MINORITY REPORT

TABLE OF CONTENTS

MINORITY REPORT

> **"[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), overruled in part on other grounds, *Malloy v. Hogan*, 378 U.S. 1 (1964).**

The Joint Supreme Court/Ohio State Bar Association Task Force to Review the Administration of Ohio's Death Penalty (hereinafter "Task Force") was tasked with the assessment of whether the death penalty in Ohio is administered in the most fair and judicious manner possible; and to determine if the administrative and procedural mechanisms for the administration of the death penalty in Ohio are in proper form or in need of adjustment. The Task Force's mandate specifically provided that "[t]he task force shall not review or report on the issue of whether Ohio should or should not have the death penalty."

In several of its recommendations, however, the Task Force veered off its narrow mandate and is making recommendations that are anti-death penalty. The work of the Task Force was strongly influenced by a pro-defense majority bent on an agenda of abolition, not fairness.

This pro-defense agenda is reflected in several of the recommendations. Some of the recommendations would tie the death-penalty system up in knots, creating procedural and litigative traffic jams that would potentially tie up particular cases in litigation even more than is already occurring.

One recommendation seeks to cut off the fact-finder from potentially highly-valuable evidence merely because it was not recorded.

One recommendation actually would abolish the death penalty for cases that are based on aggravated murders occurring during the course of certain violent felonies, i.e., occurring during rape, kidnapping, aggravated robbery, and aggravated arson. Such victims suffer horrific deaths, oftentimes after prolonged kidnapping and/or rape, and the Task Force majority's answer is to abolish the death penalty in such cases. While such a proposal does not entail outright abolition in all cases, it is certainly anti-death penalty, an area supposedly off-limits to the Task Force.

While the Task Force majority has embraced anti-death penalty and delay-inducing proposals, it has rejected proposals that would take the blinders off sentencing judges and juries to allow a full and fair assessment of the appropriate sentence in a capital sentencing proceeding, including rejecting a proposal that would have allowed consideration of victim-impact evidence.

I. Overview of Current Death-Penalty Procedure in Ohio

The death penalty can be available for aggravated murder and terrorism. But the

availability of the death penalty hinges initially on the inclusion of one or more "aggravating circumstances" in the indictment. The death penalty is available only if the indictment includes one or more death-penalty specifications alleging one or more such aggravating circumstances. See R.C. 2929.04(A); R.C. 2941.14(B).

The aggravating circumstances are listed in R.C. 2929.04(A)(1) to (A)(10). They include: assassination; aggravated murder or terrorism for hire; prior conviction for purposeful killing or attempted purposeful killing; current killing involving course of conduct involving purposeful killing or attempted killing of two or more persons; victim was law enforcement officer; the killing was committed during kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary; killing of witness to prevent testimony or in retaliation; killing of victim under age 13; aggravated murder occurring during terrorism.

The prosecution bears the burden of proving the existence of such aggravating circumstances beyond a reasonable doubt in the initial "guilt phase" in which the defendant's guilt/innocence is determined. R.C. 2929.04(B).

If one or more of such aggravating circumstances are proven at the guilt phase, the case proceeds to the sentencing stage, often called the "penalty phase," in which the jury or three-judge panel shall weigh against such aggravating circumstance(s) a wide array of "mitigating factors." The mitigating factors may include the nature and circumstances of the offense, can include the history, character, and background of the defendant, and can include any number of mitigating factors from a non-exhaustive list set forth in R.C. 2929.04(B). The list includes a catch-all factor allowing the defendant to present, and allowing the sentencer to consider, any factor relevant to whether the defendant should be sentenced to death. R.C. 2929.04(B)(7). The defense is given "great latitude" in presenting evidence of mitigating factors. R.C. 2929.04(C). Using such "wide latitude," capital defendants often present "mitigating" evidence that goes as far back as the defendant's childhood.

At the penalty phase, the prosecution has the burden of proving beyond a reasonable doubt that the aggravating circumstance(s) the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death. R.C. 2929.03(D)(1). The jury hearing the penalty phase must recommend the death sentence if it unanimously finds beyond a reasonable doubt that the aggravating circumstance(s) outweigh the mitigating factors. R.C. 2929.03(D)(2). Absent such a finding, the jury shall recommend one of the available life sentences. Id.

If the penalty phase is being heard by a three-judge panel, the same unanimity and beyond-reasonable-doubt standards apply to the question of whether the aggravating circumstances outweigh the mitigating factors. R.C. 2929.03(D)(3). The panel must impose death if it finds that the aggravated circumstance(s) outweigh the mitigating factors. Id. Absent such a finding, the panel shall impose one of the available life sentences. Id.

If a jury is hearing the penalty phase and recommends death, the trial judge must

engage in the same weighing process and must impose death if the judge determines beyond a reasonable doubt that the aggravating circumstance(s) outweigh the mitigating factors. Id. Absent such a finding, the judge imposes one of the available life sentences. Id.

II. Recommendation 1 – Exclusion of Unrecorded In-Custody Statements

The Task Force majority adopted a proposal requiring that "[a]ny in custody interrogation, as defined by *Miranda v. Arizona*, shall be electronically recorded. If the interrogation is not electronically recorded, statements made during the interrogation are presumed involuntary."

This recommendation is accompanied by commentary in the majority report indicating that the presumption of involuntariness is a rebuttable presumption. But, as the majority report emphasizes, commentary like this in the majority report has not been formally approved by the Task Force. The recommendation itself is silent on whether this is a mandatory or rebuttable presumption. Either way, the presumption is ill-advised.

This proposal exceeds the Task Force's mandate. The proposal does not "adjust" the "form" of capital-case procedures but rather reaches into the domain of how police shall gather evidence outside the courtroom. The Task Force does not have the mandate to recommend changes in evidence collection or current police evidence-collection practices.

Even if this proposal somehow qualified as an effort to improve "procedures" in capital cases, the creation of this special exclusionary rule would be a substantial step backwards for the capital-justice system. Questions about the voluntariness of a defendant's statements during custodial interrogation are properly decided by the trial judge under current law without any special presumption of involuntariness that could lead to the exclusion of such statements. A police officer's testimony about what the defendant said, and the circumstances surrounding the interrogation, are sufficient to allow the court to make such a determination. Of course, the defense can seek to dispute the officer's account and, again, the matter of voluntariness would be for the trial judge to decide.

The proposal is extremely one-sided. It is apparently based on the presumption that the police officer would lie, would make up statements, and/or would coerce statements out of the defendant. Defendants are certainly free to urge suppression based on such theories under current law. But creating a presumption of involuntariness and exclusion does an injustice to the vast majority of officers who can be counted on to provide reliable testimony about such matters. And, notably, this concern about the supposed unreliability of unrecorded information is all a one-way street here, as no similar requirement would be imposed on any defense evidence under this proposal. As between the officer and the defendant, the officer's testimony and evidence is far more likely to be reliable than the testimony and evidence coming from the accused aggravated murderer or terrorist, but only the officer's testimony is excluded.

This proposed exclusionary rule could lead to the fact-finder going without potentially damning confessions or admissions merely because they were not recorded. As a matter of principle, such an exclusionary rule should be rejected. Exclusionary rules carry "substantial social costs." *United States v. Leon*, 468 U.S. 897, 907 (1984). As recognized in *Stone v. Powell*, 428 U.S. 465 (1976), "the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. * * * Application of the rule thus deflects the truthfinding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice."

It is well known that "[t]he principal cost of applying any exclusionary rule 'is, of course, letting guilty and possibly dangerous criminals go free * * *.'" *Montejo v. Louisiana*, 129 S.Ct. 2079, 2090 (2009) (quoting *Herring v. United States*, 555 U.S. 135, 141 (2009)). Letting the guilty go free is "something that 'offends basic concepts of the criminal justice system.'" *Herring*, 129 S.Ct. at 701, quoting *Leon*, 468 U.S. at 908. "'[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.'" *Herring*, 129 S.Ct. at 701.

These kinds of exclusionary rules should be limited or abolished. They should not be expanded for the benefit of accused aggravated murderers and terrorists.

III. Recommendations 30, 32, 33, 35 – Proposals on Race

The Task Force majority adopted a number of proposals made by the "Race and Ethnicity Subcommittee." These proposals would mandate or recommend the following:

> RECOMMENDATION 30: MANDATE THAT ANY JUDGE WHO REASONABLY BELIEVES THAT ANY STATE ACTOR HAS ACTED ON THE BASIS OF RACE IN A CAPITAL CASE BE REPORTED TO THE OFFICE OF DISCIPLINARY COUNSEL OR TO THE APPROPRIATE SUPERVISORY AUTHORITY, IF NOT AN ATTORNEY.
>
> RECOMMENDATION 32: MANDATE THAT AN ATTORNEY MUST SEEK THE RECUSAL OF ANY JUDGE WHERE THERE IS "A REASONABLE BASIS FOR CONCLUDING THAT THE JUDGE'S DECISION MAKING COULD BE AFFECTED BY RACIALLY DISCRIMINATORY FACTORS," AND SHOULD THE JUDGE NOT RECUSE, IF THE ATTORNEY STILL BELIEVES THERE IS A REASONABLE BASIS FOR CONCLUDING THAT THE JUDGE'S DECISION MAKING COULD BE AFFECTED BY RACIALLY DISCRIMINATORY FACTORS, THEN THE ATTORNEY SHALL FILE AN AFFIDAVIT OF BIAS WITH THE CHIEF JUSTICE OF THE OHIO SUPREME COURT.
>
> RECOMMENDATION 33: BASED UPON ATTACHED DATA SHOWING THAT PROSECUTORS AND JURIES OVERWHELMINGLY DO NOT FIND

FELONY MURDER TO BE THE WORST OF THE WORST MURDERS, FURTHER FINDING THAT SUCH SPECIFICATIONS RESULT IN DEATH VERDICTS 7% OF THE TIME OR LESS WHEN CHARGED AS A DEATH PENALTY CASE, AND FURTHER FINDING THAT REMOVAL OF THESE SPECIFICATIONS WILL REDUCE THE RACE DISPARITY OF THE DEATH PENALTY, IT SHOULD BE RECOMMENDED TO THE LEGISLATURE THAT THE FOLLOWING SPECIFICATIONS BE REMOVED FROM THE STATUTES: KIDNAPPING, RAPE, AGG. ARSON, AGG. ROBBERY, AND AGG. BURGLARY.

