendant in capital sentencing proceedings.[335] The Illinois Commission unanimously recommended that a defendant be granted the right to allocute, reasoning that the prosecution, in capital sentencing hearings, has long been permitted to present evidence of and argue a defendant's lack of remorse. There are legitimate reasons, however, that a defendant faced with the prospect of cross-examination, may choose not to take the stand. "It is well established that a defendant who takes the stand as a witness on the trial on the merits may be cross examined and impeached in the same manner as any other witnesses. Thus such a defendant may be contradicted, impeached, discredited, attacked, sustained, bolstered up, made to give evidence against himself, cross examined as to new matter and treated in every respect as any other witness except when there are overriding constitutional and statutory provisions."[336] The right to allocute would permit a defendant to express remorse, countering the prosecution's arguments, without relinquishing important constitutional rights.

333 Janet & Robert Morrow, *In a Narrow Grave: Texas Punishment Law in Capital Murder Cases*, 43 S. Tex. L. Rev. 979, 1113 & n.357 (Fall 2002), *citing* McGautha v. California, 402 U.S. 183, 217 (1971) (stating right of allocution is of "immemorial origin"); United States v. Behrens, 375 U.S. 162, 165 (1963) (stating the right of allocution is "ancient in the law"); Green v. United States, 365 U.S. 301, 304 (1961); Ball v. United States, 140 U.S. 118, 129-30 (1891); DeAngelo v. Scheidler, 757 P.2d 1355, 1356 n.1 (Or. 1988) ("Allocution . . . is of such ancientness that it is difficult, if not impossible, to discover its historical origin") (citation and internal quotation marks omitted).

334 Janet & Robert Morrow, *supra* note 333, *citing* People v. Borrego, 774 P.2d 854, 856 (Colo. 1989) (rejecting prosecution's claim that trial court erred in permitting allocution by stating "a defendant's right to allocution is even more pronounced when facing the possibility of a death sentence"); Shelton v. State, 744 A.2d 465, 495 (Del. 2000) (providing that state right of allocution in capital cases rests on state criminal rule, state death penalty statute, and decisional law); State v. Echavarria, 839 P.2d 589, 596 (Nev. 1992) ("Capital defendants in the State of Nevada enjoy the common law right of allocution . . . ."); State v. Zola, 548 A.2d 1022, 1046 (N.J. 1988) (exercising supervisory power to recognize right of allocution in capital cases); State v. Green, 738 N.E.2d 1208, 1220-21 (Ohio 2000) (reversing death sentence imposed by three-judge panel for failure to afford defendant his allocution right under state procedural rule and remanding for re-sentencing); State v. Charping, 508 S.E.2d 851, 856 (S.C. 1999) (providing that in a capital case, state statute allows defendant to personally "make the last argument" in guilt and penalty phases); State v. Lord, 822 P.2d 177, 216-17 (Wash. 1992) (characterizing allocution as common-law right); cf. State v. Allen, 994 P.2d 728, 757 (N.M. 1999) (noting defendant made allocution during penalty phase); *see also* State v. Moeller, 616 N.W.2d 424, 465 n.18 (S.D. 2000) (illustrating example of capital appeal, deeming it unnecessary to review state's claim that trial court erred in granting defendant allocution); United States v. Chong, 104 F. Supp. 2d 1232, 1233-34 (D. Haw. 1999) (affording capital defendant right of allocution under Federal Rule of Criminal Procedure 32(c)(3)(C)). *But see* People v. Hall, 743 N.E.2d 126, 143-44 (Ill. 2000) (providing no statutory or constitutional right to allocution in capital sentencing hearing).

335 Illinois Commission Report, *supra* note 1, at 142; Janet & Robert Morrow, *supra* note 333, ("[t]he concept [of allocution] is unknown in Texas state courts").

336 Huffman v. State, 746 S.W.2d 212, 219 (Tex. Crim. App. 1988).

Recommendation 63

The jury should be instructed as to alternative sentences that may be imposed in the event that the death penalty is not imposed.

In Chapter 4, the Illinois Commission recommended a structural change in the Illinois death penalty statute which would reduce the number of eligibility factors to five. Such a change would significantly narrow the scope of crimes punishable by death, most notably by excluding felony-murders from death-eligible offenses. In Chapter 11, the Illinois Commission recommended that natural life be the mandatory alternative sentence to anyone sentenced to death.[337] Here, the Illinois Commission unanimously recommended that the jury be informed that the alternative sentence to death is life without the possibility of parole. In the event that life without parole is not adopted as a mandatory sentencing option, the Illinois Commission recommends that the jury be clearly and thoroughly advised of the terms of all alternative sentencing options, including the number of years the defendant would be required to actually serve.

The Commission explained that, under current law in Illinois, defendants who are charged with a small subset of eligibility factors (such as multiple murders) must be sentenced to life without parole or death. Under those circumstances, the U.S. Constitution requires that the court instruct the jury that a defendant will be sentenced to life without parole eligibility if he or she is not sentenced to death.

In cases not involving those eligibility factors with a mandatory alternative sentence of natural life, the jury is left to speculate as to the actual terms of a life sentence. "[T]he jury may reasonably be concerned about whether a particularly dangerous defendant may be released from prison, and choose to apply the death penalty not so much because the defendant may be deserving of death, but because there is no way to ensure future safety. This is a legitimate concern on the part of any sentencing body, and the jury should be adequately informed that there are other ways to ensure that society remains safe."[338] The Commission also reasoned that juries may either have false perceptions or be misinformed as to the terms of a determinate sentence. For example, if a defendant is sentenced to 60 years, the jury might believe that a defendant will serve only a small fraction of that term, and might therefore impose the death penalty in order to ensure public safety. Because Illinois law requires that a defendant serve 100% of his or her sentence, the Illinois Commission recommended that the jury be so informed.

Texas does not have an alternative sentencing option of natural life. In Texas, if a defendant is convicted of a capital felony, and is not sentenced to death (either because the prosecution does not seek death, because the jury votes for a

337 Illinois Commission Report, *supra* note 1, at 155.
338 *Id.* at 145.

life sentence by at least a 10-2 vote, or because the jury is unable to reach a verdict), he or she is sentenced to life.[339] Texas statutory law further prohibits parole eligibility for forty calendar years, without consideration of good conduct time.[340] For offenses committed after September 1, 1999, a defendant, upon written request, is entitled to a jury instruction that if convicted of a capital felony, he or she is not eligible for parole for at least 40 years, and that parole will not necessarily be granted in forty years.[341]

Recommendation 64

Illinois courts should continue to reject the results of polygraph examinations during the sentencing phase of trials.

The rules of evidence are relaxed during the penalty phase of capital trials, and some states have permitted the limited use of polygraph examination results. The Illinois Commission unanimously rejected this approach, citing the reasoning of the Illinois Supreme Court: "[T]he reasons we articulated in rejecting the admission of polygraph evidence at trial are also persuasive in excluding it from the sentencing jury's consideration. No evidence is as likely to divert the jurors' attention from a careful, reasoned consideration of the aggravating and/or mitigating factors before them."[342]

The Texas Court of Criminal Appeals has long held that the results of polygraph examinations are inadmissible in criminal cases under all circumstances.[343] Texas law is therefore in compliance with this recommendation.

339 TEX. CRIM. PROC. CODE §. 37.071, § 2(g) (West 2004) provides: "If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue submitted under Subsection (e) of this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) of this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life."

340 TEX. GOV'T CODE § 508.145 (Vernon Supp. 2002) provides: "(a) An inmate under sentence of death is not eligible for release on parole. (b) An inmate serving a life sentence for a capital felony is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 40 calendar years."

341 TEX. CRIM. PROC. CODE § 37.071(e)(2) (West 2004) was amended to read as follows: "(2) The court, on the written request of the attorney representing the defendant, shall: (A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment rather than death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life; and (B) charge the jury in writing as follows: 'Under 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 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.'"

342 People v. Szabo, 94 Ill. 2d 327, 362 (Ill. S. Ct. 1983).

343 *See, e.g.,* Ross v. State, 133 S.W.3d 618, 633 (Tex. Crim. App. 2004); Nethery v. State, 692 S.W.2d 686 (Tex. Crim. App. 1985).

Imposition of Sentence

"Some of the jurors were wanting to know would he get out in like seven years on good behavior. . . . If we were gonna' put him in prison, we wanted to make sure he would stay there. But . . . we didn't really feel like he would . . . we really felt like we didn't have any alternative."

— Juror in an interview following a death verdict against Randall Rogers[344]

"Nobody sat down and thought through those things to come up with a rational way. They made up something that sounded like it would give the jury some guidance, but it really obfuscates more than it guides. You have got to remember these [penalty phase] questions were . . . thought up on the spur of the moment in conference committee."

— Former U.S. Representative Craig Washington[345]

This chapter covers a variety of issues pertaining to the imposition of a death sentence, including the standard by which the jury should make its decisions. The Illinois Commission recommended eliminating confusing instructions in favor of simple charges instructing the jury to weigh aggravating and mitigating factors, and to decide whether death is the appropriate sentence. Texas is in dire need of clear and concise instructions designed to clarify the role of the jury in sentencing and to eliminate confusing standards. The Illinois Commission also recommended an independent assessment of the sentence by the trial judge, with a life sentence override in cases in which the judge does not

Texas is in dire need of clear and concise instructions designed to clarify the role of the jury in sentencing and to eliminate confusing standards.

344 J. Mark Lane, *Is There Life Without Parole? A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 LOY. L.A. L.REV. 325, 390 (1993) (juror Robbins).

345 Kathy Walt, *Debate over Death Penalty Is Renewed; Predicting Future Threats Raises Question of Flaws,* HOUS. CHRON., July 9, 2000 at B1 (quoting former U.S. Rep. Craig Washington, who was in the Texas House during the 1973 Legislative Session).

concur with the death sentence. The Commission further identified certain types of cases that should be exempt from the death penalty, including cases against persons with mental retardation, and cases relying on the uncorroborated testimony of a single eyewitness, an accomplice, or an in-custody informant. These recommendations apply with equal force in Texas.

Recommendation 65

The statute which establishes the method by which the jury should arrive at its sentence should be amended to include language such as that contained in former SB 1903 to make it clear that the jury should weigh the factors in the case and reach its own independent conclusion about whether the death penalty should be imposed. The statute should be amended to read as follows:

If the jury determines unanimously, *after weighing the factors in aggravation and mitigation, that death is the appropriate sentence* . . .

The Illinois Commission recommended that clear and concise language replace the following instructions:

> If the jury determines unanimously that there are not mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death. Unless the jury unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence the court shall sentence the defendant to a term of imprisonment under Chapter V of the Unified Code of Corrections.[346]

The Illinois Commission reasoned that the jury "might reasonably conclude that the imposition of the death penalty is mandatory, unless mitigating factors outweigh the aggravating factors. The jury might not clearly understand that if any one juror finds that a mitigating factor exists, that, and that alone, is sufficient to warrant imposition of a sentence other than death."[347]

The sentencing scheme in Texas is far more confusing than that of Illinois, and its inadequacies have been the subject of repeated litigation in the U.S. Supreme Court. Texas' first statute contained no mitigation instruction at all. Instead, it contained three "special issues," yes-or-no questions on the subjects of deliberateness of the crime, future dangerousness of the offender, and absence of unreasonable provocation by the victim.[348] Three affirmative answers to the special issues resulted in a sentence of death. In 1989, in *Penry v. Lynaugh,*[349] the Supreme Court held that the absence of a mit-

The sentencing scheme in Texas is far more confusing than that of Illinois, and its inadequacies have been the subject of repeated litigation in the U.S. Supreme Court.

