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# BLACK LETTER RECOMMENDATIONS

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## CHAPTER 1: SAFEGUARDING INNOCENCE AND PREVENTING WRONGFUL EXECUTION

**Recommendation 1.** Jurisdictions should require post-conviction review of credible claims of innocence.

- a) Jurisdictions should adopt legislation to establish that, if it is more likely than not that no reasonable jury would convict in light of the new evidence, the defendant should be released.
- b) Jurisdictions should adopt legislation to establish that, if it is more likely than not that the jury would not have convicted in light of the new evidence, the defendant should be given a new trial.
- c) Exculpatory evidence relevant to a credible claim of innocence or wrongful conviction should be allowed in post-conviction proceedings notwithstanding procedural bars.

**Recommendation 2.** If a prosecutor becomes aware of new, credible, material evidence that it is reasonably likely that an innocent person has been convicted, the prosecutor should be required to:

- a) notify the court and the defendant of that likelihood,
- b) disclose the arguably exonerating evidence, and
- c) agree to set the conviction aside if it is more likely than not that no reasonable jury would convict in light of the new evidence.

If a prosecutor becomes aware of “clear and convincing” evidence that an innocent person has been convicted, the prosecutor must pursue the applicable remedy to right the wrong.

**Recommendation 3.** The government should be required to disclose to the defense, as soon as practicable, all post-conviction forensic testing results.

**Recommendation 4.** Jurisdictions should establish procedures for systemic review of exonerations and for avoiding future errors.

- a) Jurisdictions should provide mechanisms for the review of capital cases in which defendants were exonerated, for the purpose of identifying the causes of the error and for correcting systemic flaws affecting the accuracy, fairness and integrity of the capital punishment system.
- b) The U.S. Department of Justice should establish and Congress should appropriate money for a specific office tasked with reviewing innocence claims.
- c) Jurisdictions (including the U.S. Department of Justice) should provide mechanisms to identify, on an ongoing basis, process improvements that could help to avert wrongful convictions before they happen.
- d) All stakeholders should work to increase sensitivity to innocence and wrongful conviction issues in capital cases in high schools, colleges, law schools, police academies, judicial training programs and among the broader American public.

## **CHAPTER 2: FORENSIC EVIDENCE AND LABS**

**Recommendation 5.** The government should preserve all evidence for at least 60 days after an execution. Evidence should not be destroyed until effective notice has been provided to defense counsel.

**Recommendation 6.** Defendants should be entitled by statute to testing of forensic evidence if the results may be relevant to a claim of innocence or wrongful conviction.

**Recommendation 7.** Law enforcement agencies should submit to DNA databanks (a) unidentified profiles obtained from evidence in a capital case and (b) DNA profiles of all convicted felons. Defendants should have access to databank searches.

**Recommendation 8.** Testimony from a forensic examiner offered in capital cases should be excluded from evidence when the examiner is not associated with an accredited forensic laboratory.

**Recommendation 9.** Congress should establish federal standards and procedures for accrediting forensic laboratories. States should either apply the federal standards or adopt their own more stringent standards. Accredited laboratories should be required to:

- a) employ certified technicians,
- b) use validated techniques,

- c) articulate and enforce written standard protocols,
- d) require examiner proficiency testing in the particular technique in question, and
- e) have in place a procedure for triggering an audit of all death penalty cases when there is reason to question the validity of the original analysis, including, without limitation, when there is reason to believe that the examiner has engaged in negligence or fraud in any case (whether capital or not).

**Recommendation 10.** Forensic evidence should be tested by accredited laboratories (private or public) that function independently from law enforcement.

### CHAPTER 3: ACCESS TO JUSTICE

**Recommendation 11.** A state or federal court should entertain a post-conviction claim that a petitioner facing execution was wrongfully convicted or sentenced and should examine any evidence offered to support such a claim.

- a) A claim of wrongful conviction or sentence should not be foreclosed, nor should an examination of supporting evidence be denied, on the ground that the claim or the evidence is presented too late. A court should have discretion to dismiss a claim of wrongful conviction or sentence summarily, or to refuse to hear supporting evidence, only if the petitioner is shown to be manipulating the legal process, including by concocting a fallacious claim or offering spurious evidence merely to prolong litigation.
- b) A federal court should credit a previous state court decision regarding a claim of wrongful conviction or sentence only if the state court addressed the claim and the evidence supporting it with care and explained its reasoning in an opinion, and then only if nothing has come to light since the state court decision tending to undermine its reliability.

### CHAPTER 4: CUSTODIAL INTERROGATIONS

**Recommendation 12.** Custodial interrogations of a suspect in a homicide case should be videotaped or digitally recorded whenever practicable.