RECOMMENDATION 35: ENACT LEGISLATION ALLOWING FOR RACIAL DISPARITY CLAIMS TO BE RAISED AND DEVELOPED IN STATE COURT THROUGH A RACIAL JUSTICE ACT WITH SUCH A CLAIM BEING INDEPENDENT OF WHETHER THE CLIENT HAS ANY OTHER BASIS FOR FILING IN THAT COURT.

A. INTRODUCTION

Section 1.2 of the Task Force Guidelines provides that the purpose of the Death Penalty Task Force is to study the administration of the Ohio Death Penalty and to determine if any changes are required to ensure it operates in the most fair and judicious manner possible.

The Race and Ethnicity Committee is thus charged with the duty to ensure that the Ohio Capital Punishment system is free of any bias relating to various racial or ethnic groups. This charge carries with it the implicit duty to first demonstrate actual proof that such bias exists in Ohio capital prosecutions. That showing has not been made.

B. *McCLESKEY*

Claims of bias based on race of the defendant and race of the victim are not new. The lead case in this area, *McCleskey v. Kemp*[1], was decided by the United States Supreme Court in 1987. That case held that statistical studies were not reliable and not determinative of this issue. Rather, the Court placed the burden on the defendant to prove that he was specifically targeted on the basis of his race, even while acknowledging that the *McCleskey* district court[2] actually held a lengthy hearing on the use of statistical evidence to show bias, and found such studies to be flawed and unreliable. The Supreme Court also acknowledged that this conclusion by the District Court was correct.[3] The

[1] *McCleskey v. Kemp*, 481 U.S. 279 (1987); *McCleskey v. Kemp*, 753 F.2d 877 (11th Cir. 1985); *McCleskey v. Zant*, 580 F.Supp. 338 (1984).
[2] *McCleskey v. Zant*, 580 F. Supp. 338 (1984).
[3] *McCleskey v. Kemp*, 481 U.S. 279, at 297, (1987). The 11th Circuit also found the District Court's conclusion as to unreliability of the statistical studies was correct. 753 F.2d 877, 893 et seq.

studies at issue were those associated with Professor Baldus.[4]

(1.) Analysis

The following brief discussion of *McCleskey* cases relies on the holdings of all three *McCleskey* cases and analysis from an article by Kent Scheidegger, Legal Director, Criminal Justice Legal Foundation. The article can be found at: *Rebutting the Myths About Race and the Death Penalty*, 10 Ohio St. Crim. L. 147 (2012). Reference to this article will be formatted as (Scheidegger, at ____). References to the Federal District Court decision will be (*McCleskey v. Zant*, at ____).

The trial court hearing was thorough. Extensive testimony was produced and both sides provided rebuttal material. When all was said and done, the District Court found:

1. There were serious problems with the Baldus database and the proponents failed to prove it was trustworthy. (*McCleskey v. Zant*, at 360; Scheidegger, at 153).

2. None of the models presented account for the alternative hypothesis that the race effects observed could also be explained by factors that were unaccounted for in the database, including strength of case, credibility and availability of witnesses and standard sentencing considerations. (*McCleskey v. Zant*, at 362; Scheidegger, at 153.)

3. When the unaccounted for factors *are* included in the analysis of the data, no bias based on the race of the defendant or the race of the victim is found. (*McCleskey v. Zant*, at 364 *et seq.*; Scheidegger, at 153.)

4. The evidence produced did not demonstrate any significant race-of-victim effect in prosecutors' decisions to seek the death penalty or jury sentencing decisions. (*McCleskey v. Zant*, at 367; Scheidegger, at 154.)

The District Court in *McCleskey v. Zant* concluded that when the various factors related to strength of case were included in the analysis, it became apparent that neither race of the defendant nor race of the victim had any impact on the charging or sentencing decisions.[5] Even considering just the material Baldus relied on, his study showed no bias factor in charging based on race of the defendant.

This conclusion demonstrates the lack of value in check-list type studies of death penalty cases that fail to account for factors that are critically important but cannot easily be quantified. (As stated previously, strength of case, credibility and availability of

[4] Baldus was a law professor from the University of Iowa. He, along with others, conducted the massive statistical study of the Georgia death penalty that was used in the *McCleskey* case. During his career, he studied the use of the death penalty throughout the United States.

[5] *McCleskey v. Zant*, at 367-368.

witnesses, standard sentencing considerations, etc.)

Even though the 11th Circuit decided the case on a narrower approach, they indicated they agreed with the lower court's finding as to the lack of persuasiveness of the Baldus study.[6] The United States Supreme Court reached the same conclusion.[7]

C. DEATH PENALTY TASK FORCE AND PROOF OF RACIAL BIAS

The Task Force heard from several opponents of the death penalty, some of whom were retired elected officials who had previously favored its use. There was a presentation by instructors from Michigan State who were statisticians. They had also worked with Professor Baldus, and their studies resembled the work of Baldus. They discussed a statistically based study of the death penalty in states other than Ohio. Their work did not include many of the necessary criteria also found missing in the *McCleskey* cases. They indicated that they did not find statistically significant evidence on race of the defendant, but did find such evidence as to race of the victim. The State Public Defender's Office has compiled a study of the Ohio Death Penalty, including tracking of race of defendant and race of victim. Those statistics are devoid of the factors the *McCleskey* decision found necessary to reach an accurate conclusion.

Nothing that was presented to the Task Force established a valid conclusion of racism in regard to race of the defendant, or race of the victim. As previously noted, the presentation by the Michigan State University instructors included a statement that their material showed no bias in the capital charging decision based on the race of the defendant, nor did they account for the type of data that was found lacking in *McCleskey v. Zant*, such as strength of case, standard sentencing considerations, credibility and availability of witnesses, etc. And, as the lower court noted in *McCleskey*, the inclusion of such information did, in fact, demonstrate the absence of racism in both charging and sentencing.

The only conclusion to be drawn from what the committee heard is that there has been no demonstration that charging or sentencing decisions in Ohio are influenced by race. There is no factual basis to believe that the proposals put forth by the Race and Ethnicity Subcommittee are necessary or would be helpful.

D. SPECIFIC PROPOSALS

RECOMMENDATION 30: MANDATE THAT ANY JUDGE WHO REASONABLY BELIEVES THAT ANY STATE ACTOR HAS ACTED ON THE BASIS OF RACE IN A CAPITAL CASE BE REPORTED TO THE OFFICE OF DISCIPLINARY COUNSEL OR TO THE APPROPRIATE SUPERVISOR IF NOT AN ATTORNEY.

Because there has been no demonstration of racism playing a part in capital

---

[6] *McCleskey v. Kemp,* 753 F.2d 877 (11th Cir., 1985).

[7] *McCleskey v. Kemp,* 481 U.S. 279, at 297 (1987). This conclusion about the lack of probative value of these attached statistics is unrefuted and remains unchallenged. *United States v. Savage,* 2013 WL 2060932 (U.S.D.C., E. Dist. Pa., 5-15-13).

prosecutions, this is akin to a solution searching for a problem. However, as with a good many of the proposals from the Task Force, it appears to be intended to end the death penalty rather than to make it fairer. The term "state actor" obviously refers to prosecutors or police officers. The term "reasonably believe" is very subjective and inappropriate for use under the context of this rule because it allows for harassment of prosecutors and police for engaging in perfectly acceptable behavior. Accusations of racism are typically directed at prosecutors in two regards; the charging decision, and the selection of juries. As to the charging decisions, existing law provides a method to raise such a claim. *McCleskey v. Kemp*, 481 U.S. 279 (1987). There is no need or legitimate purpose for a judge to be "mandated" to report a prosecutor to disciplinary counsel because a judge "believes" the charge is based on racism. Likewise, there is an existing legal method for use at trial for defense counsel to raise a claim of bias at voir dire. *Batson v. Kentucky*, 476 U.S. 79 (1987). Under *Batson*, a judge can set aside a state peremptory challenge if he believes that a prosecutor failed to provide a "race neutral reason." This is a highly subjective decision for the judge and those issues are often debated and fought over on appeal. This proposal would require every judge who upholds a *Batson* challenge to report the prosecutor to disciplinary counsel. This proposed remedy for a non-existent problem resembles the push for "heightened" or "extra due process" that often is raised in death penalty motions and appeals. That concept has been repeatedly rejected by state and federal courts.[8] The proposal at issue here is absurd and clearly the aim of this proposal is to intimidate prosecutors.

As to police officers, a judge has no first-hand knowledge of anything outside the courtroom. The Death Penalty Task Force has not been presented any information demonstrating that police racism is a serious problem and that topic does not appear to be an issue in death penalty appeals. Again, such a proposal serves no purpose but to intimidate law-enforcement.

Because the need for this proposal is not demonstrated, and the existing legal remedies are more than adequate, this proposal is both unnecessary and, in fact, detrimental to any concept of fairness.

> RECOMMENDATION 32: MANDATE THAT AN ATTORNEY MUST SEEK THE RECUSAL OF ANY JUDGE WHERE THERE IS "A REASONABLE BASIS FOR CONCLUDING THAT THE JUDGE'S DECISION MAKING COULD BE AFFECTED BY RACIALLY DISCRIMINATORY FACTORS" AND SHOULD THE JUDGE NOT RECUSE, IF THE ATTORNEY STILL BELIEVES THERE IS A REASONABLE BASIS FOR CONCLUDING THAT THE JUDGE'S DECISION MAKING COULD BE AFFECTED BY RACIALLY DISCRIMINATORY FACTORS THEN THE ATTORNEY SHALL FILE AN AFFIDAVIT OF BIAS WITH THE CHIEF JUSTICE OF THE OHIO SUPREME COURT.

---

[8] See *Branch v. Mississippi, 822 So.2d 36 at p. 42 et seq. (*Sup. Ct. of Miss. 2014). Recently, in *State v. Griffin*, ___ Ohio St.3d ___, 2013-Ohio-5481 (Ohio Sup. Ct. 12/19/2013), the Court noted that all constitutionally required special procedures were already built into Ohio's death penalty statute.

This proposal is once again a solution in search of a problem with significant negative consequences. The Task Force mission is to ensure the Ohio death penalty is "administered in the most fair and judicious manner possible." Before making a change such as the one proposed here, it seems reasonable to expect the proponents would show numerous examples of racist behavior by Ohio's judges. Such is not the case. Indeed, not one example of such behavior has been documented. Thus, it is hard to comprehend why such a draconian remedy as the above should be adopted, that is, unless the real intended purpose is not really "fairness".