346 720 ILCS 5/9-(g).
347 Illinois Commission Report, *supra* note 1, at 152.
348 TEX. CODE CRIM. PROC. ANN., § 37.071(b) (Vernon 1981 and Supp. 1989).
349 492 U.S. 392 (1989).

igation instruction violated the Eighth and Fourteenth Amendments, as it provided no vehicle for giving mitigating effect to evidence presented by Penry that he was mentally retarded, had an arrested emotional development, and had an abused background. In essence, the jury was not given an opportunity to return a verdict that would result in a sentence less than death, even if the jury believed that the mitigation presented warranted such a sentence. In addition, the Court reasoned that the Texas scheme permitted the jury to give only aggravating effect to mental retardation, as an inability to learn from one's mistakes might be evidence of future dangerousness.

Texas' response to *Penry* was to add a "nullification" instruction, which instructed the jury, in a very confusing way, to change its answer to one of the three special issues if the mitigation warranted a life sentence:

> 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.*[350]

The U.S. Supreme Court again ruled this instruction unconstitutional (some ten years later), reasoning that "it made the jury charge as a whole internally contradictory, and placed law-abiding jurors in [the] impossible situation" of not answering one of the special issues truthfully.[351]

In 1991, the Texas Legislature amended the statute to include a mitigation "special issue." Though the U.S. Supreme Court plainly struck down both of these earlier statutory schemes, all inmates sentenced prior to 1991 were sentenced pursuant to one of these two unconstitutional schemes. When these cases came up for review by the Texas Court of Criminal Appeals and the Fifth Circuit Court of Appeals, both courts applied increasingly restrictive interpretations of the *Penry* decisions, refusing to grant relief to inmates unless they had presented a highly specific type of mitigation evidence: "uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, and evidence that the criminal act was attributable to this severe permanent condition."[352] This past year, the Supreme Court struck down that restrictive interpretation of the *Penry* decisions, holding that it had "no foundation" in the law.[353] Though the Supreme Court's latest decision should afford relief to some of the inmates left on death row who were sentenced prior

350 Penry v. Johnson, 532 U.S. 782 (2001).
351 *Id.*
352 *See* Tennard v. Dretke, 124 S.Ct. 2568 (2004).
353 *Id.* at 2570.

to 1991 under unconstitutional sentencing schemes, many were executed because they could not meet the unconstitutionally stringent standard applied by Texas and federal courts.

Since 1991, the Texas statute has included a mitigation special issue, 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 rather than a death sentence be imposed.[354]

The Texas statute does not define mitigating factors, nor does it instruct the jury to decide on an appropriate sentence. One risk of not defining mitigating circumstances is that jurors will consider some factors that should weigh in favor of a life sentence, such as youth or mental illness, as probative on the issue of future dangerousness, tending to support a sentence of death. And, more so than the Illinois statute, the Texas statute, with its yes-or-no issues, "may imply that the jury has no choice about whether or not to impose the death penalty."[355]

Texas' statute also falls short of the Illinois statute because of its excessive reliance on predictions of "future dangerousness." This statutory scheme results in arbitrary and unreliable death sentences, by requiring juries to make predictions about future dangerousness, in spite of overwhelming scientific evidence that accurate predictions of future dangerousness — even by professionals — are impossible. An assessment of a defendant's future dangerousness is perhaps the most critical sentencing decision a capital jury is required to make as it asks whether the defendant poses such a significant threat to their environment that the State is incapable of safely incarcerating them. However, such an assessment falsely assumes that it is possible to predict future dangerousness. For more than two decades, the American Psychiatric Association has recognized that this is a false assumption and has publicly stated that "[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession."[356]

Research confirms the fallibility of this inquiry. A recent study analyzing 155 cases in which prosecutors used expert testimony to predict a defendant's future dangerousness found that the experts were wrong in 95% of cases; a finding supported by other studies assessing the propensity towards recidivist violence dis-

354 TEX. CRIM. PROC. CODE § 37.0711(3)(e) (West 2004).
355 Illinois Commission Report, *supra* note 1, at 152.
356 Brief of Amicus Curiae, Am. Psychiatric Ass'n, Barefoot v. Estelle, 463 U.S. 880 (1983) (No. 82-6080).

played by capital defendants.[357] Furthermore, inclusion of a future dangerousness assessment within the capital sentencing process, when that assessment is not based on a reliable scientific method, allows existing biases of jurors to inappropriately contaminate the process. This risk is exacerbated by expert testimony that has, in at least seven Texas cases, suggested that membership in a minority race increases a defendant's dangerousness.[358] The deadly speculation introduced into a capital trial by predictions of future dangerousness undermines the capital system and its assertions of fair and even-handed justice.

The sentencing statute in Texas is also far less clear than that of Illinois as to the margin by which a sentence of life could be imposed. The Commission worried that, under the Illinois scheme, "the jury might not clearly understand that if any one juror finds that a mitigating factor exists, that, and that alone, is sufficient to warrant imposition of a sentence other than death." Texas' death penalty statute is not just confusing on this point, it actually misleads the jury as to the applicable law. Texas law provides that a single "yes" vote on the mitigation special issue — one hold-out juror — can ensure that instead of death, a defendant will be sentenced to life.[359] However, the jury is instructed that it may not answer "yes" to the mitigation special issue unless *ten* or more jurors agree, and the litigants are not allowed, under Texas law, to *tell* the jurors what the effect of disagreement will be.[360] Thus, the law insists that the jury be told that ten are required on the special issues and mitigation issue, though this is not true.

Because Texas' instructions do not clearly state that jurors are responsible for deciding on an appropriate sentence, do not define mitigation, rely on predictions of future dangerousness that are inherently unreliable, and mislead the jury as to the margin by which a life sentence can be imposed, Texas is in much greater need of statutory sentencing and instructional reform than was Illinois.

357 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. 62-82 (2001); James W. Marquart & Jonahthan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 22-24 (1989); James W. Marquart, Sheldon Ekland Olson, Jonathan R. Sorensen, *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?* 23 LAW & SOC'Y REV. 449, 460 (1989).

358 Texas Defender Service, *Deadly Speculation*, *supra* note 32, at 40-41.

359 TEX. CRIM. PROC. § 37.071(g) (West 2004).

360 *Id.* at § 37.071(a)(1) (West 2004).

Recommendation 66

After the jury renders its judgment with respect to the imposition of the death penalty, the trial judge should be required to indicate on the record whether he or she concurs in the result. In cases where the trial judge does not concur in the imposition of the death penalty, the defendant shall be sentenced to natural life as a mandatory alternative (assuming adoption of new death penalty scheme linked to five eligibility factors).

Commission members unanimously recommended that the trial judge in a capital case be required to indicate on the record whether he or she concurs in the sentencing result, and impose a sentence less than death if he or she does not concur. A majority of the Commission recommended that the alternative to a death sentence be "natural life," or a sentence of life without parole. According to the Commission, "[t]his proposal is designed to address the situation in which the trial judge has some lingering concern about the defendant's guilt, or when the judge believes the verdict of death may have been influenced by passion or prejudice."[361]

In Texas, the trial judge has no discretion as to sentencing: two affirmative answers to the special issues and one negative answer to the mitigation issue results in an automatic sentence of death. No mechanism exists for reducing a sentence of death to life that is based on residual doubt, or was imposed based on passion or prejudice. Texas therefore does not comply with Recommendation 66.

Recommendation 67

In any case approved for capital punishment under the new death penalty scheme with five eligibility factors, if the finder of fact determines that death is not the appropriate sentence, the mandatory alternative sentence would be natural life.

The Illinois Commission recommended, in Chapter 4, that the number of eligibility factors for the death penalty be reduced from 20 to five, in an effort to ensure that only the most serious crimes be punishable by death. Assuming that reform, the Commission proposed that the alternative to a sentence of death should be "natural life," or life without the possibility of parole. In the absence of the recommended shortening of the statute, the Commission recommended instructing the juries on all sentencing options.

Texas is one of only two states that do not provide an option of life without the possibility of parole in death penalty cases.[362] Texas' emphasis on future dangerousness exacerbates the problem, as jurors who fear future acts of violence may not feel that there is a reasonable alternative to a death sentence.

361 Illinois Commission Report, *supra* note 1, at 153.

362 New Mexico and Texas are the only death penalty states without the option of a natural life sentence. Death Penalty Information Center, *State by State Information, available at* http://www.deathpenaltyinfo.org.

Recommendation 68

Illinois should adopt a statute which prohibits the imposition of the death penalty for those defendants found to be mentally retarded. The best model to follow in terms of specific language is that found in the Tennessee statute.

Since publication of the Illinois Commission report, the U.S. Supreme Court ruled in *Atkins v. Virginia*[363] that executing the mentally retarded violates the Eighth Amendment prohibition against cruel and unusual punishment. The Court left it to the states to define and implement its mandates.

The Illinois Commission recommended the use of the Tennessee statute as a model, which uses the DSM-IV definition of retardation, requiring an IQ of less than 70, with deficits in adaptive behavior arising prior to the age of 18. The burden of proof and production is on the defendant, and the defendant must show mental retardation by a preponderance of the evidence. The determination of mental retardation is made by the court.

Texas has not yet passed a legislative response to *Atkins*. After *Atkins* was decided, bills were submitted to bring Texas into compliance with the case's mandates. One was filed during the 2003 Legislative Session, which modeled itself after competency to stand trial determinations.[364] There, competency is determined prior to trial by a separate jury. Prosecutors, however, have consistently preferred a version of the bill that included a determination of mental retardation as a special issue after a finding of guilt or innocence had been made.[365] No bill has passed to date.

The void left by the failure of the Texas legislature defining standards and procedures for the assessment of mental retardation led the Texas Court of Criminal Appeals, in *Ex Parte Briseno*, to issue "temporary judicial guidelines in addressing *Atkins* claims."[366] The court elected to use the definition of mental retardation adopted by the American Association on Mental Retardation as follows: (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."[367]

Briseno also identified a number of evidentiary factors that may be considered when making a determination of adaptive deficits, which focus heavily on lay opinions and on the circumstances of the crime. These include: (1) whether those who knew the defendant best during developmental stage, *i.e.*, his family, friends, teachers, employers, and authorities, think he was mentally retarded at that time, and if so, whether they acted in accordance with that determination;

363 536 U.S. 304 (2002).
364 SB 163 by Ellis (D-Houston).
365 In the 78th Texas Legislative Session in 2003, Texas prosecutors supported HB 614 by Keel (R-Austin) and SB 332 by Staples (R-Palestine), which would have had the determination of mental retardation made post-conviction at the time of sentencing.
366 *Ex Parte* Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004).
367 *Id.* at 7.