- a) Recordings should include the entire custodial interrogation process.
- b) Where videotaping or digital video recording is impracticable, an alternative uniform method, such as audiotaping, should be established.
- c) Video or audio recording of the entire custodial interrogation process should not require the suspect's permission.

**Recommendation 13.** Whenever there is a failure for any reason to videotape or audiotape any portion of, or all of, the entire custodial interrogation process, and the statement was not otherwise suppressed, a defendant should be entitled, upon request, to a cautionary jury instruction, appropriately tailored to the individual case, that does the following: notes that failure,

- a) permits the jury to give it such weight as the jury feels that it deserves, and
- b) where appropriate, further permits the jury to use it as the basis for finding that the statement either was not made or was made involuntarily.

## **CHAPTER 5: ENSURING RELIABLE EYEWITNESS TESTIMONY**

**Recommendation 14.** State and federal jurisdictions should adopt legislation to require that eyewitness identifications be conducted in accordance with best practice techniques called for by prevailing scientific research. Further, jurisdictions should support research that will result in the continuing development of best practices in identification techniques.

**Recommendation 15.** Courts should suppress unreliable eyewitness identifications. The admissibility determination should be made based on objective criteria, not subjective self-reporting by the witness of his or her likelihood of accuracy at the time of the identification.

**Recommendation 16.** When courts admit eyewitness identification testimony, jurors should be given specific instructions that identify the factors that may influence reliability.

**Recommendation 17.** To give further context to the jury instructions, courts should admit expert trial testimony explaining prevailing research trends relating to the objective reliability of identification procedures and the factors that affect subjective identification reliability.

**Recommendation 18.** Jurisdictions should adopt a standardized protocol or set of best practices to be followed for all forensic interviews of children, which should include the videotaping of all interviews of children.

**Recommendation 19.** State and federal courts should admit expert trial testimony to give context to jury instructions and to explain prevailing research trends relating to the suggestibility of children and the factors that affect the reliability of children's testimony.

## **CHAPTER 6: RESERVING CAPITAL PUNISHMENT FOR THE MOST HEINOUS OFFENSES AND MOST CULPABLE OFFENDERS**

**Recommendation 20.** Implementation of the Eighth Amendment's prohibition against execution of individuals who have intellectual disability should be improved.

- a) The defendant should be required to prove intellectual disability by a preponderance of the evidence.

- b) There should be a rebuttable presumption that a person with an intelligence quotient (“IQ”) below 75 is intellectually disabled and therefore ineligible for the death penalty. The prosecution should be permitted to rebut the presumption by clear and convincing evidence. An IQ above 70 can be considered in determining whether the defendant has demonstrated intellectual disability by a preponderance of the evidence.
- c) Diagnostic tests requiring documentation of lack of adaptive functioning by age 18 should be excused for good cause.
- d) If the court makes a pretrial determination that the evidence of intellectual disability is not sufficient to render the defendant ineligible for the death penalty, the defendant should be permitted to raise the issue at trial for de novo determination by the jury. The court’s pretrial determination should not be communicated to the jury.

**Recommendation 21.** The death penalty should not be applied to persons who, at the time of the offense, suffered from severe mental disorders that significantly impaired their capacity to appreciate the nature, consequences or wrongfulness of their conduct, to exercise rational judgment in relation to the conduct or to conform their conduct to the requirements of law.

- a) A “significant impairment” at the time of the offense should be a threshold question at a special hearing during the penalty phase of a trial.
- b) A “significant impairment” at the time of the offense should mean any significant impairment, whether or not such impairment was due to voluntary action (such as voluntary intoxication or drug use or an affirmative decision not to self-medicate).

**Recommendation 22.** A defendant who shows reckless indifference but does not personally kill, attempt to kill, or intend that a killing take place should not be eligible for capital punishment. States should exclude from death eligibility those who were convicted under a felony murder theory alone.

## **CHAPTER 7: ENSURING EFFECTIVE COUNSEL**

**Recommendation 23.** Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers’ performance. An existing public defender system may comply if it implements the proper standards and procedures.

**Recommendation 24.** Capital defense lawyers should be adequately and reasonably

compensated, with due regard for taxpayers, and the defense should be provided with adequate and reasonable funding for experts and investigators at all stages of the proceeding, including post-conviction.

**Recommendation 25.** Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case and possess adequate time and resources to prepare. Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the case was not affected by the attorney’s incompetence. There should be a strong presumption in favor of the attorney’s obligation to offer at least some mitigating evidence at the sentencing phase of a capital trial.