Mandating that attorneys "seek recusal" if they have a "reasonable basis" to believe the judge's decision "could be affected" by racism is nonsensical. "Could be affected" is about as low a burden as can be found. [It is similar to using a standard of "possible" as opposed to probable.] Then, if recusal is denied, requiring the attorney to file an "affidavit of bias" based on the same pitiful "could be affected" standard, is a recipe for disaster. And, the proposed mandatory filing requirement as to recusals and affidavits of bias on the flimsiest of grounds will only spur the filings of such documents. The only result of this proposal will be delays, mistrials, and forum shopping. All in "fear" of a problem that simply does not exist. Again, the underlying effect of this proposal is intimidation, not fairness.

> RECOMMENDATION 33: BASED UPON ATTACHED DATA SHOWING THAT PROSECUTORS AND JURIES OVERWHELMINGLY DO NOT FIND FELONY MURDER TO BE THE WORST OF THE WORST MURDERS, FURTHER FINDING THAT SUCH SPECIFICATIONS RESULT IN DEATH VERDICTS 7% OF THE TIME OR LESS WHEN CHARGED AS A DEATH PENALTY CASE, AND FURTHER FINDING THAT REMOVAL OF THESE SPECIFICATIONS WILL REDUCE THE RACE DISPARITY OF THE DEATH PENALTY, IT SHOULD BE RECOMMENDED TO THE LEGISLATURE THAT THE FOLLOWING SPECIFICATIONS BE REMOVED FROM THE STATUTES: KIDNAPPING, RAPE, AGG. ARSON, AGG. ROBBERY, AND AGG. BURGLARY.

The majority report recommends that the legislature remove the "felony murder death specification"[9] from Ohio law. The Racial Disparity Subcommittee bases this proposal on two grounds. First, a statistic-based analysis showing that the "felony murder" specification results in death verdicts only 7% of the time, and thus these offenses cannot be among the "worst of the worst" death eligible crimes. The premise that if 93% of R.C. 2929.04(A)(7) specifications do not result in a death penalty proves that the 7% that do result in a death penalty cannot be "worst of the worst" is a non-sequitur. Actually, that statistic would seem to prove the opposite. Second, another statistic-based allegation that removing this specification will result in a reduction of race disparity in the Ohio death penalty. Both of these conclusions are flawed. They rely on the same faulty statistical analysis rejected in *McCleskey*.

[9] R.C. 2929.04(A)(7) is the death specification at issue here.

(1.) Felony Murder

"Felony murder" is a term that has different meanings. Most people use the term to describe an unintentional killing during the commission of a crime. That type of felony murder is codified in Ohio in R.C. 2903.02(B), "cause the death of another as a proximate result of" committing certain offenses. No intent to kill is required.

That is not the situation with the Ohio death specification at issue here. R.C. 2903.01(B), Aggravated Murder, requires a purposeful killing. In other words, what the majority report refers to as "felony murder" is in fact an offense that requires the state to prove the defendant purposely killed the victim. Also, Ohio's Aggravated Murder during a felony specification does in fact include crimes that are the worst of the worst. There is no point in cataloguing those crimes here, but a reading of the summaries of the crimes in the Attorney General Annual Report will easily demonstrate this. These crimes are generally horrible, vicious and shocking. They obviously merit a sentence of death.

(2.) Statistics

The Race and Ethnicity Committee also relies on statistics that purport to demonstrate death verdicts are only returned 7% of the time in cases where the death specification is a 2929.04(A) [during commission of a felony] specification. This is not a particularly informative statistic. The overall state rate for capital indictments resulting in a death sentence is just under 10%. Further, of the 312 defendants sent to death row through 2012, 217 have been sent on at least one felony murder specification. Thus, 68% of those sent to death row arrived with a felony murder specification. The Death Penalty Task Force's reference to a 7% success on these specifications is a clever deception that attempts to minimize the number of "felony murder" death sentences while ignoring the reality of the very large number of those on death row with that particular specification.

The assertion in this proposal that "prosecutors…overwhelmingly do not find felony murder to be the worst of the worst" is absurd. As noted above, 68% of those on death row through 2012 arrived with at least one felony murder specification. These cases were determined by both prosecutor and jury to be among the "worst of the worst." Prosecutors are expected to be careful and selective in exercising discretion in death-eligible cases. The conceded fact that the prosecutors do decline to charge capitally in every conceivably eligible case is a major part of making the system fair. Surely the committee majority does not believe indiscriminate charging is the way to go.

Also, the indictment pattern across the State has greatly changed since 1981. From 1981 through 2002, there were 15 years in which over 100 capital indictments were returned. There have been no such 100+ years since then. The totals for the last three years are:[10]

[10] See Ohio Supreme Court Capital Indictment Index.

2011	53
2012	36
2013	21

When the death penalty was reenacted in 1981, some counties, in an effort to treat all defendants equally, indicted virtually all eligible cases as capital cases, and then pruned them down as more information was developed about mitigation. That practice has now ceased. The statewide indictment numbers for the last three years, set forth above, are the three lowest full year totals since the current statute became effective in mid-October 1981.

In the context of an area which contains so many subjective criteria, statistics may well support death penalty by quota, but not through fairness.

Finally, law-enforcement in Ohio is constitutionally centered on a county basis[11], each county has its own prosecutor, its own grand jury, and more important, each county has its own particular law enforcement concerns and priorities. Ohio has many large urban counties and it has even more mid-size and small counties. Each one is free to elect prosecutors who best represent the concerns of its citizens. Some variation in priorities is natural and proper.

The proponents of the proposals of the Race and Ethnicity Subcommittee have not presented a factual basis to justify the changes they seek. They do, however, seek to further the use of unnecessary restrictive rules and laws which are not aimed at fairness, but at abolition. A request for a moratorium made by one of the subcommittees early on in the process was removed from consideration by the Supreme Court because the Task Force guidelines prohibited such action.[12] The proponents of the moratorium have responded by flooding the Task Force with proposals that are designed to achieve abolition under another name.

> RECOMMENDATION 35: ENACT LEGISLATION ALLOWING FOR RACIAL DISPARITY CLAIMS TO BE RAISED AND DEVELOPED IN STATE COURT THROUGH A RACIAL JUSTICE ACT WITH SUCH A CLAIM BEING INDEPENDENT OF WHETHER THE CLIENT HAS ANY OTHER BASIS FOR FILING IN THAT COURT.

The majority recommends the enactment of a "Racial Justice Act" which would permit capitally charged or sentenced persons to present and prove claims of racial bias based on statistical analysis of unrelated cases. Review of like legislative efforts by the federal government and other states overwhelmingly demonstrates that a "Racial Justice Act" in Ohio would undermine the enforcement of Ohio's death penalty without

[11] Ohio Const. Art. X, Sec. I Counties; R.C. 309.01, R.C. 309.08(A), Crim. R. 6.
[12] The Task Force guidelines required this conclusion. See Task Force Operating Guidelines Section 1.0, General Guidelines; Section 1.2, Purpose.

promoting racial justice.

(1.) The Federal Racial Justice Act (RJA)

In 1988, Congress considered the first proposed Racial Justice Act. Repudiating *McCleskey's* requirement to show case-specific, intentional discrimination, the proposed RJA authorized the use of statistical evidence to establish an inference of discrimination, which could be rebutted by the government.[13] The RJA as originally framed did not pass either the Senate or the House in 1988, and several revised versions proposed between 1989 and 1994 were not enacted.[14]

In their seminal review, California Attorney General Daniel E. Lungren and Special Assistant Attorney General Mark L. Krotoski explain the major consequences had the proposed legislation been enacted, not only on the enforcement of the death penalty, but on the criminal justice system as a whole.[15] Lungren and Kotoski argue cogently that in shifting the focus away from the particular facts giving rise to a death sentence, the proposed legislation is antithetical to the Constitution's requirement that each defendant be sentenced on the specific facts of his or her crime and background. The authors correctly observe that each capital case is a unique amalgam of factual circumstances, and that the outcome of each case represents the product of the assessment of numerous variables, including the strength of the available evidence, and witness availability, credibility, and memory. The authors conclude, "Quite simply, whether racism may have infected a particular case cannot be inferred from statistics from any group of cases. The fundamental premise of the RJA is unsound and unworkable."[16]

Lungren and Krotoski also explain why legislation like the proposed RJA will hamper the states' ability to enforce the death penalty. They note the protracted litigation which an RJA is likely to generate, as well as the substantial cost in responding to statistical claims. Their concerns are justified, in view of the already lengthy appellate and post-conviction reviews in capital cases. An RJA which permits non-case specific claims undoubtedly "would establish a new claim and opportunity for capital defendants which has nothing to do with the merits of their case, resulting in more delay and litigation."[17]

(2.) State RJAs

North Carolina's RJA, enacted in 2009, permitted the use of statistical evidence in claims that race was a significant factor in decisions to seek or impose the death penalty.

---

[13] Olatunde C.A. Johnson, Legislating Racial Fairness in Criminal Justice, 39 Colum. Hum. Rts. L. Rev. 233, 238-239 (2007).
[14] Id. at 239-240.
[15] Daniel E. Lungren and Mark L. Krotoski, The Racial Justice Act of 1994 – Undermining Enforcement of the Death Penalty Without Promoting Racial Justice, 20 U. Dayton Law Review (1995).
[16] Id. at 664-665.
[17] Id. at 669.

It applied retroactively, providing virtually all of the state's capitally sentenced prisoners the opportunity to raise claims.[18] The North Carolina legislature repealed the RJA in 2013. In signing the repeal legislation, Governor Pat McCrory confirmed, as prosecutors predicted, that nearly every death row prisoner, regardless of race, made claims under the Act. "The state's district attorneys are nearly unanimous in their bipartisan conclusion that the Racial Justice Act created a judicial loophole to avoid the death penalty and not a path to justice." Governor McCrory agreed that the law had effectively banned capital punishment.[19]

With the repeal of North Carolina's RJA, Kentucky is the only state which has enacted an RJA that is currently in force. However, Kentucky's RJA differs in important respects. It permits a capitally charged defendant to present in a pre-trial hearing statistical or other evidence that race was a factor in the decision to seek a sentence of death at the time the death sentence was sought. The defendant is required to "state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case," and has the burden of proving "by clear and convincing evidence that race was the basis of the decision to seek the death penalty."[20] There are no provisions for post-trial claims.

While lauding the passage of Kentucky's RJA, one commentator also found the "actual effect" of the legislation "difficult to assess." Among other things, the commentator noted a survey in which several public defenders reported that the RJA was compelling prosecutors to invoke the death penalty in every eligible case.[21]

(3.) A "Racial Justice Act" in Ohio would undermine the enforcement of Ohio's death penalty without promoting racial justice.