(2) whether the defendant has formulated plans and carried them through, or whether his conduct is impulsive; (3) whether the defendant's conduct shows leadership or shows he is led by others; (4) whether the defendant's conduct in response to external stimuli is rational and appropriate, regardless of whether it is socially acceptable; (5) whether the defendant responds coherently, rationally, and on point to oral or written questions, or whether his responses wander from subject to subject; (6) whether the defendant can hide facts or lie effectively in his own or others' interests; and (7) putting aside any heinousness or gruesomeness surrounding the capital offense, whether commission of the offense required forethought, planning, and complex execution of purpose.[368]

The approach taken by the Court of Criminal Appeals has no basis in any diagnostic literature on mental retardation. The Court's emphasis on lay opinions regarding mental retardation and on the criminality of the defendant prejudices decision-makers and undermines scientific protocols for diagnosis.[369]

Recommendation 69

Illinois should adopt a statute which provides:

The uncorroborated testimony of an in-custody informant witness concerning the confession or admission of the defendant may not be the sole basis for imposition of a death penalty.

Convictions for murder based upon the testimony of a single eyewitness or accomplice, without any other corroboration, should not be death eligible under any circumstances.

The Illinois Commission has recommended, in other chapters, multiple provisions pertaining to the unreliability of in-custody informants, accomplice testimony, and eyewitness identification. Though the Commission stopped short of recommending that no conviction be based on uncorroborated evidence that falls into one of these three categories, the Commission did recommend that the ultimate penalty of death should not be permitted based solely on evidence from one of these suspect categories.

The Commission has already addressed the reliability problems associated with evidence from each of these categories, and has made a number of recommendations designed to ferret out unreliable evidence. For example, with regard to in-custody informants, the Commission has recommended, elsewhere, disclosure by the State of witness backgrounds, disclosure of any deals or benefits, a pretrial hearing to determine the reliability of the testimony, and a special curative instruction. With regard to eyewitness testimony, the Commission has recommended new methods of conducting police lineups and photospreads, admissibility of expert testimony on the subject of eyewitness identification, and revisions to Illinois' cautionary instructions.

368 *Id.* at 1.

369 *See, e.g.,* The American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (10th ed. 2002); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders 41* (4th ed. Text Rev. 2000).

Texas does not preclude a capital conviction or sentence of death based on the uncorroborated testimony of in-custody informants or eyewitnesses. Texas does address accomplice testimony, prohibiting conviction based on the uncorroborated testimony of an accomplice:

> "A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offence committed; and the corroboration is not sufficient if it merely shows the commission of the offense."[370]

Commentators have long had issues with the reliability of inmate and accomplice witnesses because of the inherent conflict they face when being offered leniency in exchange for information. In 1997, David Spence was executed for the murder of Jill Montgomery. His conviction rested almost exclusively on the basis of jailhouse and purported accomplice testimony. There are significant questions in that case regarding the veracity of the witnesses and the reliability of the information provided. In fact, one witness recanted prior to trial and refused to testify against Spence.[371] Those who did testify had been promised leniency in their own cases and extraordinary jailhouse privileges, including conjugal visits with their wives and girlfriends. The Spence case is even more troubling because of the sentiment on the part of the Waco police officials at the time of the investigation that Spence was not the perpetrator of the crimes. Lt. Marvin Horton, supervisor of the Waco Police Department's investigation into the murders for which Spence was ultimately executed said, "I do not think David Spence committed this offense." Larry Scott, Waco Chief of Police at the time, said, "I have really never been convinced [of David Spence's guilt].[372]

Texas has a history of executing criminals on the basis of one witness. Gary Graham was executed in 2000 after being convicted in the murder of Bobby Lambert. One woman, a school teacher, served as an eye witness to the crime. The other parties present could not identify Mr. Graham as the killer. Similarly, Anibal Rousseau is currently on death row though several people claim that he was not the man who shot an Environmental Protection Agency officer in 1989. He was convicted on the basis of one positive identification made under extreme stress at night in a parking lot. No additional evidence links him to the crime.

370 TEX. CRIM. PROC. CODE § 38.14.

371 *See generally* Texas Defender Service, *State of Denial supra* note 200; Sara Rimer and Raymond Bonner, *Bush Candidacy Puts Focus on Executions*, N.Y. TIMES, May 14, 2000, *at A1*; Alan Berlow, *The Hanging Governor*, Salon.com, May 11, 2000 *available at* www.salon.com; and the court files in *Ex Parte* Spence, CCA No. 15,346-03; and Spence v. Scott, 5th Cir. Nos. 94-20212 & 94-20213

372 *Id.*

12 *Proceedings Following Conviction and Sentence*

"Achieving the proper balance between clear guidelines that assure relative equality of treatment, and discretion to consider individual factors whose weight cannot always be preassigned, is no easy task in any sentencing system. Where life itself is what hangs in the balance, a fine precision in the process must be insisted upon."

U.S. Supreme Court Justice Thurgood Marshall[373]

This chapter discusses needed reforms to procedures in place after trial and sentencing, including changes to the direct appeal and clemency phases of capital cases. The Commission was concerned about equity in capital sentencing and therefore recommended expanded review of proportionality issues in the direct appeal phase. The post-conviction appellate process in Illinois is similar to that of Texas and includes a mandatory direct appeal to the state's highest criminal court, as well as an opportunity for state review of the conviction and sentence in habeas corpus proceedings.

Recommendation 70

In capital cases the Illinois Supreme Court should consider on direct appeal (1) whether the sentence was imposed due to some arbitrary factor, (2) whether an independent weighing of the aggravating and mitigating circumstances indicates death was the proper sentence, and (3) whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases.

The Commission concluded that the Illinois Supreme Court should undertake a review to assess, as part of the direct appeal, whether a death sentence had been applied in an "appropriate and even-handed manner."[374] The Com-

[373] Lockett v. Ohio, 438 U.S. 586 (1978) (concurring opinion).
[374] Illinois Commission Report *supra* note 1, at 166.

mission cited with approval other states which use proportionate review to determine whether the imposition of the death penalty is procedurally fair statewide, such as New Mexico, Tennessee, Georgia, and others.[375] Specifically, the Commission urged consideration of the three particular issues and envisioned that a death sentence in a particular case would be compared to sentences imposed in similar cases to ensure fairness. Appellate review of these fact-specific issues would ensure that death sentences were not imposed in a haphazard or unfair way.

Using the approach as recommended in Illinois, appellate review in Texas capital cases should be expanded beyond the existing scope of inquiry in criminal cases. Appellate courts should engage in detailed, case-specific analysis of issues such as proportionality, arbitrariness, and the sufficiency of the evidence supporting a jury's findings on the special issues to ensure that death is the appropriate punishment for a particular individual in a particular case. Without this type of thorough review, Texas courts cannot achieve the goals of heightened accuracy and reliability in capital cases.[376]

Arbitrariness

Although the Texas Court of Criminal Appeals has emphasized the need "to provide a reasonable and controlled decision on whether the death penalty should be imposed, and to guard against its capricious and arbitrary imposition," it has done little to develop a consistent body of case law effectuating that goal.[377] In Texas capital cases, the Court employs a "rational basis" standard of review. If the state provides a rational basis for its categorization of death-eligible crimes, the court will not find a statutory classification to be arbitrary.[378]

The more appropriate analysis — and the one envisioned by the Illinois Commission — involves the court's examination of each individual case and a determination of whether the sentence was the result of some arbitrary factor. This factor could, of course, be racial or socio-economic in nature, but the unique character of the death penalty demands that appellate courts examine *any* factor that has potentially contributed to an arbitrary or biased death sentence.

Weighing the Aggravating and Mitigating Circumstances

The Texas death penalty statute does not contain a traditional list of aggravating or mitigating circumstances that are to be "weighed" by the jury.[379] Rather, the Texas scheme consists of three "special issues." On the basis of the "yes" or "no" answer to these questions, the jury determines the sentence. The

375 *Id.*

376 Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

377 *See, e.g.*, Roney v. State, 632 S.W. 2d 598, 603 (Tex. Crim. App. 1982).

378 *See, e.g.*, Henderson v. State, 962 S.W. 2d 544 (Tex. Crim. App. 1997) (finding the Texas Legislature justified in classifying the murder of children under the age of six as death penalty eligible because government has an interest in protecting its young children).

379 *See infra,* Recommendation 65 at 94.

first two special issues address future dangerousness[380] and the role of the defendant as a party.[381] If the jury answers the first two special issues affirmatively, then it must answer the "mitigation" question:

> 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 sentence of life imprisonment rather than a death sentence be imposed.[382]

As a result of this unique sentencing scheme and its failure to utilize a more traditional and reliable system of weighing aggravating and mitigation circumstances, the Texas courts cannot currently re-weigh these circumstances on direct appeal as suggested by the Illinois Commission. Nevertheless, the process could be reformed either to allow for traditional weighing of factors or to require a review of the sentence by the Texas Court of Criminal Appeals, in which it could conduct a comprehensive review of the evidence relating to the existing special issues.

The Texas Court of Criminal Appeals engages in a shallow level of appellate review of the factual sufficiency of either the mitigation or future dangerousness question. The court has held that "there is no evidence that must be considered to have mitigating value," and "a factual sufficiency review of a jury's determination of a probability of future dangerousness is not required."[383] Instead, the court has found the controlling question to be: "whether any rational trier of fact could have found beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[384] As long as there is a "modicum" of evidence,[385] the court will find a "rational trier of fact" could conclude the defendant constitutes a continuing threat to society." The result of this low standard of review is the affirmation of nearly every death sentence.

Proportionality

Texas appellate courts do not currently engage in any sort of proportionality analysis and therefore, the Texas judicial system overlooks a basic tenet of death penalty jurisprudence. The U.S. Supreme Court has held that "the Eighth Amendment bars . . . those punishments that are . . . 'excessive' in relation to the crime

380 TEX. CRIM. PRO. CODE ANN. § 37.071 (2)(b)(1) (Vernon Supp. 2002).
381 *Id.* at § 37.071(2)(b)(2).
382 *Id.* at § 37.071(2)(e)(1).
383 McGinn v. State, 961 S.W. 2d 161, at 169 (Tex. Crim. App.), *cert. denied*, 525 U.S. 967 (1998).
384 Burns v. State, 761 S.W. 2d 353, 355-56 (Tex. Crim. App. 1988). This analysis adopts the rationality standard from the U.S. Supreme Court's decision in Jackson v. Virginia, 443 U.S. 307 (1979), and applies it to the future dangerousness issue.
385 This evidence can include nothing more than the circumstances of the offense. *See, e.g.*, Black v. State, 816 S.W. 2d 350 (Tex. Crim. App. 1991).

committed"[386] and thus mandates that a person can be sentenced to death only for a crime for which the death penalty is the appropriate and proportionate punishment.[387] Texas' failure to engage in proportionality review can be remedied by incorporating such an analysis into the appellate review process which should encompass an analysis of the individual defendant and alleged crime.