## **CHAPTER 8: DUTY OF JUDGE AND JURY**

**Recommendation 26.** Capital punishment should not be imposed in the absence of a unanimous verdict both as to the death penalty sentence or advisory sentence and as to each aggravating circumstance used to support that sentence.

**Recommendation 27.** Judges should be prohibited from overriding a jury’s recommendation of a sentence less than death.

**Recommendation 28.** Jurors should be instructed that residual doubt may be considered as a mitigating circumstance in sentencing.

**Recommendation 29.** Judges should ensure that they have adequately discharged their duty to guide jurors properly in the applicable law.

**Recommendation 30.** The trial court should instruct the jury about all available sentencing options and inform the jury as to the meaning of those sentences, including a life sentence without parole.

## **CHAPTER 9: ROLE OF PROSECUTORS**

**Recommendation 31.** Prosecutors should provide full discovery to the defense in death penalty cases, including all information and evidence relating to the subject matter of the offense charged, defenses or other issues in the case that are not protected by an established governmental or other testimonial privilege. Some jurisdictions refer to this as “open-file discovery.” Prosecutors’ offices in jurisdictions with capital punishment, irrespective of the applicable discovery standard, also must develop effective procedures for requiring law enforcement and investigative agencies to gather, properly document and provide all relevant information and evidence to prosecutors for discovery review.

**Recommendation 32.** All capital jurisdictions should establish a Charging Review Committee to review prosecutorial charging decisions in death-eligible cases. The committee should be comprised of one or more line prosecutors, at least one supervisory official, and the chief or head of the prosecuting office. Prosecutors in death-eligible cases should be required to submit proposed capital and non-capital charges to the committee. The committee would then issue binding approval or disapproval of proposed capital charges, with an accompanying explanation. Each jurisdiction should forbid prosecutors from filing a capital charge without the committee’s approval.<sup>18</sup>

**Recommendation 33.** The Vienna Convention on Consular Relations (“VCCR”) should be enforced by law enforcement officers.

- a) Each death penalty jurisdiction should impose on its attorney general (or another central law enforcement officer) the duty of ensuring full compliance with the VCCR. This duty should include training law enforcement actors about consular rights and monitoring adherence to those rights. An independent authority, such as an inspector general, should report regularly about compliance to the jurisdiction’s chief executive or legislative body.
- b) The U.S. should re-join the Optional Protocol to the VCCR and adopt implementing legislation to give domestic effect to the Optional Protocol.
- c) Every death penalty jurisdiction should enact legislation rendering foreign nationals ineligible for the death penalty if they are not provided with their consular rights in a timely fashion under the VCCR.

## **CHAPTER 10: SAFEGUARDING RACIAL FAIRNESS AND PROPORTIONALITY**

**Recommendation 34.** All jurisdictions that impose the death penalty should enact legislation to help ensure that racial discrimination plays no role in the capital punishment system. As a critical component of this program, each jurisdiction should adopt a framework for the rigorous collection of data on the operation of the capital punishment system and the role of race in it. A second component is to ensure racial and ethnic diversity among the decision-makers in death penalty cases, particularly defense lawyers, prosecutors, jurors and judges.

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<sup>18</sup> Committee member Judge William S. Sessions supports issuance of an advisory rather than a binding recommendation from the committee on whether to seek the death penalty. Judge Sessions’ full explanatory statement on this issue is found at the end of Chapter 9.

## CHAPTER 11: EXECUTIVE CLEMENCY

**Recommendation 35.** The executive branch should:

- a) ensure that the clemency process is accessible to all death-sentenced prisoners for independent review of their claims,
- b) implement open and transparent clemency procedures that include, at a minimum, notice and a meaningful opportunity to be heard for the offender and representatives of the state,
- c) adopt substantive standards against which clemency applications will be evaluated, and
- d) provide a written explanation of the clemency decision, including the factors that were considered important and relevant.

## CHAPTER 12: EXECUTION PROCEDURES

**Recommendation 36.** Jurisdictions should rely on the most current scientific knowledge to develop protocols that minimize the risk of pain or suffering, which currently demands the adoption of a one-drug protocol.

**Recommendation 37.** Jurisdictions should act with transparency in the development and administration of lethal injection protocols.

**Recommendation 38.** Jurisdictions should use only drugs obtained in compliance with all laws and approved by the U.S. Food and Drug Administration for use in humans and should take appropriate measures to ensure the quality of the drugs.

**Recommendation 39.** Jurisdictions should ensure that qualified medical personnel are present at executions and responsible for all medically-related elements of executions.