There are no reasons to believe that an RJA in Ohio would prove compatible with enforcing capital punishment. Ohio's capital cases are no less complex, and, consistent with constitutional requirements, the focus must remain on the specific facts and circumstances of each defendant and his or her crime. Given the opportunity to raise non-case specific claims of racial disparity, like those permitted by the proposed federal and repealed North Carolina RJAs, every death-sentenced prisoner in Ohio may be expected to raise such claims, even where the particular facts and circumstances render it extremely unlikely that race was a significant factor in charging or sentencing the defendant. Nor are there any reasons to expect that a limited approach modeled on Kentucky's RJA would achieve better results.

The "bottom line" is that a "Racial Justice Act" in Ohio would undermine the enforcement of Ohio's death penalty without promoting racial justice.

---

[18] Michael L. Radelet and Glenn L. Pierce, Race and Death Sentencing in North Carolina, 1980-2007, 89 N.C.L. Rev. 2119, 2121-2122 (2011).
[19] "North Carolina governor signs repeal of Racial Justice Act," UPI NewsTrack, June 21, 2013.
[20] Ky. Rev. Stat. Ann. Section 532.300.
[21] Note 1, supra at 243-244.

IV. Recommendations 8 & 9: Enact legislation to exclude from death eligibility and execution those suffering from "serious mental illness" as defined by legislature.

Summary

The majority's proposal is unworkable, unnecessary, and unprecedented. There are already legal protections to prohibit the execution of individuals who are minors, intellectually disabled, and insane. The majority seeks to add to this list anyone that suffers a "serious mental illness." This proposal would prohibit the execution of murderers who fully understand the crimes they committed. The proposal creates a field day for unnecessary delay and costly expenditures for experts. Of course this will also generate more delay at the post-conviction stage.

Public Policy

At any given time, a majority of Americans are said to be in support of the death penalty. Ohio's sentencing laws are based on three considerations: deterrence, rehabilitation, and retribution. A death sentence is society's way of declaring that rehabilitation is not possible. The focus then must turn on the level of deterrence and the appropriateness of the punishment.

The majority's proposal wants the law to state that capital punishment is inappropriate for anyone diagnosed with a serious mental illness. But the proposal does not define serious mental illness and the only current definitions would clearly include individuals who were aware of their actions. Congress has defined serious mental illness as "persons 18 years and over, who currently or at any time during the past year, have a diagnosable mental, behavioral, or emotion disorder of sufficient duration to meet diagnostic criteria specified in the DSM (diagnostic and statistical manual of mental disorders), that has resulted in a functional impairment which substantially interferes with or limits one or more major life activities."[22] The majority of incarcerated defendants would be able to find an expert to claim that they fit this description. There are hundreds of diagnosable mental disorders contained in the DSM-IV. According to the National Institute on Mental Health, about one in four adults has a diagnosable mental disorder.[23] One in seventeen adults has a "serious mental illness."[24] Expanding the prohibition to such a large segment of society is unnecessary and will only serve to induce dangerous criminals to feign mental illness. Adopting the majority's proposal would effectively eliminate capital punishment.

As discussed below, adequate legal protections already exist. Ohio prohibits execution of people who are insane or intellectually disabled. The majority's proposal seeks to prohibit executing anyone else. There are no limits on the prohibition – it includes anyone with a serious mental illness regardless of their ability to appreciate the

---

[22] 1992 ADAMHA Reorganization Act (P.L. 102-321).

[23] http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml.

[24] *Id.*

nature, consequences, or wrongfulness of their actions or to conform their conduct to the law. Even more narrowly-tailored similar proposals have been rejected by other states and Ohio's legislature should do the same.

Law

In 2002, the United States Supreme Court prohibited the execution of the mentally retarded.[25] The Ohio Supreme Court adopted *Atkins* later the same year.[26] There is no precedent which extends *Atkins* and *Lott* to defendants suffering from "serious mental illness."[27] There is "no evidence that the execution of such offenders is inconsistent with 'evolving standards of decency.'"[28] In stark contrast to mental retardation, "[m]ental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or deterrability in different ways and to different degrees."[29] "The term 'mental illness' does not necessarily equate with the definition of legal incompetency."[30] The majority proposal would expand this precedent to include individuals who are legally and morally responsible for their crimes.

A categorical ban exempting mentally ill defendants from death sentences is unnecessary given existing judicial safeguards. The Ohio Revised Code explicitly permits the judge and jury in a capital case to consider a defendant's mental illness as a mitigating factor.[31] Reviewing courts may also examine a defendant's mental state when scrutinizing a death sentence.[32] "It has long been recognized that 'a person [who] lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.'"[33] "Fundamental principles of due process require that a criminal defendant who is legally incompetent shall not be subjected to trial."[34]

Ohio also limits punishment of those deemed insane. A judge or jury may find a defendant suffering from severe mental illness not guilty by reason of insanity, in which case the defendant would not be subject to a criminal sentence.[35] In *Ford v. Wainwright*,

---

[25] *Atkins v. Virginia*, 536 U.S 304 (2002).
[26] *State v. Lott*, 97 Ohio St.3d 303, 2002-Ohio-6625.
[27] See *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 155 ("We have found no court that has held that it violates the Eighth Amendment to impose a death sentence on a defendant who was severely mentally ill at the time of the offense.").
[28] *Id.*, quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)(plurality opinion).
[29] *Hancock* at ¶ 157.
[30] *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, quoting *State v. Berry*, 72 Ohio St.3d 354 (1995), at the syllabus.
[31] *See* R.C. 2929.04(B)(3) and (B)(7).
[32] See *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283.
[33] *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, ¶ 155, quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975).
[34] *Skatzes*, citing *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); *see State v. Berry*, 72 Ohio St.3d at 359.
[35] See R.C. 2945.40.

477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment prohibits imposing the death penalty on a prisoner who is insane. *Ford* also required states to implement sufficient procedures to allow defendants to challenge their competency to be executed. Ohio has done this in R.C. 2949.28 and R.C. 2949.29.

In Ohio, a convict is presumed not to be insane. R.C. 2949.29(C). The defendant bears the burden of proving insanity by a preponderance of the evidence. R.C. 2949.28 provides a mechanism for a convicted death row inmate to suspend the execution of his death sentence if that inmate meets the definition of "insane" defined in subsection (A), which states:

> "As used in this section and section 2949.29 of the Revised Code, "insane" means that the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed on the convict."

In *Panetti v. Quarterman*, 551 U.S. 930, 959 (2007), the Court held that *Ford* did not foreclose inquiry into whether or not a defendant has a rational understanding of the reasons for his execution. In light of *Panetti*, a defendant must have a rational understanding of the "reasons for his punishment."

Ohio has multiple avenues of legal protection available to individuals who cannot appreciate the wrongfulness of their actions, who don't understand the reason for punishment, or who cannot conform their actions to the law. Ohio's current laws are consistent with precedent from the United States Supreme Court and are similar to laws in other states.

Conclusion

The creation of a "new, ill-defined category of murderers who would receive a blanket exemption from capital punishment without regard to the individualized balance between aggravation and mitigation in a specific case,"[36] is wholly unnecessary given the existing statutory and procedural safeguards. The presence of mental illness does not automatically negate the goals of capital punishment, namely deterrence and retribution. Defendants suffering from severe mental illness should be dealt with on an individual basis.

V. Recommendation 34 – Proposal on Central-Charging Committee

To "address cross jurisdictional racial discrepancy," the Task Force majority further recommends that the General Assembly create a "Death Penalty charging committee" to be housed in the Ohio Attorney General's Office and to consist of "former county prosecutors appointed by the Governor and members of the Ohio Attorney General's staff." County prosecutors wishing to seek the death penalty must submit the case to this "charging committee," which would then "approve or disapprove of the charges paying particular attention to the race of the victim(s) and defendant(s)." This

[36] *Hancock* at ¶ 158.

vague recommendation suffers from a faulty premise, offers no standards (at least no *proper* standards), will result in needless delays, and creates constitutional concerns.

Faulty Premise

The Task Force majority apparently believes that in seeking the death-penalty County Prosecutors discriminate – either intentionally or unintentionally – against African-Americans. But the so-called "racial discrepancy" behind this belief is a myth. The reality is that there is no evidence whatsoever that County Prosecutors are disproportionally seeking the death penalty against African-Americans or any other racial group.

The claims of "racial discrepancy" are apparently based on comparing the general population in Ohio with the demographics of those against whom the death penalty is sought and/or those who are on death row. But this oversimplified statistical methodology is, of course, flawed. Raw statistics – even when generated from "sophisticated statistical studies" – do not take into account the "innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." *McCleskey v. Kemp,* 481 U.S. 279, 294 (1987).

In other words, comparing death-penalty statistics with the general population does nothing to prove a racial discrepancy. What matters is whether similarly-situated individuals are likely to be charged differently because of their race. And on this question, there is no evidence – either within any particular county or across Ohio – that County Prosecutors disproportionately seek the death penalty based on the race of either the murderer or the murdered. Prosecutors are (rightly) not required to explain why they seek the death penalty in particular cases, *id*. at 297, but the mere absence of such an explanation is no basis to infer discrimination based solely on statistics. The aggravated murderers who are on death row are there not because of racial discrimination; they are because they "committed an act for which the United States Constitution and [Ohio] laws permit imposition of the death penalty." *Id*.

Indeed, the Task Force's recommendation of a charging committee does more to prove the *absence* of any racial discrepancy in Ohio's death penalty. If there really is a racial discrepancy, then County Prosecutors' decision *not* to seek the death penalty would be just as much in need of oversight as the decision to pursue the death penalty. If there really is a racial discrepancy, then once death-penalty charges are filed, County Prosecutors should be monitored during any plea discussions, pre-trial proceedings, and the trial and appeal. And if a racial discrepancy really does exist, then one would expect to hear a similar outcry in cases not involving the death penalty. That the Task Force recommends a charging committee in death cases but then does nothing to address these other areas of prosecutorial discretion is strong proof that even the Task Force majority does not *really* believe that County Prosecutors are discriminating against African-Americans.

In short, prosecutorial discretion is "essential to the criminal justice process," *id.*, and there is simply zero evidence that County Prosecutors in Ohio have abused this

discretion so as to justify a "charging committee" to oversee their decisions to seek the death penalty.

No Proper Standards

Under the Task Force majority's recommendation, the charging committee would have the power to "approve or disapprove" of all death-penalty prosecutions in Ohio. But the recommendation says nothing of what standards the charging committee would apply, thus leaving each individual member of the committee to apply his or her own subjective standards of what constitutes an appropriate death-penalty case.