Recommendation 71

Illinois Supreme Court Rule 3.8, Special Responsibilities of a Prosecutor, should be amended in paragraph (c) by the addition of the language italicized:

(c) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate guilt of the accused or mitigate the degree of the offense. *Following conviction, a public prosecutor or other government lawyer has the continuing obligation to make timely disclosure to the counsel for the defendant or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the defendant or mitigate the defendant's capital sentence. For purposes of this post-conviction disclosure responsibility "timely disclosure" contemplates that the prosecutor or other government lawyer should have the opportunity to investigate matters related to the new evidence.*

This recommendation was advanced by the Commission to help safeguard against miscarriages of justice which might occur simply because a defendant has been denied access to exculpatory information, or a mechanism to use that information once it has been developed. U.S. Supreme Court decisions show a distinct trend toward ensuring that defendants are not denied access to such information. In the seminal case of *Brady v. Maryland*, the Court announced that suppression by the prosecution of evidence favorable to the accused violates due process where the evidence is material to either guilt or to punishment, *irrespective of the good or bad faith of the prosecution.*[388] This concept was further developed when the Court held that favorable evidence would be deemed "material" if there is a "reasonable probability" that the *cumulative* effect of the suppressed evidence would have produced a different result.[389]

Currently, Texas law does not create any continuing *Brady* obligation of disclosure for evidence which comes to light after conviction. While Texas law provides a limited right to post-conviction DNA testing,[390] there are many restrictions to such access and the Texas Court of Criminal Appeals has applied such a strict standard for access that few motions for testing are granted.[391] In any event, it is necessary to create a statutory provision that specifically requires

386 Coker v. Georgia, 433 U.S. 584 (1977).
387 *Id.*
388 Brady v. Maryland, 373 U.S. 83 (1963) (emphasis added).
389 United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995).
390 TEX. CRIM. PRO. CODE ANN. § 64.01 (Vernon 2003).
391 *See, e.g.* Skinner v. State, 122 S.W. 3d 808 (Tex. Crim. App. 2003).

public prosecutors and other government lawyers to disclose evidence, negating the guilt of the defendant or mitigating the capital sentence after the sentence of death is imposed at trial. The Texas Legislature should create a continuing discovery obligation for public prosecutors and government lawyers. This statue will extend the obligation of disclosure beyond conviction and mandate timely disclosure of all exculpatory evidence.

Recommendation 72

The Post-Conviction Hearing Act should be amended to provide that a petition for a post-conviction proceeding in a capital case should be filed within 6 months after the issuance of the mandate by the Supreme Court on affirmance of the direct appeal from the trial.

The rationale for the Illinois Commission's recommendation is simple. It makes little sense to have two post-conviction procedures occurring at the same time, and the preparation of a petition for a writ of habeas corpus is typically far more time consuming than preparation of an appeal. Thus, it would be prudent to wait for any habeas corpus petition to commence until after the state appeals are exhausted, and the issuance of the mandate by the Supreme Court on affirmance of the direct appeal. This gives the defense the time it needs to develop the facts underlying a habeas petition.

In Texas, the timing for the filing of the state writ of habeas corpus is contained in §4 of Article 11.071 of the Code of Criminal Procedure. That provision states that the application for a writ of habeas corpus must be filed in the convicting court not later than six months (180 days) after the date the convicting court appoints habeas counsel for the defendant, or the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever is later. Thus the Texas scheme clearly anticipates overlapping procedures.

The timing anticipated by the Commission recommendation is more appropriate. By allowing a defendant the ability to use the time during the appeal process to work on developing the facts for an application for a writ of habeas corpus, fairness is accorded to the defendant, while resolution of the issues is not unduly delayed. Further, the defendant should be able to amend the petition anytime before the State's answer unless other good cause is shown, without such amendment being regarded as a successor petition.

Recommendation 73

The Illinois Post-Conviction Hearing Act should be amended to provide that the trial court should convene the evidentiary hearing on the petition within one year of the date the petition is filed.

The Commission recognized that the "Great Writ" continues to be a vital element of American law, rooted in the principle that "in a civilized society,

government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release."[392] Thus, the writ of habeas corpus ensures that an individual is not unjustly deprived of his or her life or liberty. A hearing is crucial to a fair application of these principles.

The writ of habeas corpus, however, cannot play this essential role when statutory procedures unduly limit its effectiveness. The current restrictions on access to a post-conviction hearing in state court severely limit, if not undermine, the function habeas corpus serves in the legal process.

Article 11.071 of the Texas Code of Criminal Procedure governs the procedures for habeas corpus review in death penalty cases. Section Eight of Article 11.071 gives the convicting court the discretion to decide whether findings of fact essential to the legality of the detention should be further developed in an evidentiary hearing. Although legal documents, such as briefs and affidavits, provide a foundation for resolving legal issues, they cannot substitute for full-scale, in-court evidentiary hearings. Only hearings encourage further attorney preparation, verbal discourse, and additional judicial analysis of legal issues. Despite the critical importance of conducting hearings in state habeas cases, trial courts have permitted hearings in less than 25% of the cases.[393] While constraints on judicial resources may justify judicial discretion in some cases, the nature of a death penalty case, with its ultimate result, demands that all other considerations yield in this context. Therefore, given the revered position of the writ of habeas corpus and the severity of the punishment of death, a mandatory evidentiary hearing would assure that no individual is sentenced to death as a result of a constitutional violation.

Accordingly, the law in Texas should provide that within a reasonable amount of time after the State files an answer to the application for a writ of habeas corpus, the convicting court must hold an evidentiary hearing to develop all controverted factual issues material to the legality of the applicant's confinement.

392 Fay v. Noia, 372 U.S. 391, 402 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

393 Texas Defender, *Lethal Indifference*, *supra* note 30, at 67, which reviewed cases filed between 1995 and 2001.

Recommendation 74

The Post-Conviction Hearing Act should be amended to provide that in capital cases, a proceeding may be initiated in cases in which there is newly discovered evidence which offers a substantial basis to believe that the defendant is actually innocent, and such proceedings should be available at any time following the defendant's conviction regardless of other provisions of the Act limiting the time within such proceedings can be initiated. In order to prevent frivolous petitions, the Act should provide that in proceedings asserting a claim of actual innocence, the court may make an initial determination with or without a hearing that the claim is frivolous.

Texas does recognize some claims of innocence as cognizable in habeas corpus proceedings.[394] The Court of Criminal Appeals generally approaches these claims using the same standards articulated by the U.S. Supreme Court,[395] and in reviewing such claims of actual innocence, which are based on newly discovered evidence but lack a claim of constitutional error at trial, the court requires the applicant to convince the habeas court that the "new facts unquestionably establish [the applicant's] innocence."[396] Thus, the Court of Criminal Appeals has held that relief will be granted only if the petitioner can prove by "clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."[397] In contrast, if the evidence of innocence is accompanied by a claim of constitutional error at trial, the court requires the petitioner only to prove that a constitutional violation "probably" resulted in the conviction of one who is actually innocent.[398]

These distinctions should be abolished. If evidence offers a substantial basis for actual innocence, then the claim should be cognizable regardless of the presence or absence of a constitutional error. If prosecutors are under a continuing obligation to disclose evidence negating guilt (and thereby suggesting innocence), then there must be a vehicle through which the accused can present the exculpatory evidence and secure the appropriate relief. Accordingly, a statute should supplant case law, allowing for post-conviction proceedings to be initiated in any case in which the applicant offers substantial evidence of innocence.

394 *Id.*
395 Schlup v. Delo, 513 U.S. 298 (1995); Herrera v. Collins, 506 U.S. 390 (1993).
396 Schlup, 513 U.S. at 317 *quoted in Ex parte* Elizondo 947 S.W. 2d 202, 209 (Tex. Crim. App. 1996).
397 *Ex parte* Elizondo, 947 S.W. 2d at 209.
398 *Id.*

Recommendation 75

Illinois law should provide that after all appeals have been exhausted and the Attorney General applies for a final execution date for the defendant, a clemency petition may not be filed later than 30 days after the date that the Illinois Supreme Court enters an order setting an execution date.

The Comission included this recommendation because the existing Illinois statute provided no time limit for the filing of a clemency petition.[399] Texas currently complies with this recommendation. While a number of problems have been identified regarding the clemency process in Texas, including the lack of hearings in capital cases, the lack of independence of the Board of Pardons and Paroles and the absence of criteria by which the clemency petition should be evaluated, a complete review of the shortcomings of the Texas clemency process is beyond the scope of this report.[400]

399 Illinois Commission Report, *supra* note 1, at 174. *See also* 730 ILCS 5/3-3-1(a)(3).

400 For a complete review and analysis of the Texas clemency process in capital and non-capital cases, as well as a comparison with the clemency practices in other states, *see* Texas Appleseed and Texas Innocence Network, *The Role of Mercy: Safeguarding Justice in Texas through Clemency Reform* (2005).

13 *Funding*

"[C]ompensation for attorneys representing indigent capital defendants often is perversely low. . . . As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client's defense." [401]

— U.S. Supreme Court Justice Harry Blackmun

This chapter discusses the critical issues of funding in the capital punishment system. The Commission recognized that in order to implement the necessary reforms recommended, sufficient funds must be committed to the criminal justice system and called upon members of the executive and legislative branches to designate the resources necessary to improve the quality of justice in Illinois.

Recommendation 76

Leaders in both the executive and legislative branches should significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms in capital cases.

The Illinois Commission recommended that more resources be allocated to the criminal justice system as a whole. It found that the Illinois Supreme Court should play a pivotal role in ensuring that reforms are properly implemented.

In Texas, this would require that the governor and state legislature work closely with the Court of Criminal Appeals in allocating resources. Currently, "[j]udges in each county bear the primary responsibility for developing the specific indigent defense practices to be followed by local officials in capital cases."[402]

401 McFarland v. Scott, 512 U.S. 1256, 1257-58 (1994) (Blackmun, J., dissenting from denial of certiorari).

402 Equal Justice Works and Texas Defender Service, *supra* note 232, at 1.

The Illinois State Bar Association conducted a study to assess state funding for the court system. Similarly, the Texas Bar Association could conduct a study to determine whether state funding for the court system should be increased. As was done in Illinois, a resolution authorizing such a study could be introduced in the Texas State Legislature. In Illinois, the state pays judges' salaries and the county is responsible for finances related to the court buildings and other court related staff.[403] Similarly, in Texas, state and county governments share the responsibility for financing the courts.

According to a 1998 Department of Justice Report, the most recent available, court funding in Texas is allocated in the following way: The basic salary for a district judge is paid by the state. Most counties supplement the salary of a district judge by about five to ten percent. The Texas legislature appropriated $38,579,438 for the state fiscal year in 1998 for the salaries of district judges and visiting district judges.

Texas maintains a Basic Civil Legal Services Account, which is used to help provide some civil legal services to indigents.[404] The account is administered by the Texas Supreme Court and funded by additional filing fees collected by the courts. In state fiscal year 1998,[405] the account receipts were approximately $2,000,000.

Texas could similarly create a Basic Criminal Legal Services Account to improve criminal indigent defense and programs. Furthermore, Texas could increase the amount of state funding dedicated to indigent defense at the trial court level.

The Illinois Commission notes that some of the proposals may add to the cost of capital trials, but that the increased spending will make the capital punishment system more effective, fair, and accurate.

Recommendation 77

The Capital Crimes Litigation Act, which is the state statute containing the Capital Litigation Trust Fund and other provisions, should be reauthorized by the General Assembly.

The Illinois Commission recommended the reenactment of the Capital Crimes Litigation Act, which represents a major commitment of state resources to the prosecution and the defense in capital cases. While the law benefits both the prosecution and defense, "the provisions which support the full funding of defense costs should significantly improve the quality of defense representation of capital defendants."[406]

403 Illinois Commission Report, *supra* note 1, at 178.
404 TEX. GOV'T CODE § 51.941 (Vernon 2004).
405 September 1, 1997, through August 31, 1998.
406 Illinois Commission Report, *supra* note 1, at 176.