If the charging committee is supposed to review the evidence to determine whether the facts of the case meet the statutory criteria for the death penalty, then there is no reason to believe that the charging committee would be any more capable of making this determination than the County Prosecutor. Even if the County Prosecutor was somehow unqualified to assess the evidence of the case, there already exists a "charging committee" to assure that there is enough evidence to support the charges; it is called the Grand Jury. And if the Grand Jury were not a sufficient check on the County Prosecutor's assessment of the evidence, then the trial and appeals processes – which includes the Ohio Supreme Court's independent sentence evaluation – most certainly would.

Perhaps the Task Force intends the charging committee to determine whether a death-penalty prosecution is appropriate in light of non-statutory factors – i.e., local resources, the likelihood that a jury from that county would convict, etc. But again, there is no reason to believe that the charging committee would be any more capable of weighing these factors than the County Prosecutor. The County Prosecutor – who is directly accountable to the voters of his or her county – will know these area-specific factors far better than a committee composed of out-of-county former prosecutors and bureaucrats from Columbus.

While the Task Force majority's recommendation provides no clear standards for the charging committee, it does instruct the committee to pay "particular attention to the race of the victim(s) and defendant(s)." The irony here is palpable: A charging committee created to address "racial discrepancy" is expressly instructed to make charging decisions based on race. But this instruction is not just ironic, it is offensive. A prosecutor should never – *never* – make a decision to file (or not file) charges (or any other decision) based on the race of the defendant or the victim.

Indeed, one wonders how the charging committee would follow this instruction in practice. Will the committee keep running tabs of "African-American," "Caucasian," and "Other" defendants and victims? Rather than making prosecutorial decisions based on evidence, law, and other legitimate factors, the committee will most likely spend its time continually comparing the numbers in these racial categories with the general population in Ohio to make sure that no one category is over or under represented. This would amount to a quota system in capital prosecution.

There are more questions about how the committee will pay "particular attention" to race. If the committee approves a death-penalty case in Cuyahoga County against an African-American defendant with a Caucasian victim, will it then feel obligated to approve the next such request in Hamilton County, lest there be an appearance that African-Americans are treated differently in opposite corners of the State? Equally troublesome, will the committee also feel obligated to disapprove the next such legitimate request in Cuyahoga County, lest there be an appearance that African-Americans are treated unfairly in that county? Conversely, will the committee feel obligated to approve the next case involving a Caucasian defendant and African-American victim in Cuyahoga County? What if in a particular case there are multiple defendants or victims of different races? Will the committee – for no other reason but to keep the running tally of death-penalty cases in line with the general population – feel obligated to approve the death penalty for one defendant or victim, but not for the other?

Instructing the charging committee to "pay particular attention" to race will not address the Task Force's perceived racial discrepancy. It will only make the death penalty in Ohio *more* racially divisive, and it will do so when there was no racial discrepancy to begin with. If there really is a racial discrepancy in Ohio's death penalty – and there is not – then requiring a charging committee to approve or disapprove of death-penalty charges based on race will not solve the problem. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

Needless Delays

Creating a charging committee will also result in needless delays. If the charging committee's approval is a prerequisite to pursuing the death penalty, then the first order of business for every death-penalty defendant will be to challenge the charging committee's approval. Death-penalty defendants already spend considerable time and effort litigating numerous (often frivolous) issues. Creating a charging committee will only add more litigation and more delay.

The lack of any proper standards discussed above will only make this time-consuming litigation more wasteful. When death-penalty defendants challenge the charging committee's approval of their cases—and they will—the lack of proper standards for the charging committee makes review of the approval impossible. Calling balls and strikes is difficult enough; it is impossible when there is no strike zone.

One thing is for certain, though: Every death-penalty defendant will argue that the charging committee failed to properly pay "particular attention to the race of the victim(s) and defendant(s)." The defendant will want records of prior cases submitted to the charging committee to compare his or her case against the committee's prior approvals and disapprovals. Gathering and reviewing these records will take up invaluable judicial resources. Naturally, the defendant will think that he or she is entitled to more records than what is provided, and obtaining the desired records will most likely be the subject of separate litigation. And make no mistake about it. A signature feature of death-penalty litigation in Ohio will be the defendant arguing that the charging

committee approved his or her case precisely *because* of the defendant's or victim's race. The argument will go something like this: Had either the defendant or the victim been of a different race, the charging committee would have surely disapproved the death penalty. Again, the irony is inescapable: A charging committee ostensibly created to "address cross jurisdictional racial discrepancy" will inevitably be accused of racial discrimination.

Constitutional Concerns

Not only is the Task Force's recommendation of a charging committee ill-advised as a matter of policy, but there are constitutional concerns as well. To start, the Task Force does not say exactly *how* the charging committee will be created.[37] The Ohio Constitution states that the "general assembly shall provide by general law for the organization and government of counties." Ohio Const., Art. X, Sec. 1. As part of creating the legal framework for county government, the legislature enacted R.C. Chapter 309, Prosecuting attorney. The powers and duties of the county prosecutor are set forth in R.C. 309.08 and R.C. 309.09, which include the prosecution of crime in the county. R.C. 309.08(A). No one else is given this authority (there are some specific exceptions as to the duties of the Attorney General that are specifically stated, and that do not refer to a power to set aside charges or portions of charges obtained by a county prosecutor from a county grand jury). R.C. Chapter 2939, Grand juries, establishes the working of the grand jury. The county prosecutor is designated as the officer who conducts the indictment process, R.C. 2939.10 (with some specifically enumerated exceptions for the AG or special prosecutor). There is no provision in Ohio law for the attorney general, or anyone else, to exercise veto power over a charge returned by a grand jury.

Because Article X of the Ohio Constitution gives only the legislature the power to create/change the operation of county government, only the legislature can create a limit on the power of the county grand jury and prosecutor. Any limit on the County Prosecutor's authority to prosecute felonies in his or her county must be accomplished through statute. Any attempt to create the charging committee through non-legislative means (i.e., by procedural rule) would be unconstitutional.

Moreover, prosecuting crime is a quintessential executive function. Although the Task Force's recommendation as currently worded states that the charging committee would be housed in the executive branch (the Attorney General's Office), any attempt by either of the other government branches to limit the charging committee's authority would violate separation-of-powers principles, which are an essential component to Ohio's constitutional structure. *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2414, ¶¶ 39-54.

---

[37] At the final meeting of the Task Force on 4/10/14, the Chairman asked the minority if there was a constitutional objection to this proposal. He was told yes, that only the Ohio legislature could make this change. The final draft of the majority report now indicates that this recommendation requires legislative action. However, there is no such language in the actual recommendation.

In the end, the following passage from the United States Supreme Court explains perfectly why the Task Force's recommendation of a charging committee is ill-advised:

> Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious. In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the Baldus study does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.

McCleskey, 481 U.S. at 313. Just as the statistics in *McCleskey* were insufficient to show that Georgia's death-penalty system was unconstitutional, the claims of "racial discrepancy" in Ohio provide no good reason to create a charging committee to oversee County Prosecutors' decision to pursue death-penalty cases.

VI. Recommendation 38 – Exculpatory Evidence at Grand Jury

The Task Force majority (10-9) urged that legislation be adopted "to require a prosecutor to present to the Grand Jury available exculpatory evidence of which the prosecutor is aware."

In *United States v. Williams*, 504 U.S. 36, 51-52 (1992), the United States Supreme Court rejected the notion that there is a duty on the part of the prosecutor to present exculpatory evidence to the grand jury. The Court cited several reasons for rejecting such a requirement. The *Williams* Court noted that a grand jury investigation can investigate merely on suspicion that the law was violated or even because it wants assurance that the law was not violated. The investigation need not identify the offender it suspects, or even the precise nature of the offense it is investigating. Moreover, the grand jury sits not to determine guilt or innocence, but to assess whether there is an adequate basis for bringing a criminal charge.

As recognized in *Williams*, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body. To make the assessment of whether an accusation should be made, it has always been thought sufficient to hear only the prosecutor's side, since the finding of an indictment is only in the nature of making an accusation, which *later* will be tried and determined.

In addition, as *Williams* recognized, it is well settled that a defendant cannot challenge the sufficiency of the evidence supporting the grand jury's issuance of an indictment. But imposing a duty to present "exculpatory" evidence would become a form of insufficiency challenge, since a complaint about the sufficiency of the evidence could always be recast as a complaint that the prosecutor's presentation was "incomplete" or "misleading."

Little would be gained by the Task Force's "exculpatory evidence" proposal. The concept of "exculpatory evidence" involves favorable evidence that would be material in the proceeding because it would create a reasonable probability of a different outcome in that proceeding. But the threshold for indictment in the grand-jury process is merely the standard of probable cause, and it would be very rare that a piece of evidence would be so "exculpatory" that it would defeat a finding of probable cause. See, e.g, *State v. Iacona*, 93 Ohio St.3d 83 (2001). What might be "exculpatory" at a trial governed by a beyond-reasonable-doubt standard would be unlikely to be "exculpatory" at the grand-jury phase so as to defeat probable cause. Id. at 96 ("Determination of the merits of the competing prosecution and defense theories, both of which were credible, ultimately was a matter for a factfinder at trial.").

In addition, under normal exculpatory-evidence standards, the entire trial record is assessed in determining whether the evidence is "exculpatory." This usually involves a full trial proceeding resulting from testimony from many witnesses. At the grand-jury phase, however, the prosecution is not expected or required to develop all of the testimony from these many witnesses, and it is often premature to make an assessment of the "exculpatory" nature of purported "favorable" evidence/information at that stage.

While there is little benefit to be gained by requiring assessments of "exculpatory" value at the grand jury stage, it is clear that this proposal, like with the central-charging-committee proposal, would create delay-inducing litigation. It is very likely that the defense would file motions to dismiss seeking to have the court engage in an inventory of all of the evidence presented to the grand jury and all of the evidence known to the prosecution or police. It is very likely that the defense would seek to subpoena all of the information presented to the grand jury and all of the information known to the prosecutor. Such time-consuming assessments would inevitably delay trial, would invade the usual secrecy of the grand jury proceedings, and would invade the prosecutor's work-product privilege in many instances by demanding that prosecutor explain why particular items of evidence were thought not to be exculpatory at the time.

The commentary accompanying Task Force Recommendation 38 contends that the presentation of exculpatory evidence at the grand jury would include evidence of the defendant's mental illness or low intelligence and other mitigating factors. But "mitigating factors" are not even properly presented to the grand jury. The grand jury decides whether there is probable cause that particular aggravating circumstance(s) exist. The grand jury does not decide whether the death penalty would be the appropriate sentence after considering "mitigating factors." The penalty-phase jury/panel performs that task.