Relevant sections of the Illinois statute that should be instituted in Texas include the ability to petition for certification of expenses for reasonable and necessary capital litigation expenses (investigator, expert, forensic, and other witnesses, and mitigation specialists) and for compensation and expenses to be paid from the Capital Litigation Trust Fund, the creation of a Capital Trust Fund, and the creation of a Texas Public Defender's office that would receive monies from the fund annually.[407]

The Texas Fair Defense Act governs these issues and obligates the 254 counties in Texas "to adopt written procedures for promptly and fairly appointing indigent defense counsel in all criminal cases, including capital prosecutions" and that judges provide details of the implementation of these procedures "in written plans that counties must annually submit to the Texas Task Force on Indigent Defense."[408] In lieu of creating an entirely new statute, lawmakers could create appropriate amendments to this existing law. This might be a preferable strategy, as "the Task Force on Indigent Defense is authorized to develop statewide policies and standards governing capital representation as a part of its broad mandate to improve indigent defense."[409]

Recommendation 78

The Commission supports the concept articulated in the statute governing the Capital Litigation Trust Fund, that adequate compensation be provided to trial counsel in capital cases for both time and expense, and encourages regular reconsideration of the hourly rates authorized under the statute to reflect the actual market rates of private attorneys.

The Illinois Commission recommended the inclusion of a provision that ensures the hourly rates of defense attorneys are commensurate with the actual market rates of private attorneys in the same geographic area. The Commission asserted that appropriate funding of defense attorneys improves the ability of defense counsel to provide an adequate defense. Furthermore, the Commission found that it is important to provide private attorneys who take on capital cases with rates related to market values. Attorney compensation is also an important issue in Texas:

> [S]o long as Texas counties overwhelmingly rely on private appointed counsel to defend capital cases, adequate attorney compensation will be one of the most important factors, if not the most important factor affecting a county's ability to attract qualified counsel to represent indigent defendants in criminal cases.[410]

407 *See* 725 I. L. C. S. 124 (2000).
408 TEX. CODE CRIM. PROC. ANN. § 26.052 (Vernon 2003). *See also* Equal Justice Center and Texas Defender Service, *supra* note 232, at 1-2.
409 *Id.* at 6.
410 Equal Justice Center and Texas Defender Service, *supra* note 232, at 32.

Currently, in Texas, "[a]ttorneys are to submit forms requesting payment and itemizing the services they have performed on a case. If the judge disapproves the requested amount of payment, he or she is required to state in writing the reasons for approving an amount different from that requested. An attorney who wishes to dispute a fee reduction may file an appeal with the presiding judge of the administrative judicial region."[411]

The FDA states that in determining attorney compensation, county plans should take into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates.[412] While it is difficult to quantify an objective norm for reasonable rates, the disparity in Texas counties' attorney compensation schemes is cause for concern:

> A number of county plans include a good attorney compensation provision specifying that capital counsel will be paid on the basis of a straight hourly fee within national norms for time reasonably expended, in a manner consistent with State Bar of Texas and ABA Standards . . . [however], many more county plans specify attorney compensation rates that are clearly unreasonable, or contain other compensation provisions that serve as barriers to effective representation.[413]

Similarly, in the area of experts and investigator expenses, "[t]he majority of county plans do not comply with the FDA's provisions regarding expert and investigator expenses. . . . Most notably, more than half of the county plans fail to include procedures for reimbursement of expenses incurred without prior court approval in capital cases."[414]

These funding shortcomings — including ridiculously-low caps or hourly rates for attorneys, investigators, or experts — are dangerous.

These funding shortcomings — including extremely-low caps or hourly rates for attorneys, investigators, or experts — are dangerous. Reasonable compensation will also serve to draw more qualified, competent attorneys to handle capital cases. Texas could include provisions similar to those found in Illinois to ensure that lawyers are paid at competitive, market rates.

411 *Id.* at 8.
412 TEX. CODE CRIM. PROC. ANN. § 26.05(c) (Vernon 2001).
413 Equal Justice Center and Texas Defender Service, *supra* note 232, at 32.
414 *Id.* at 34.

Recommendation 79

The provisions of the Capital Litigation Trust Fund should be construed as broadly as possible to ensure that public defenders, particularly those in rural parts of the state, can effectively use its provisions to secure additional counsel and reimbursement of all reasonable trial related expenses in capital cases.

The Commission unanimously supported broad funding provisions in the Capital Crimes Litigation Act. Of particular concern was the funding of rural public defenders to allow for appropriate trial preparation. The Capital Litigation Trust Fund would allow public defenders to obtain finances for trial expenses and would provide for funds for the appointment of additional counsel, if needed. Additionally, the Commission recommended that the Act also provide funding for forensic testing.

Thus, in drafting a Capital Crimes Litigation Act, the Texas Legislature should construct the Act broadly, allow lawyers (especially in rural counties) to get state funding for trial expenses, and allocate adequate funds for forensic testing. Texas would also benefit from a statewide public defender's office that could monitor the amount of state monies distributed.

Recommendation 80

The work of the State Appellate Defender's office in providing statewide trial support in capital cases should continue, and funds should be appropriated for this purpose.

In Illinois, the Capital Crimes Litigation Act appropriates funds directly to the State Appellate Defender to support its advice and consultation with appointed counsel in counties other than Cook.[415] In addition, the State Appellate Defender Act authorizes the State Appellate Defender's office to assist trial lawyers in capital cases. The State Appellate Defender's office has a division that assists appointed private attorneys and public defenders working on death penalty cases. The Death Penalty Trial Assistance Division assists in investigations, mitigation, and sometimes trials and provides training.[416]

While Texas provides similar resources to the state to aid in the prosecution of these cases, it provides no similar resources for the defense. Texas has no statewide defender's office for capital cases at either the trial or appellate level. Establishing such an office could provide benefits both in terms of fiscal economy and in terms of more qualified and better prepared defense attorneys.

415 Illinois Commission Report, *supra* note 1, at 181.
416 *Id.*

Recommendation 81

The Commission supports the recommendations in the Report of the Task Force on Professional Practice in the Illinois Justice System to reduce the burden of student loans for those entering criminal justice careers and improve salary levels and pension contributions for those in the system in order to ensure retention of qualified counsel.

According to a majority of the Commission, public salaries should be related to market values to avoid drawing experienced attorneys out of public service, as financial pressures cause lawyers to leave the public sector. The Illinois Justice System's Task Force on Professional Practice proposed creating a provision that would provide stipends to assist State counsel and public defenders in repaying their student loans. Texas has no similar Task Force or program but could benefit from the investigation of attorney salary and payment schemes and the consideration of a loan repayment program for eligible lawyers practicing criminal law.

Recommendation 82

Adequate funding should be provided by the State of Illinois to all Illinois police agencies to pay for electronic recording equipment, personnel and facilities needed to conduct electronic recordings in homicide cases.

Because statewide standardization is important, the Commission unanimously supported this recommendation. Consequently, if Texas chooses to mandate the recording of homicide interrogations, the State should finance the equipment and facilities to ensure uniformity.

Without articulating separate recommendations, the Commission formed opinions regarding funding in the following areas:

DNA Funding

The Commission supported a commitment to funding the salaries of personnel and recommended that the State fund the hiring and training of both entry and supervisory level forensic scientists, and provide support for up-to-date testing facilities. Furthermore, the Commission recommended, in Chapter 23, that the state and federal governments provide funds to develop a comprehensive DNA database. Texas could also provide such funding and support to improve the quality of DNA testing.

Recommendations on Staff Support and Training

The Commission recommended additional funding to develop statewide materials and research support for judges and to train judges, prosecutors, and defense counsel. Such services would require significant funding. Thus, if Texas chooses to enact Recommendations 36 and 44, there must be a funding provision.

14 General Recommendations

"I have great confidence in our justice system, but no system is perfect, and we must not be afraid of asking the questions that will lead to creating a more perfect system of justice for all the people of Texas."

— Governor Rick Perry[417]

The final chapter of the Commission's report addressed policy issues that are applicable to the criminal justice system as a whole. The Commission recommended that (1) the application of many of the recommendations designed to improve the capital justice system be applied to the criminal justice system as a whole; (2) data collection be systemized to include all first degree murder cases, and not just capital cases; and (3) judges be reminded of their disciplinary obligations to report attorney misconduct.[418] The Commission also discussed issues collateral to their mandate: the unmet needs of surviving victims in the capital justice system; the difficulties faced by exonerees who had experienced years of wrongful incarceration; the effect of extra-judicial factors such as race on sentencing decisions; and the overwhelming financial cost of the capital justice system.

Recommendation 83

The Commission strongly urges consideration of ways to broaden the application of many of the recommendations made by the Commission to improve the criminal justice system as a whole.

Though the Illinois Commission was charged with a report on the system of capital punishment, the Commission expressed concern that many of the injustices and inadequacies of the death penalty system affected the criminal

417 Mike Ward, *Perry Creates Criminal Justice Advisory Panel,* AUSTIN AMER. STATESMAN, March 15, 2005 (quoting Gov. Rick Perry).

418 Illinois Commission Report, *supra* note 1, at 187.

justice system as a whole. The Commission noted that capital cases receive a higher level of scrutiny than criminal cases generally, and that therefore flaws in non-capital criminal cases were more likely to pass unnoticed.[419] The Commission noted the media attention given to problems with police interrogation methods and the continuing use of DNA evidence to exonerate those wrongfully arrested and convicted. The Commission stated:

> It is of critical importance to our state, and fundamental to our system of government, that we have a criminal justice system upon which we can rely to produce a just and fair result. Revelations of wrongful convictions and miscarriages of justice inevitably undermine the confidence of the general public in the reliability of the criminal justice system as a whole.[420]

The Commission urged the Governor and the legislature to consider extending recommendations relating to "the gathering of evidence, avoiding tunnel vision, protection against false confessions, eyewitness evidence, DNA evidence, and the caution about problems associated with certain types of cases, such as those involving in-custody informants" to the justice system as a whole.[421] It noted that extended periods of incarceration, though not as serious as wrongful capital convictions, impose grave suffering on wrongfully convicted individuals and that such failures of criminal justice should be strenuously avoided.

The judicial system in Texas, like that of Illinois, has been the subject of strong criticism in recent years due to a number of high profile exonerations. In January 2001, Christopher Ochoa was released from a life sentence for murder after spending 13 years in prison. He had been coerced by law enforcement to falsely confess.[422] His release was the result of exculpatory DNA testing, testing which also led to the exoneration of his co-defendant Richard Danziger. Other Texas cases resulting in the release of inmates due to exculpatory DNA testing include those of Brandon Moon,[423] Victor Larue Thomas[424] and Calvin Washington,[425] among others.

419 *Id.*
420 *Id.* at 188.
421 *Id.*
422 Stephen A. Drizin, *Coerced Confessions Shine Light on Taping*, CHIC. SUN TIMES, February 1, 2001.
423 http://www.innocenceproject.org/case/display_profile.php?id=155
424 http://www.innocenceproject.org/case/display_profile.php?id=89
425 http://www.innocenceproject.org/case/display_profile.php?id=90

In Texas, the Illinois Commission's recommendations should be broadly considered and applied. Like Illinois, Texas imposes the death penalty in only a small percentage of cases (two percent of those convicted of murder).[426] The extension of the recommendations which are appropriate to the criminal justice system as a whole would lower the risk of wrongful convictions, leading in turn to increased public confidence. Limiting the effect of fairer procedures to the capital justice arena would leave serious flaws in the criminal justice system, and Texas would thereby miss an opportunity to repair damaged public confidence.