The commentary also relies on a policy of the United States Department of Justice, which is quoted as requiring that federal prosecutors disclose to the grand jury "substantial evidence that directly negates the guilt of a subject of the investigation * * *." It is notable, though, that the Task Force recommendation goes far beyond this federal policy. The Task Force recommendation contains no "substantiality" requirement or direct-negation requirement. In addition, the federal policy makes it clear that a violation of the policy should not result in dismissal of the indictment, but the Task Force recommendation does not include any "no dismissal" language. The overbreadth of Recommendation 38 in

comparison to the federal policy confirms that the recommendation would be a font of time-consuming pre-trial litigation in Ohio courts.

Given that the Task Force recommendation goes far beyond the federal policy, and given that the recommendation provides so little benefit while creating the detriment of time-consuming litigation, Recommendation 38 is extremely unwise.

VII. Recommendations 3 & 4 -- Laboratory testing of evidence

The majority has approved two recommendations concerning the laboratory testing of evidence.

The majority first recommends the enactment of procedures through which the defendant in a capital case may obtain re-testing in an accredited laboratory of "evidence of the sort customarily subject to testing in a laboratory." The recommendation specifically excludes "fingerprint evidence." Where evidence has been tested by an un-accredited laboratory at the direction of police or prosecutors, the defense may demand a re-test of the evidence by an accredited laboratory at the state's expense. The results of the first test will not be admissible at trial.

The majority's proposed procedures include special rules where testing will likely consume or destroy the evidence. If an indictment has issued, the trial court must grant permission before the testing is done. Where no indictment has issued, the testing may be done without court authorization, but only by an accredited laboratory. In the event that the special procedures are not followed, and testing by a non-accredited laboratory has consumed or destroyed the evidence, the results of the testing will be presumptively inadmissible. The presumption may be overcome, "for good cause shown," and subject to an "appropriate" instruction by the trial court on the weight the jury may give to the results.

Under the majority's proposal, defense forensic experts shall also be required to rely on testing by accredited labs, at the request of the prosecution.

The majority's proposal defines "accredited lab" as any laboratory accredited by the American Society of Crime Laboratory Accreditation Board (ASCLD/LAB); Forensic Quality Services, A.K.A. National Forensic Science Technology Center; or the American Association for Laboratory Accreditation (AALA).

Although the majority's intentions are laudable, the proposed procedures raise practical concerns. No provision is made for evidence tested by a non-accredited laboratory before the enactment of the proposed procedures. Automatically excluding the results in such circumstances may not serve the interests of justice, where apart from non-accreditation of the laboratory there are no reasons to question the reliability of the results.

The proposal's specific identification of accreditation agencies does not account for the possibility that new accrediting agencies could be established.

The category of evidence or testing potentially subject to the majority's proposal – "evidence of the sort customarily subject to testing in a laboratory" – is quite broad, and could be subject to dispute. For example, would it include all examinations of firearms, or all toxicology tests? Also, the specific exclusion of "fingerprint evidence" may appear arbitrary. Specific identification of the testing subject to the accreditation requirement is probably necessary. This would also allow for special requirements for specific tests. For example, where DNA testing is to be done by an accredited private lab, the state has a legitimate interest in ensuring that the testing method used is compatible with CODIS and will meet FBI upload requirements.

The majority's proposal that defense forensic experts "be required to rely on testing by accredited labs" suggests that such experts are not directly subject to other requirements. A defense forensic expert subject to the proposed procedures should be explicitly required to meet the same qualification as a forensic scientist employed by a government lab, e.g., to be a qualified analyst working in an accredited lab, meeting continuing education and proficiency testing requirements.

The majority's proposal does not address "observation" of testing, which is frequently requested by defense forensic experts. Such observation does not enhance the reliability of testing, but in fact increases distraction and therefore the risk of error.

Finally, in authorizing the defense to demand a re-test at the state's expense, the majority's proposal could entail significant costs, in the event that the defense seeks open-ended testing by a private laboratory. In some recent death penalty cases, such costs have exceeded six figures.

The majority further recommends enactment of a general statutory requirement that "all crime labs in Ohio" be "certified by a recognized agency as defined by the Ohio legislature." The majority's general recommendation, if enacted, would render unnecessary the re-testing procedures previously recommended. It also leaves open the type of legal and practical questions which the more specific proposal at least in part attempts to address, e.g., the circumstances if any under which testing may be done by an un-accredited lab, or the admissibility of lab results done by a hospital or lab that is not subject to the accreditation requirement.

VIII. Recommendation 39 – Mandatory Pre-Trial Conferences

The Task Force majority (10-5) adopted a proposal recommending mandatory pre-trial conferences in which issues of discovery compliance are vetted and the parties eventually make declarations that they have complied with their discovery obligations. But an objectionable provision in the proposal would require that "[t]he pre-trial conference shall be ex parte upon the request of defense counsel and upon good cause shown as to matters related to defense experts but shall be on the record."

This part of the proposal is objectionable because it is too broad and one-sided. Ex parte conferences should be discouraged, as they allow the party that is present to make representations that would be disputed if the other side were present. The transcript of the

ex parte conference then goes up on appeal without the other side having had a chance to dispute matters to begin with. A "good cause shown" standard is also too general, as no ex parte conference should be allowed for the defense unless confidential, privileged matters would need to be disclosed.

The proposal is also one-sided because it only allows the defense, and not the prosecution, to seek an ex parte conference. The circumstances inducing the need for a prosecution-requested ex parte conference could include problems of witness protection and security.

IX. Recommendation 51 – Appointment of Counsel

The majority's recommendation that the presiding trial judge or administrative judge appoint counsel for indigent defendants raises a number of concerns. Some would argue that such appointment power can be abused by allowing the promotion of patronage over the goal of effective representation, resulting in the potential appearance of impropriety and the appointment of less than stellar capital counsel. Indigent representation costs the State of Ohio many millions of dollars a year. With that much at stake, it is imperative that the appointment of representation occur in a highly ethical manner.

The need for competent representation is strongest in a capital case. An indigent defendant deserves experienced counsel who have manageable dockets, without concerns that the appointment of counsel may have been influenced by patronage issues. In light of Task Force Recommendation 53, any system of appointment should be controlled by specific objective factors tied to the competence and effectiveness of counsel under a uniform process established by the Supreme Court. Recommendation 51 should be rejected.

X. Recommendation 52 – Trial judge to control appointment of defense experts - ex parte hearing allowed… "upon establishing counsel's compliance with discovery." Court's decision is immediately appealable.

Summary

This proposal would promote gamesmanship and delay capital proceedings. First, ex parte hearings are disfavored at law for good reason and their use should not be expanded to allow defense counsel unfettered unilateral access to the trial court. Second, the ability to take an interlocutory appeal of a ruling about defense experts is nothing more than a delay tactic by the defense. Delay puts the public at risk because it can weaken prosecution. A defendant's rights are adequately protected by raising claims on direct appeal.

Public Policy

There is strong public policy against adopting this proposal. Ex parte hearings prohibit one side from being heard. This can lead to improper influence by one party. While ex parte hearings are recognized to protect trial strategy, a blanket allowance of ex

parte hearings for any expert issue is overly broad. The Task Force proposal does not recommend any protective measures. At a minimum, ex parte hearings should be limited to purely procedural matters and transcribed for future review.

The case of *State v. Anthony Sowell* is a recent example of the problem with this proposal. Sowell was indicted for killing 11 women in Cleveland, Ohio. His defense attorneys received permission to have ex parte hearings with the trial court about funding for experts. Sowell was convicted and sentenced to death. After his conviction, his trial attorney initiated proceedings in the Eighth District Court of Appeals claiming that he and his experts were not compensated according to the agreement with the trial court. The disputed amount was approximately $45,000. That is in addition to the hundreds of thousands of dollars already spent on Sowell's case. Defense counsel claimed that the trial court enlarged the amount of funding during unrecorded ex parte hearings. Assuming that defense counsel's allegations are true, there is no evidence of what exactly the trial court agreed to because the ex parte hearings were not recorded. Defending against this allegation was a balancing act. Because the trial judge still had to rule on Sowell's post-conviction petition, prosecutors could not speak to the judge about the matter. The court administrator, who had little knowledge of the case, had to seek clarification from the judge. All of this could have been avoided if the ex parte hearings were recorded and limited in scope. The majority proposal to expand the use of ex parte hearings should be denied—it is bad policy and bad law.

The proposal also seeks an immediate pre-trial appeal of expert issues. This is not the law, nor should it be. Interlocutory appeals are limited only to very serious issues that have constitutional implications. If a party can take an interlocutory appeal of a trial issue, that appeal will cause unnecessary delay. Delay weakens prosecutions. In the time it will take to pursue an interlocutory appeal, witnesses can move or become uncooperative and memories can fade. This delay would only serve to benefit the defendant who would then be likely to file frivolous interlocutory appeals to delay the case. It is also unlikely that the already over-burdened appellate courts could reasonably handle the additional case load and maintain current staffing levels.

Public policy does not support this proposal. It will require extra expense to taxpayers and will threaten public safety by delaying prosecution.

Law

"Ex parte communications generally are disfavored because they conflict with a fundamental precept of our system of justice: a fair hearing requires 'a reasonable opportunity to know the claims of the opposing party and to meet them.'"[38] The use of ex parte hearings were mentioned by the United States Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68 (1985.) "However, *Ake* does not require that the [defendant's] motion be considered ex parte. An ex parte hearing may be required when such protection is necessary to protect defense counsel's strategy, but it is not required in

[38] *In re Paradyne Corp.*, 803 F.2d 604, 612 (11th Cir. 1986), quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938).

every case."[39] Under current law, an ex parte hearing might be required when a standard, open hearing could jeopardize a defendant's "novel or unique [trial] strategy."[40]

An explicit statutory provision providing for the pre-trial appeal of a trial court's denial of a defendant's request for the appointment of an expert witness would "plunge" criminal prosecutions into an untenable "procedural morass."[41] "Such a procedural rule would *** grant an automatic long delay to every single person accused of crime who wished to make a similar motion, run out the string, and gamble on the mortality of witnesses."[42] While *Earley* considered interlocutory appeals of a different topic, its reasoning equally applies to the majority's proposal. Current Ohio authority limits pre-trial appeals only to critical constitutional issues or rulings that prohibit prosecution.