Limiting the effect of fairer procedures to the capital justice arena would leave serious flaws in the criminal justice system, and Texas would thereby miss an opportunity to repair damaged public confidence.

Recommendation 84

Information should be collected at the trial level with respect to prosecutions of first degree murder cases, by trial judges, which would detail information that could prove valuable in assessing whether the death penalty is, in fact, being fairly applied. Data should be collected on a form which provides details about the trial, the background of the defendant, and the basis for the sentence imposed. The forms should be collected by the Administrative Office of the Illinois Courts, and the form from an individual case should not be a public record. Data collected from the forms should be public, and should be maintained in a public access database by the Criminal Justice Information Authority.

Recommendation 84 was initially discussed in conjunction with Recommendation 70 (proportionality review on direct appeal). However, the Commission believed that Recommendation 84 had sufficient general importance to warrant a separate heading.

The importance attached by the Commission to Recommendation 84 stems in large part from the difficulty the Commission itself experienced in collecting and analyzing data related to the capital punishment system in Illinois. "Throughout the nearly two years that the Commission has studied the capital punishment system in Illinois, Commission members had to contend with an astonishing lack of data about how the capital punishment system works."[427] Similar problems exist in Texas. Neither Illinois nor Texas has implemented a statewide system to gather information about cases in which the death penalty is applicable, sought, or imposed. As the Commission stated:

> The efforts undertaken by the Commission to collect data revealed how important factual information about these cases is to a complete understanding of how the system has (or has not) been working.[428]

[426] John Blume, Theodore Eisenberg & Martin T. Wells, *Explaining Death Row's Population and Racial Composition*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES Vol. 1, 165 (2004).
[427] Illinois Commission Report, *supra* note 1 at 189.
[428] *Id.*

The Commission bemoaned Illinois' lack of an "organized statewide effort to gather information about cases in which the death penalty is imposed."[429] They were critical of the lack of uniformity of information in judicial opinions, especially the lack of clear statements of the eligibility factors relied upon, the lack of information about the race of the defendant or the victim, and the failure of some opinions to include details about the date or facts of the offense.[430]

Capital cases in the Texas system are similar in the irregularity and paucity of information contained in judicial opinions. District court decisions and findings of fact are unpublished and unavailable in a central location. As to opinions issued by the Texas Court of Criminal Appeals, very few specifically identify the eligibility factors relied upon to render the case capital, most cases contain no information about the race of the defendant or the victim, and some cases are devoid of any statement of facts whatsoever. Moreover, the Texas Court of Criminal Appeals issues unpublished opinions in about 73% of the capital cases it considers, and rarely issues any opinion at all in post-conviction proceedings.[431] Systemic analysis of the capital system in Texas is therefore very difficult.

Recommendation 84 encapsulates the Illinois Commission's belief that the retention of a capital system can be justified only if that system is also strictly monitored. Without evaluation and monitoring, extra-legal factors which should be excluded from consideration of capital crimes may influence the application of capital punishment. Without accurate and comprehensive collection and organization of data related to the capital system, strict evaluation and monitoring cannot exist. Furthermore, the Illinois Commission recommended that data be collected on all capital murder cases, whether a capital conviction was pursued or not. As the Commission stated:

> Collecting information on death penalty cases is useful and important, but in order to understand how the system is working, it is important to be able to compare the data in those cases to cases in which the death penalty was not sought or imposed.[432]

This recommendation is to be viewed in conjunction with the Illinois Report's Technical Appendix which provides sample trial court report forms from Georgia, Maryland, Oklahoma, and Tennessee. The Illinois Commission regarded these report forms as examples which could be adopted by the State of Illinois to draw its data collection into line with other states which rely upon forms filled out by the judge at the trial stage and forwarded to that state's Supreme Court.

Like Illinois, Texas does not require the trial judge to complete a report or form of any kind, nor does Texas maintain any centralized capital murder data-

429 *Id.* at 189.
430 *Id.*
431 Texas Defender Service, *Lethal Indifference, supra* note 30, at 55.
432 Illinois Commission Report, *supra* note 1, at 190.

base. Those wishing to analyze and collate information regarding the application of the death penalty in Texas are unable to utilize a single state-sponsored source, and must rely instead on records located in hundreds of district court houses scattered throughout the state, information provided by the Texas Department of Criminal Justice, and information collected by a loose group of nongovernmental organizations that study the death penalty. As such, Texas, like Illinois, is unable to adequately monitor its capital system, and ensure that it is functioning in a fair and just manner. At its most basic level, this failure is of greater concern than in other states because of the unparalleled rate of executions in Texas.

Texas could and should require the trial judge to complete a detailed report on every capital case, laying out the relevant trial and criminal data. This data should be collected and managed by the Texas Office of Court Administration. The adoption of this recommendation in Texas is perhaps the most basic step that the State can take to ensure that the gravity of capital punishment is matched by diligence in monitoring its application, thereby ensuring that it functions in a fair and even-handed manner.

Recommendation 85

Judges should be reminded of their obligation under Canon 3 to report violations of the Rules of Professional Conduct by prosecutors and defense lawyers.

In the Illinois Report, a "majority of the Commission members supported the idea that instances of misconduct which violate the Rules of Professional Conduct, whether by prosecutors or defense lawyers, should be reported," because of the consistent problems created by "questionable" conduct on the part of counsel on both sides.[433] The Commission recommended that "[i]mproper conduct by either party should be fully investigated and sanctioned where appropriate."[434]

The Illinois Commission was equally concerned with those cases in which the Supreme Court finds that counsel has acted improperly, but that this impropriety is not sufficient to warrant a reversal because it has not prejudiced the defendant. The Commission stated that:

> There are a significant number of cases where the Supreme Court has stated that the conduct of the prosecutor was clearly improper, but was not grounds for reversal. Analysis of the errors occurring on the part of defense counsel is more difficult, since the Court will often curtail its discussion of an ineffective assistance of counsel by determining that there has been no prejudice to the defendant, without specifically addressing the question of whether the counsel's performance fell below the expected professional standard.[435]

433 *Id.* at 190-91.
434 *Id.* at 190.
435 *Id.* at 191-92.

Canon 3 of the Texas Code of Judicial Conduct imposes a number of obligations on judges when they "receive information clearly establishing that a lawyer has committed a violation of the Texas Disciplinary Rules of Professional Conduct."[436] A judge is generally required to take "appropriate action," but when the violation "raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects [the Judge] shall inform the Office of the General Counsel of the State Bar of Texas or take other appropriate action."[437]

The Texas Rules of Professional Conduct cover all aspects of legal professionalism, including the client-lawyer relationship, the lawyer's role as counselor and advocate, non-client relationships, law firms and associations, public service, information about legal services, and guidelines on maintaining the integrity of the profession. It forbids a broad range of unethical conduct and sets an appropriate standard of legal professionalism. Canon 3 of the Code of Judicial Conduct imposes the additional responsibility on Judges to maintain "order and decorum in proceedings before the judge," and to "require lawyers in proceedings before the court to refrain from manifesting, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status against parties, witnesses, counsel or others. This requirement does not preclude legitimate advocacy when any of these factors is an issue in the proceeding."

A study conducted by the Chicago Tribune in June 2000 highlights the widespread incidence of unprofessional legal conduct in Texas death penalty cases, and the possibility that this creates for a malfunction of the legal apparatus.[438] In an analysis of the 131 executions performed while George Bush was Governor, the study found that "[i]n 43 (one-third) of the cases the defendant was represented at trial or on initial appeal by an attorney who had been or was later disbarred, suspended, or otherwise sanctioned."[439] The fact that such a large proportion of defendants were represented by these lawyers raises the significant possibility that they were denied their constitutional rights to effective counsel.[440]

A specific example of the problems created by judicial inattentiveness to counsel misconduct is the case of Leonard Rojas, in which the Texas Court of Criminal Appeals appointed a state habeas lawyer who had been disciplined twice and given two probated suspensions from the practice of law by the State Bar.[441] He was serving these probated suspensions when he was disciplined for a third time two weeks after he was appointed to represent Rojas. Despite this, he was

436 http://www.courts.state.tx.us/Judethics/canons.htm

437 http://www.courts.state.tx.us/Judethics/canons.htm

438 Steve Mills, Ken Armstrong, and Douglas Holt, *Flawed Trials Lead to Death Chamber: Bush Confident in System Rife with Problems*, CHIC. TRIB., June 11, 2000.

439 http://www2.bc.edu/~sydnor/10.html#_ftn4

440 *See* Strickland v. Washington, 466 U.S. 668, 686 (1984).

441 *See* Texas Defender Service, *Lethal Indifference*, *supra* note 30, at 19. *See also Ex parte* Leonard Rojas, Writ No. 39,062 (Tex. Crim. App. 2003).

deemed "qualified" by the CCA, which allowed him to file a 15-page petition raising 13 non-cognizable record-based claims, all of which were denied.[442]

The statutory mechanism in Texas is particularly vulnerable to serious failings in the appointment of competent and diligent counsel to capital defendants, especially during the post-conviction phase.[443] Under Article 11.071 of the Texas Code of Criminal Procedure, the CCA is required to "appoint competent counsel" to such defendants "under rules and standards adopted by the court" for state post-conviction proceedings. However, a combination of judicial indifference, a shortage of competent counsel willing to pursue such work, and the financial disincentive of strict funding caps on habeas counsel has generated a system in which ineffective, neglectful, and under-qualified counsel are the norm. As the Illinois Commission recommended, it is insufficient for the judiciary to turn a blind eye to such conduct. It is charged with the responsibility of administering justice, and must be willing to address issues of professional misconduct even if that means sacrificing some modicum of legal efficiency.

A study undertaken by the Texas Defender Service entitled 'Lethal Indifference' explored the frequent counsel neglect perpetrated on clients by CCA-appointed habeas counsel in violation of §1.01(b)(1) of the Texas Rules of Professional Conduct. Of the habeas applications reviewed in that study, 71 (28%) raised claims based solely on the trial record, which are not cognizable under the law.[444] Such filings are equivalent to filing a blank piece of paper. In 97 cases (39%) no extra-record materials were filed indicating that the statutorily required investigation had not been conducted.[445] The study also identified repeated instances of highly under-qualified lawyers engaging in state-habeas work in clear violation of § 1.01(a) of the Texas Rules of Professional Conduct. For example:

> The case of Ricky Kerr epitomizes the failings of Article 11.071. The lawyer appointed to file Kerr's habeas application had no capital

442 Texas Defender Service, *Lethal Indifference*, *supra* note 30, at 19.

443 Particular attention should be drawn to Section One of the Texas Rules of Professional Conduct which governs the client-lawyer relationship. Section 1.01 states: "Competent and Diligent Representation

(a) 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, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

(c) As used in this Rule neglect signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients."

444 *Id.* at 15.