A sweeping statutory rule permitting the appeal of a trial court's discretionary denial of a request for the appointment of an expert witness would lead to inescapable pretrial delays in a significant percentage of criminal prosecutions; such appeals would interfere with the State's ability to preserve both the general integrity of the trial process, as well as the availability and safety of State witnesses. This type of legal condition cannot be tolerated.

Conclusion

The Task Force's proposal is legally unsupported and contrary to public policy. It does not provide any greater protection for defendants and only seeks to harm prosecution. It should be rejected.

XI. Recommendation 36 – Enact legislation to require jury pool list to add "all licensed drivers who are U.S. citizens."

This proposal requires a jury pool to contain all licensed drivers. Ohio's statute currently requires a jury pool to be comprised of voters and allows the list to be supplemented with licensed drivers. R.C. 2313.06. The American Bar Association has endorsed the use of multiple source lists to create a master jury list. Ohio's statute already complies by allowing multiple sources. The majority's proposal wants to mandate what is discretionary with the jury commissioners. Their reasons for doing so are unfounded.

The proposal is based on the allegation that capital juries are not an accurate cross-section of society. In order to prevail on this claim, the defendant "must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation is due to systematic exclusion of the group in the jury-selection

[39] *State v. Brown*, 5th Dist. No. 2011-CA-0021, 2011-Ohio-6782.
[40] *Id.*, see *State v. Peeples*, 94 Ohio App.3d 34 (1994).
[41] *State v. Earley*, 5th Dist. No. CA-565, 1980 WL 354236 (Jan. 28, 1980).
[42] *Id.*

process." *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

Current Ohio law provides adequate safeguards. R.C. 2313.06(B) already allows a jury pool to be made from multiple source lists including licensed drivers by providing jury commissioners with the ability to draw from licensed-driver lists.

Forty-three states and the District of Columbia currently permit the use of two or more source lists to compile master jury lists.[43] Ohio is in that majority. Federally, only thirty-three of the ninety-four district courts use supplemental lists.[44] There is no reason to mandate the use of licensed drivers. Capital juries are already comprised of an equal cross-section of society and there are multiple protections in place to ensure that a defendant's rights to a fair jury will be protected. The majority proposal seeks to include disengaged citizens into the most important of civic duties. Rather than diluting the pool of responsible citizens, this legislature should maintain Ohio's current system which protects the rights of defendants and the law abiding residents of this state.

XII. Recommendation 17 – Requiring Even More Evidence of Guilt at Trial

The Task Force majority recommends that the General Assembly:

> ENACT LEGISLATION THAT MAINTAINS THAT A DEATH SENTENCE CANNOT BE CONSIDERED OR IMPOSED UNLESS THE STATE HAS EITHER: 1) BIOLOGICAL EVIDENCE OR DNA EVIDENCE THAT LINKS THE DEFENDANT TO THE ACT OF MURDER; 2) A VIDEOTAPED, VOLUNTARY INTERROGATION AND CONFESSION OF THE DEFENDANT TO THE MURDER; OR 3) A VIDEO RECORDING THAT CONCLUSIVELY LINKS THE DEFENDANT TO THE MURDER; OR 4) OTHER LIKE FACTORS AS DETERMINED BY THE GENERAL ASSEMBLY.

The majority essentially recommends that the legislature specify and limit the evidence upon which a sentence of death may be sought or imposed, without regard to the particular facts and circumstances of the case. Common sense and experience readily reveal that the majority's recommendation is ill-advised.

Implicit in the majority's recommendation is the assumption that the legislature can identify in advance evidence that is so probative of guilt that it can and should be required in all capital cases. Common sense indicates that the weight of any piece of evidence depends on the particular facts, as established by the presence or absence of other pieces of evidence. For example, the presence of the defendant's DNA on the murder weapon could be highly probative in "linking" the defendant to the "act of murdering" the victim, absent evidence of an innocent explanation for the DNA's

---

[43] Hannaford-Agor, Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded, 59 Drake L. Rev. 761, 779-81 (2011).

[44] Id.

presence. But so would the presence of the defendant's fingerprints on the gun. Under the majority's proposed legislation, a sentence of death is permissible in the first instance, prohibited in the second.

The same is true for the other kinds of evidence described in the proposed legislation. The existence of false confessions has been cited by the majority with respect to other recommendations. The reliability or truthfulness of a confession – even one made on videotape – is measured ultimately by the available corroborating evidence. A videotaped confession that contradicts other evidence is no more reliable or probative than a similarly uncorroborated confession made to a "jail house snitch." Defendants seldom accommodate the prosecution by committing murder while being videotaped. Generally, whether the defendant's appearance on the tape actually "links" the defendant to the act of murder again depends on other circumstantial evidence.

All things considered, here experience verifies common sense. Timothy McVeigh, perhaps the most notorious mass murderer in recent history, would not have been eligible for a capital sentence under the majority's proposed criteria.[45]

There are like examples in Ohio. Alton Coleman murdered Marlene Walters during the course of a multi-state murder and kidnapping spree. The prosecution presented the eyewitness testimony of Mr. Walters, who was also attacked but survived, and compelling circumstantial evidence including expert testimony that Coleman's fingerprints were found at the scene.[46] Jeffrey Lundgren murdered Dennis and Cheryl Avery and their three children. Although the state's evidence consisted primarily of the testimony of his accomplices, Lundgren admitted at trial that he personally killed the Averys by shooting them one-by-one.[47] William Zuern stabbed to death Officer Phillip Pence at the Community Correctional Institute, and was immediately subdued by other officers. Zuern was awaiting trial on a murder charge.[48] Coleman, Lundgren and Zuern were ultimately executed for their crimes, which most assuredly were among the "worst of the worst." None would have been eligible for a capital sentence punishment under the majority's criteria.

The majority's recommendation should be rejected.

XIII. Recommendation 47 – Jury Instruction on "Mercy"

The Task Force majority (10-8) adopted a proposal recommending that juries must be instructed that they always have the option to extend mercy. The intent of this proposal is to allow the capital sentencer to decide to grant mercy to the convicted aggravated murderer or terrorist even if the aggravating circumstances outweigh the mitigating factors.

A substantial statutory change would need to take place to allow such an instruction.

---

[45] *See United States v. McVeigh*, 153 F.3d 1166 (10th Cir. 1998).
[46] *State v. Coleman*, 37 Ohio St.3d 286 (1988).
[47] *State v. Lundgren*, 76 Ohio St.3d 474 (1995).
[48] *State v. Zuern*, 32 Ohio St.3d 56 (1987).

Current law prevents the sentencer from giving weight to mere "mercy" as a mitigating factor. "[M]ercy is not a mitigating factor." *State v. O'Neal*, 87 Ohio St.3d 402, 416 (2000). "Permitting a jury to consider mercy, which is not a mitigating factor and thus irrelevant to sentencing, would violate the well-established principle that the death penalty must not be administered in an arbitrary, capricious or unpredictable manner." *State v. Lorraine*, 66 Ohio St.3d 414, 417-418 (1993). "Mercy, like bias, prejudice, and sympathy, is irrelevant to the duty of the jurors." Id. "The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice." *Saffle v. Parks*, 494 U.S. 484, 493 (1990). The United States Supreme Court has not construed its cases "to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant." *Johnson v. Texas*, 509 U.S. 350, 371-72 (1993); see, also, *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶ 220; *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, ¶ 190.

Under Ohio law, there is no room for a sentencer to extend "mercy" to impose a life sentence if the sentencer finds that the aggravating circumstances outweigh the mitigating factors. In those circumstances, the death sentence is mandatory. As the Ohio Supreme Court noted in *Lorraine*, R.C. 2929.03(D)(2) provides that "[i]f the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury *shall* recommend to the court that the sentence of death be imposed on the offender." (Emphasis added.) "This statutory requirement eliminates the subjective state of mind the issue of mercy generally adds to a jury's deliberation." *Lorraine*, 66 Ohio St.3d at 417-18.

The Task Force proposal cites a dissent from Justice Scalia in *Morgan v. Illinois*, 504 U.S. 719, 751 (1992). But that dissent does not support the proposition that "mercy" can be a freestanding mitigating factor, let alone a mitigating factor that overrides the result of the sentencer's weighing of aggravating circumstances against mitigating factors. Justice Scalia himself does not adopt this view, having concurred in the later decision in *Johnson* rejecting a "mercy" requirement.

This proposal for a "mercy" instruction is apparently based on the view that the jury/panel must be given freer latitude in making the sentencing decision. But the Task Force majority ironically rejected another proposal that would have given the sentencer greater freedom. The other proposal would have recommended the removal of the beyond-reasonable-doubt weighing process in favor of allowing the jury/panel to review all relevant aggravating and mitigating evidence and then to decide which of the statutory penalties is appropriate. Such a system would have given the sentencer the freedom to consider and weigh "mercy" in the sentencing process. It also would have simplified the sentencing process for the sentencer. But the proposal also would have allowed the jury/panel to consider and weigh a wide array of sentencing information about the defendant and his offenses in aggravation in deciding whether to impose death. The Task Force majority (13-4) rejected the proposal.

The juxtaposition of these matters reveals, again, the one-sided nature of the Task Force approach. On the "mercy" instruction issue, the Task Force is in favor of jury

freedom to consider mercy and even to give it overriding weight; such consideration could only benefit the convicted aggravated murderer or terrorist. But when it comes to giving the sentencer greater freedom by dispensing with the cumbersome weighing process and by allowing the jury/panel to hear and consider all matters relevant to sentencing, the Task Force majority rejects such a proposal. The Task Force majority's interest in sentencing freedom is really only a one-way street in favor of the convicted aggravated murderer or convicted terrorist.

XIV. Recommendation 5 – "Proportionality" Review Expansion

Under current statutory law, the Ohio Supreme Court on direct appeal is tasked with "consider[ing] whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." R.C. 2929.05(A). The Court's current practice is to look at other cases involving the same aggravating circumstances in which the death penalty has been imposed and affirmed. "The proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." *State v. Steffen*, 31 Ohio St.3d 111 (1987).

This focus on cases in which the death penalty has been imposed has prompted vehement objections from the defense bar to the supposed narrowness of such proportionality review, contending that such proportionality review should consider all cases in which the death penalty was charged, including those in which the death penalty ultimately was not imposed. The Court has repeatedly rejected such objections.

The Task Force majority (10-7) now urges the adoption of legislation that would prospectively expand the proportionality review to include cases in which the death penalty was charged but not imposed. Again, it is notable that the Task Force majority adopts this pro-defense position, which aligns with the pro-defense bent of other proposals being made by the Task Force majority.