445 *Id.*

> post-conviction experience and had been licensed to practice law for less than three years. On Kerr's behalf, counsel filed a five-page petition containing a single boilerplate claim that failed to challenge Kerr's conviction or sentence. This lawyer later acknowledged his incompetence in handling the case conceding that the 'decision concerning how to protect [the inmate's] rights under 11.071 may have been a gross error in judgment' and that '[i]t may be that I was not competent to represent [the inmate] in a death penalty case.' Counsel also described meritorious claims of error he had not asserted due to his misunderstanding of Texas law.[446]

However, rather than address these systemic problems, the CCA has chosen to construe the requirements of Article 11.071 in such a way as to abdicate judicial responsibility for attorney misconduct and incompetence. Rather than assess competent counsel by analyzing counsel behavior on a case-by-case basis, the CCA has ruled that defendants who received incompetent representation are not entitled to relief.[447] The CCA reasoned that while a death row inmate is entitled to a competent lawyer, the competence of an attorney is not measured according to what the attorney does during the period of habeas representation. Instead, the CCA held that being on the list of approved attorneys is sufficient, regardless of the actual performance, or lack thereof, by the attorney.[448]

Faced with such endemic problems, Recommendation 85 has particular gravity for the Texas judicial system. It is an important reminder to the judiciary that they themselves also have a responsibility to the defendant and to the legal system generally to maintain a high level of professional conduct and thereby ensure that justice is served.

446 *Id.* at 25.
447 *See Ex Parte* Graves, 70 S.W.3d 103 (Tex. Crim. App. 2002).
448 *Id.*

15 Conclusion

"It is the hope of Commission members that leaders throughout governments, as well as members of the public, will engage in that serious and reasoned debate over what is one of the most important public policy issues facing our state and our nation." [449]

— Illinois Commission on Capital Punishment

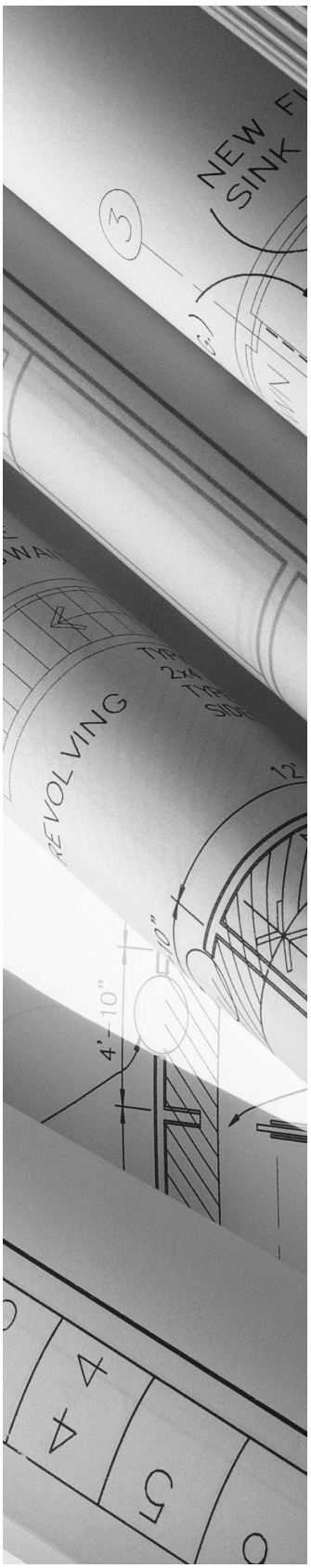
After two years of review, the bipartisan Illinois Commission "left with the firm belief that the death penalty process itself is incredibly complex, and that there are few easy answers."[450] Despite the challenges of evaluating a complicated system with intrinsic human frailties, the Commission identified a clear need for specific and obtainable improvements. The Illinois Commission's work provides a valuable springboard from which Texas can embark on its own systemic review.

Texas has much to learn from Illinois' experience. Texas has a system that is unparalleled in its expeditious course from conviction to execution. Post-conviction review is often perfunctory, at best. Yet the systemic weaknesses identified by the Illinois Commission that led to an exceedingly high number of wrongful convictions in Illinois are not only similar, but often less dangerous than the systemic weaknesses present in Texas. While Texas capital cases evade stringent governmental scrutiny and thorough review, the serious risk persists that innocent persons are ushered through the system unnoticed. Texas should heed the warnings heralded by the State of Illinois and implement necessary reforms aimed at heightening the reliability of its capital punishment system. And these reforms should be applied to the non-capital criminal justice system as well, to promote fairness, accuracy, and public confidence in the legal system.

449 Illinois Commission Report, *supra* note 1, at 207.
450 *Id.*

This Report demonstrates Texas' desperate need to reform its system of capital punishment in order to minimize the risk of wrongful convictions or unreliable death sentences. Texas does not follow the recommended procedures identified by the Illinois Commission 80% of the time. As this Report reveals, in some instances, even the procedures existing in Illinois prior to the Commission's recommendations were better than procedures used in Texas today.

The institution of the Texas Governor's Criminal Justice Advisory Council provides a rare opportunity to improve the quality of justice. Texas too can implement viable solutions to long-standing injustices. Now that the deficiencies in the Texas system have been identified, the implementation of necessary reforms must begin.



MINIMIZING RISK

Recommended Reforms

Recommended Reforms

"No government is perfect. One of the chief virtues of a democracy, however, is that its defects are always visible and under democratic processes can be pointed out and corrected."

— Harry S. Truman[451]

§ Follow the American Bar Association's recommendations and the lead of other states, such as Maryland and Illinois, in calling for a moratorium on the death penalty while a commission reviews issues of fairness in the application of the death penalty and the adequacy of procedures designed to prevent the innocent or undeserving from being executed.

§ Ensure that the Texas Criminal Justice Advisory Council is an independent, balanced council with authority to investigate any cases or issues, gather evidence, and issue subpoenas as necessary.

§ Require that the Texas Criminal Justice Advisory Council review cases in which an innocent person was convicted of a crime and later exonerated. Require that the Council review and determine the causes of the conviction, as well as identify needed reforms to prevent systemic flaws from recurring.

§ Revise the sentencing procedures in Texas to allow jurors to consider the presence of articulated statutory aggravating and mitigating factors as in other death penalty jurisdictions.

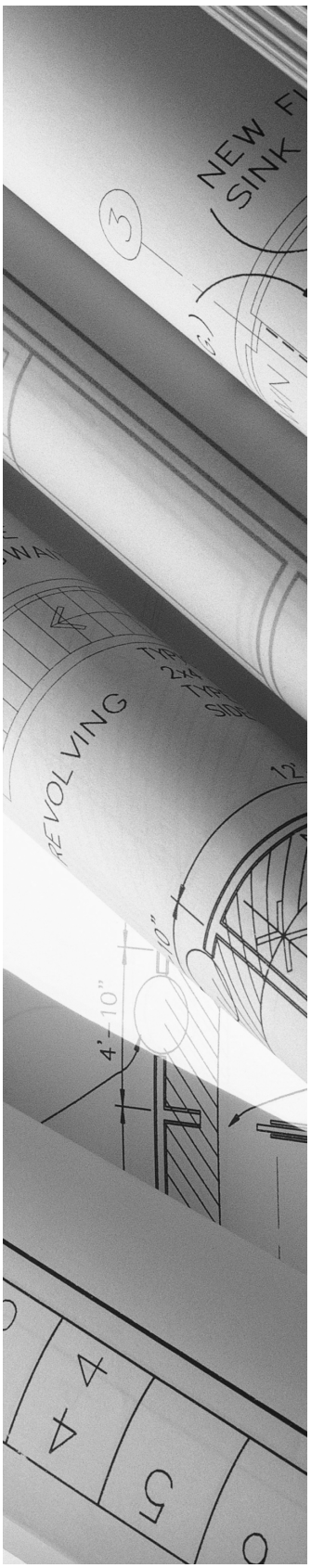
§ Reduce the number of eligibility factors and eliminate the death penalty for murder during the course of a felony.

§ Adopt a life-without-parole sentencing option. The judge should instruct the jury in a way that leaves no doubt as to the meaning of the life-without-parole statute.

§ Develop clear jury instructions, so that juries understand their obligation to consider mitigating factors.

[451] Address before Joint Session of Congress (Mar. 12, 1947), *available at* http://www.yale.edu/lawweb/avalon/trudoc.htm.

§ Establish a statewide public defender office to ensure that defendants facing the death penalty in Texas are well-represented and defense attorneys are well-trained.



MINIMIZING RISK

Appendices

Appendix

Wrongly Convicted and Others Released

Wrongly Convicted

Ernest Willis was released in 2004, after serving nearly 17 years on Texas' death row. Willis was sentenced to death for the 1986 murders of two women who died in a home fire. At the time of trial, a state expert ruled the fire arson. Willis had been staying at the house at the time and had escaped the fire. Officers at the scene claimed that Willis had acted strangely. Despite very limited evidence against Willis, he was convicted of capital murder. His attorneys — one of whom was later disbarred — offered little evidence in defense.

Years later, after a federal court overturned his conviction,[452] the District Attorney of Pecos County, Texas, hired an independent arson investigator to review the case file. This expert concluded that there was no evidence of arson. The District Attorney apologized, saying Willis: "simply did not do the crime. . . . I'm sorry this man was on death row for so long and that there were so many lost years."[453]

Kenneth Vodochodsky's conviction and death sentence were reversed by the Texas Court of Criminal Appeals on April 21, 2004.[454] The Court found that there was insufficient evidence of his guilt to sustain the conviction. Vodochodsky had been convicted for playing a role in the 1999 murders of three police officers. The Court found, however, that there was not sufficient evidence that Vodochodsky solicited, planned, or participated in the crime. At this point, no re-trial of the case is expected.[455]

452 Willis v. Cockrell, 2004 WL 1812698 (W.D.Tex.).

453 Scott Gold and Lianne Hart, *On Death Row 17 Years, Texas Inmate Released*, BOSTON GLOBE, October 7, 2004.

454 Vodochodsky v. Texas, No. 74,129 (Tex. Crim. App. 2004).

455 Jeorge Zarazua, *Inmate Tastes Legal Victory but Faces More Hurdles*, SAN-ANTONIO EXPRESS NEWS, March 28, 2005.

Randall Adams, whose case drew national scrutiny with the release of the documentary film *The Thin Blue Line*, was wrongly convicted and sentenced to death for the murder of a Dallas Police officer. Adams was freed after the real killer, David Harris, confessed on tape to the crime. Harris, unlike Adams, had an extensive background of violent criminal activity and his false testimony had largely contributed to Adams's conviction. Adams's trial lawyer, a real estate attorney, was not up to the task of refuting the charges against his client. The substantial evidence of Adams's innocence was discovered much later, during the appellate process. After 12 years in prison, Adams, who continually proclaimed his innocence, was released.[456]

Wrongly convicted and sentenced to death for murdering an El Paso couple who had once hired him as a gardener, Federico Martinez-Macias lived for nine years on Texas' death row. The evidence against Martinez-Macias was wholly lacking; no fingerprints, bloodstains, or physical evidence linked him to the crime. The true murderer, Pedro Levanos — found with property taken from the victims' home and identified by an eyewitness — later confessed to burglarizing the home after being confronted with evidence of his failed polygraph test. A post-conviction investigation revealed that lawyers at trial had been given $500 total to cover expenses for investigators and expert witnesses. After the Texas Court of Criminal Appeals dismissed his 100-page brief in state habeas within a week of its submission, the U.S. Court of Appeals for the Fifth Circuit granted him relief for ineffective assistance of counsel. The Fifth Circuit chastised the state for supplying such meager funds for Martinez-Macias's defense: "The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got what it paid for."[457] Martinez-Macias's conviction was overturned, and he was released from prison.

In a bizarre murder case involving three guns and one victim, Ricardo Aldape Guerra was convicted and sentenced to death for the murder of a Houston police officer in 1982. In federal habeas corpus proceedings, after an exhaustive investigation by counsel, the court ruled that the testimony of the state's witnesses — the only evidence linking Guerra to the crime — was tainted by official misconduct. The federal court ruled that the actions of the police and prosecutors in this case were "outrageous," "intentional," "done in bad faith" and "designed and calculated to obtain . . . another 'notch in their guns.'"[458] Guerra was freed in 1997, after more than 12 years on death row.

Clarence Brandley, a high-school janitor in Montgomery County, was wrongly convicted of the murder and sexual assault of Cheryl Ferguson, whose

456 *See Ex parte* Adams, 768 S.W.2d 281 (Tex. Crim App. 1989). *See also, Milestones*, TIME, Apr. 17, 1989, at 69; Richard L. Fricker, *Crime and Punishment in Dallas*, 75 AM. BAR ASSOC. J., 52 (July, 1989).

457 Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992). *See also* Marcia Coyle, *Old Habeas Law Saved His Life*, NAT'L L. J., May 20, 1996, at A21; University of Massachusetts Alumni Magazine, Spring 1994.

458 Guerra v. Collins, 916 F. Supp. 620 (S.D. Texas 1995).

body he found on school premises. When the investigating officers arrived on the scene, they began to question Brandley — an African American — and another of the six janitors — a Caucasian — who were on staff that summer afternoon. The officer conducting the interview said, "One of the two of you is going to hang for this. Since you're the nigger, you're elected."[459] During Brandley's trial, the state withheld exculpatory evidence and sponsored perjured testimony. An investigation by defense lawyers, the Department of Justice, and the FBI, conducted during habeas corpus proceedings, uncovered further misconduct, and in 1989, Brandley's conviction was overturned.[460]

John Skelton was released in 1990 after being imprisoned since 1982. Despite several witnesses who testified that he was 800 miles from the scene of the murder, Skelton was convicted and sentenced to death for killing a man by exploding dynamite in his pickup truck. The Court of Criminal Appeals reversed the conviction, entered a directed verdict of acquittal and found that the purely circumstantial evidence was insufficient to support a guilty verdict.[461]

Prosecutors dropped charges in 1990 against Vernon McManus and he was released after serving nearly ten years in prison.[462] Muneer Deeb was wrongly convicted and sentenced to death for allegedly hiring three hitmen to kill his exgirlfriend. Granted a new trial in 1991 because of improper trial proceedings, Deeb was acquitted. After maintaining his innocence and serving eight years in prison, he was released.[463]

Others Released

Andrew Mitchell was released from death row after 13 years. He received a reduced sentence after proving that the state had withheld evidence at his trial.[464]

The case of Kerry Max Cook, riddled with police and prosecutorial misconduct, is another compelling example of the flaws in the system. In 1978, Cook was convicted for the murder of Linda Jo Edwards. Eleven days before he was to be executed in 1988, the U.S. Supreme Court stepped in when Texas courts had denied relief.[465] Cook's conviction was overturned in 1991.[466] Eventually, after

459 *See* Davies, *supra,* note 65.

460 *See Ex Parte* Brandley, 781 S.W.2d 886 (Tex. Crim App. 1989). *See also* Sue Anne Pressley, *Death Row and the Pace of Justice: Texas Janitor's Case Shows that Rush to Execute Could End in Error*, WASH. POST, Feb 1, 1995, at A1.

461 *See* Skelton v. State, 795 S.W.2d 162 (Tex. Crim. App. 1989). *See also Conviction Overturned in Fatal '82 Bombing*, DALLAS MORNING NEWS, Dec. 14, 1989, at 1A.

462 *See* McManus v. State, 591 S.W. 2d 505 (Tex. Crim. App. 1979). *See also* Cindy Horswell, *McManus Case Draws Mixed Reactions,* HOUS. CHRON., Jan, 25, 1987.

463 *See* Deeb v. State, 815 S.W.2d. 692 (Tex. Crim. App. 1991). *See also* Barbara Kessler, *Fighting the System: Ex-inmate Acquitted of Waco Murders Embraced by Rights Advocates, but Skeptics Doubt His Innocence*, DALLAS MORNING NEWS, Dec. 14, 1989, at 19B.

464 *See Ex parte* Mitchell, 853 S.W.2d 1 (Tex. Crim. App. 1983). *See also* David Elliot, *Former Inmate Argues Against Death Penalty: Andrew Lee Mitchell Was Released After a Ruling that Evidence Had Been Suppressed*, DALLAS MORNING NEWS, Aug. 12, 1993.

465 *See* Cook v. Texas, 488 U.S. 807 (1988).

466 *See* Cook v. State, 821 S.W.2d 600 (Tex. Crim. App. 1991).

two hung juries,[467] Cook pleaded no contest to a reduced murder charge and was released. He continues to maintain his complete innocence, but accepted the state's offer to avoid the possibility of another wrongful conviction. Recent DNA tests of evidence taken from the victim matched the genetic profile of an ex-boyfriend, an original suspect in the case, and not that of Cook.[468]

The notorious case of Henry Lucas provides another example of the courts' failure to rectify mistakes made by police and prosecutors. Lucas originally confessed to the 1979 murder of a hitchhiker in Texas. Lucas also confessed to hundreds of other murders — including the murder of Jimmy Hoffa and his fourth grade teacher, who was actually still alive at the time he confessed. Two investigations by the Texas Attorney General's Office concluded that he almost certainly did not commit the murder for which he was condemned to die, though no court ever granted Lucas relief. Upon the recommendation of the Board of Pardons and Paroles, Governor Bush commuted his sentence to life.[469]

467 *See* Cook v. State, 940 S.W.2d 623 (Tex. Crim. App. 1996).

468 *See* Evan Moore, *No-Contest Plea, 20-Year Credit Let Murder Suspect Cook Go Free*, HOUS. CHRON., Feb. 17, 1999, at A1; Death Penalty Information Center, Released from Death Row: Probable or Possible Innocence, *available at* http://www.deathpenaltyinfo.org/innocothers.html#Released.

469 *See Ex parte* Lucas, 834 S.W.2d 339 (Tex. Crim. App. 1992), *vacated sub nom.*, Lucas v. Johnson, 509 U.S. 918 (1993), *aff'd on remand*, *Ex parte Lucas*, 877 S.W.2d 315 (Tex. Crim. App. 1994); Lucas v. Johnson, 132 F.3d 1069 (5th Cir. 1998), *cert. denied*, 524 U.S. 965 (1998).

2 *Appendix*

Illinois Commission Members

The Illinois Commission was composed of the following members:[470]

Chairman, Judge Frank McGarr

Now in private practice with a focus on mediation and arbitration, Judge McGarr served as a federal prosecutor and as the First Assistant Illinois Attorney General before spending 18 distinguished years on the federal bench. He served as Chief Judge of the Federal District Court for the Northern District of Illinois between 1981 and 1986.

Co-Chair, Senator Paul Simon

Senator Simon has served the people of Illinois with distinction, both as a member of the Illinois General Assembly and the United States Congress. After he retired from the United States Senate in 1997, Senator Simon was a professor at Southern Illinois University and Director of its Public Policy Institute. Senator Simon died in 2005.

Co-Chair, Thomas P. Sullivan

An accomplished litigator, Mr. Sullivan served as United States Attorney for the Northern District of Illinois from 1977 to 1981. Currently in private practice at Jenner & Block, he is often called upon to lend his legal expertise, judgment, and leadership on public interest committees.

[470] Illinois Commission on Capital Punishment, *Committee Members, available at* http://www.idoc.state.il.us/ccp/.

Former Deputy Governor Matthew R. Bettenhausen,
Member and Executive Director

Mr. Bettenhausen served as the Deputy Governor for Criminal Justice and Public Safety. A former Assistant United States Attorney in the Northern District of Illinois, he most recently served as the Associate Chief of the Criminal Division. State agencies reporting to him as Deputy Governor included the Illinois State Police, the Illinois Department of Corrections, the Illinois Criminal Justice Information Authority, the Office of the State Fire Marshal, and the Law Enforcement Training Board, among others.

Kathryn Dobrinic, Member

Ms. Dobrinic served for 12 years as the elected State's Attorney for Montgomery County. Having practiced law in central Illinois for more than 20 years, Ms. Dobrinic served as the public defender in Christian County and has also worked in private practice.

Rita Fry, Member

An award-winning attorney, Ms. Fry is the Public Defender of Cook County, Illinois. The Office of the Cook County Public Defender is the second-largest public defender's office in the nation, with more than 500 attorneys providing indigent defense service in the largest county in the State.

Theodore Gottfried, Member

Mr. Gottfried is the State Appellate Defender of the State of Illinois, and has held the office since 1972. The office of the State Appellate Defender is responsible for providing appellate level and post-conviction indigent legal services throughout the State. With more than 140 attorneys statewide, Mr. Gottfried's office also provides advice and counsel to capital defense attorneys.

Donald Hubert, Member

Mr. Hubert is a Fellow of the International Academy of Trial Lawyers and the American College of Trial Lawyers. A well-respected litigator, he has represented defendants in murder cases as well as police officer defendants in civil police brutality cases. He serves by appointment of the Illinois Supreme Court as Chairman of the Court's Committee on Professional Responsibility and is a former president of the Chicago Bar Association. He has devoted significant efforts to various charitable efforts, including Chairman of the Board of Trustees of Hales Franciscan High School.

William J. Martin, Member

During his tenure as a prosecutor in the Cook County State's Attorneys office, Mr. Martin is well known as the man who prosecuted Richard Speck. He also has extensive experience as a criminal defense lawyer, and is well acquainted with the capital punishment system. His subspecialty is legal ethics, and he has defended hundreds of lawyers in Illinois disciplinary proceedings.

Thomas Needham, Member

Now in private practice with the firm of Baird & Needham, Mr. Needham most recently served as the Chief of Staff for Chicago Police Superintendent Terry Hillard. Before joining the Superintendent's office, Mr. Needham was a policy advisor to Mayor Daley on public safety issues and a veteran Cook County prosecutor.

Roberto Ramirez, Member

Mr. Ramirez is founder and president of Tidy International, a janitorial and custodial company which is one of the fastest-growing Hispanic-owned companies in the United States. He immigrated to the United States as a young boy with his widowed mother and eight siblings. In 1996, he founded the Jesús Guadalupe Foundation in honor of his parents, as a means to financially assist Latino students in their pursuit of higher education.

Scott Turow, Member

A partner with Sonnenschein Nath & Rosenthal, Mr.Turow is probably better known across the world as a best-selling author of legal novels. Mr. Turow served as an Assistant United States Attorney in the Northern District of Illinois for several years before entering private practice.

Mike Waller, Member

The elected State's Attorney of Lake County, Illinois, Mr. Waller is a veteran trial lawyer and prosecutor. The Lake County State's Attorneys office is the third-largest prosecutor's office in the State.

Andrea Zopp, Member

A successful corporate lawyer, Ms. Zopp has also been a criminal defense lawyer, and formerly served as First Assistant State's Attorney in Cook County. She is also a former Assistant United States Attorney in the Northern District of Illinois.

Judge William H. Webster, Special Advisor to the Commission

A senior partner with the Washington law firm of Milbank, Tweed, Hadley and McCloy, Judge Webster has served as the director of the CIA and FBI. He has also served as a Judge of the U.S. Court of Appeals for the Eighth Circuit, a U.S. District Court Judge, and as a federal prosecutor in Missouri.