If anything, "proportionality" review should be dispensed with entirely, rather than expanded. Such "proportionality" review is not constitutionally required, even in capital cases.

> The Constitution is not offended by inconsistency in results based on the objective circumstances of the crime. Numerous legitimate factors may influence the outcome of a trial and a defendant's ultimate sentence, even though they may be irrelevant to his actual guilt. If sufficient evidence to link a suspect to a crime cannot be found, he will not be charged. The capability of the responsible law enforcement agency can vary widely. Also, the strength of the available evidence remains a variable throughout the criminal justice process and may influence a prosecutor's decision to offer a plea bargain or to go to trial. Witness availability, credibility, and memory also influence the results of prosecutions. Finally, sentencing in state courts

> is generally discretionary, so a defendant's ultimate sentence necessarily will vary according to the judgment of the sentencing authority. The foregoing factors necessarily exist in varying degrees throughout our criminal justice system.

McCleskey v. Kemp, 481 U.S. 279, 307 n. 28, 317 (1987). Even in capital cases, cross-case proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37 (1984). There is not even a requirement that co-defendants in the same case receive the same sentence. *Getsy v. Mitchell*, 495 F.3d 295, 305 (6th Cir. 2007) (en banc).

Several concerns make it especially problematic to consider life-sentenced cases and other cases in any such "proportionality" review. Cases charged with death-penalty specification(s) may not have gone to trial and instead may have resulted in a non-death sentence as a result of a plea. In those cases, the factual record is not fully developed, and so the Supreme Court would not have access to all of the facts, reasons, and circumstances why the case ended up with a sentence less than death. In many situations, it would be difficult and likely impossible for the Supreme Court to assess whether the life-sentenced cases were "on all fours" with the case being considered by the Supreme Court.

Even for cases that went to trial and resulted in a fully-developed factual record, it would be unproductive in the vast majority of cases for the Court to engage in a detailed review of the facts and circumstances of other cases. Searching for a case "on all fours" with the case being appealed would be like trying to find a needle in a haystack, as myriad factual variations can provide reasons to distinguish the outcomes of the two cases. This is particularly true in light of the special "mitigation" principle in the death-penalty context that requires individual sentencers to consider supposed mitigating factors going as far back as the childhood of the killer. When every case devolves into such a wide-ranging list of "mitigators" regarding the killer, differences in outcomes prove nothing.

A quirk in Ohio law also makes it difficult to truly assess the significance of the different sentencing outcomes. Under Ohio law, the jury must be unanimous to recommend a death sentence. The Ohio Supreme Court has said that a single juror can prevent the jury from recommending death and that jurors can receive instructions to that effect. When the jury's vote in a particular case can be 11-1 *in favor of* death, but the case still defaults to a life sentence as a matter of law, it makes no sense to consider that life sentence in any proportionality review as weighing toward a life sentence.

Complicating matters even further is that this kind of hung-jury outcome is often hidden because the court's instructions often inform the jurors that they must default to a life sentence if they reach an impasse on death. When the jury returns to the courtroom, they announce a "life" sentence, but they actually can be a hung jury that could have been voting in favor of a death sentence by a substantial majority. Given that the deliberations of the jury can hide what truly prompted the jury to "reject" death, and given that just a single outlier juror can veto the death penalty in a given case, it would be a substantial

waste of time to be looking at cases resulting in non-death sentences.

Finally, even in cases in which the other life-sentenced case is "on all fours" in every material respect, there is still the question of why the life-sentence decision in the other case should be considered as any more "valid" than the death-sentence decision that was made in the case being appealed. The other sentencer may have merely been a lenient sentencer reluctant to impose a death sentence. A single sentencer should not control all sentencing outcomes in the state.

But this is the ultimate goal of this proposed pro-defense expansion of proportionality review. The goal is to turn "proportionality" review into a one-way ratchet that would bar death in one case merely because a more-lenient sentencer in another case chose to impose a life sentence. Nothing in law or logic should require this "race to the bottom" towards leniency in death-penalty sentencing.

XV. Recommendation 20 – Enact legislation to allow defendant to withdraw jury waivers if either phase is reversed.

Summary

This proposal demands that a defendant have the option of revoking a jury waiver if either the guilt phase or the penalty phase of the trial is overturned on appellate review. The Ohio Legislature included explicit language in R.C. 2929.03 and R.C. 2929.06 reiterating the binding power of a defendant's jury waiver even in cases where a reviewing court finds error in the penalty phase of the defendant's trial. Ohio courts have consistently recognized this explicit provision against "hybrid" trials. The Ohio Supreme Court and a number of reviewing Federal courts have dismissed both Due Process and Equal Protection violation claims as they relate to this portion of Ohio's capital scheme. The majority proposal is aimed at giving cold-blooded killers more rights than their counterparts who did not previously waive a jury.

Public Policy

There is strong public policy for rejecting the majority's proposal. Capital appellate litigation takes decades and any reversal is likely to occur years after the trial. The majority proposal wants to allow a defendant, who previously waived his right to a jury, to withdraw that waiver years later. The proposal essentially seeks to codify defense gamesmanship. The passage of time may weaken the prosecution's case while giving the defendant time to construct a different defense.

Jury waivers are not entered into lightly. A defendant, with the benefit of counsel, considers how a jury would respond to the evidence and any possible defenses. The trial court must ensure that the defendant knowingly, intelligently, and voluntarily waives his right to a jury. Prior to the amendments to R.C. 2929.06, a defendant who waived his right to a jury trial remained capitally eligible if the penalty phase was reversed but a defendant who exercised his right to a jury did not.[49] The statute was

[49] *State v. Penix*, 32 Ohio St.3d 369 (1987); *State v. Davis*, 38 Ohio St.3d 361 (1988).

amended to eliminate the disparity.

The majority proposal would allow a capital defendant to test the waters. If the defendant loses with a panel of judges, he can try again with a jury. Impaneling a new jury is unnecessary, expensive, and time consuming. The defendant was already aware of the evidence and potential defenses at the time of trial. The amendments to R.C. 2929.06 were meant to bring equality. The majority's proposal seeks to end that by giving a greater benefit to those defendants who originally waived their right to a jury.

While there are relatively few penalty-phase reversals, the majority proposal would still have a large impact on the ability to obtain a capital sentence against some of Ohio's most dangerous criminals. One example is the case of *State v. Kelly Foust* from Cuyahoga County. Kelly Foust broke into the home of Damaris Coreano, his ex-girlfriend's friend. He bludgeoned Damaris's father to death with a hammer and repeatedly sexually assaulted Damaris. Foust tied Damaris up and left her in a bathtub to die while he lit the house on fire. He did all of this after committing prior sexual assaults. Foust is the type of person that the majority proposal seeks to protect. Foust, and those in a similar position, do not deserve any greater protection than any other capital defendant and certainly should not have the ability to weaken the chance of successful capital prosecution.

Law

In drafting R.C. 2929.03 and R.C. 2929.06, the Ohio Legislature included explicit language reiterating the binding power of a defendant's jury waiver as to both the guilt and sentencing phases of a capital trial. This proposal demands that a defendant have the power to withdraw their jury waiver if either phase of their trial is reversed on appellate review. This protection already exists where there is reversible error at the guilt phase. Permitting defendants to withdraw a jury waiver in cases where a legitimate finding of guilt remains and where errors are confined to the penalty phase proceedings only flies in the face of explicit statutory language and established judicial precedent.

R.C. 2929.03(C)(2)(b) provides that once a defendant waives his right to a jury trial, that waiver also applies to the penalty phase. A defendant may not withdraw his jury waiver following the commencement of trial, nor may a defendant withdraw his waiver between the guilt and penalty phases of a capital trial.[50] Ohio's capital proceedings, therefore, do not permit a three-judge panel to hear the guilt phase, but then empanel a jury to determine the sentence. R.C. 2929.06(B) discusses applicable procedures if only the penalty phase is reversed. It states in relevant part that "[i]f the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing." Ohio's statutory scheme explicitly rejects the majority's proposal. As previously discussed, this was done in order to promote the equality between those defendants who exercised their right to a jury and those who

[50] *See State v. Davis*, 12th Dist. No. CA2009-10-263, 2011-Ohio-787, ¶34.

waived that right.[51]

The Ohio Supreme Court has recognized that neither the Revised Code nor the Criminal Rules permit "an accused charged with aggravated murder to waive a jury, request that three judges determine guilt upon a plea of guilty, and then have a jury decide the penalty."[52] That Court has also previously "issued a writ of prohibition against a trial judge who had created 'a hybrid procedure – a jury sentencing hearing to make certain findings upon which [the trial judge] would base his sentencing decision.'"[53] In 2012, the Ohio Supreme Court found that R.C. 2929.06 did not violate the Retroactivity Clause of Ohio's Constitution, the Ex Post Facto Clause, or the Double Jeopardy Clause.[54] R.C. 2929.06(B) applies only to situations "where an aggravated murder conviction with a death specification has been affirmed, but the death sentence has been set aside for legal error, when the error infects and thus invalidates the sentencing phase of the trial." The *White* Court classified R.C. 2929.06 as remedial. Courts have also rejected arguments claiming that Ohio's capital scheme violates the Equal Protection clause. "When a law seeks to regulate an individual's fundamental rights or distinguishes between individuals on the basis of certain suspect characteristics, the statute is subject to strict scrutiny under the Equal Protection Clause."[55] However, neither prisoners nor capital defendants represent a "suspect class."[56] Additionally, the Sixth Circuit found that a "sound, rational basis" exists "for the different treatment of defendants resentenced after jury trials and those resentenced after trials before three-judge panels."[57]

Conclusion

The current statutory framework promotes equality and has been deemed constitutional. Adopting the majority's proposal would bring unnecessary expense and litigation while promoting gamesmanship by the defense. There is no reason that a prior valid jury waiver should be invalidated when only a sentence is impacted.

XVI. Recommendation 27 – Post-Conviction Review – Unlimited Briefing

The Task Force majority recommends that:

---

[51] Margery Koosed, On Seeking Controlling Law and Re-seeking Death Under Section 2929.06 of the Ohio Revised Code, 46 Clev. St. L. Rev. 261 (1998).
[52] *State v. Ketterer*, 111 Ohio St.3d 70, 2006-Ohio-5283, ¶ 123.
[53] *Id.* at ¶ 125; *see State ex rel. Mason v. Griffin*, 104 Ohio St.3d 279, 2004-Ohio-6384.
[54] *State v. White*, 132 Ohio St.3d 344, 972 N.E.2d 534.
[55] *Davis v. Coyle*, supra, at 779, citing *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).
[56] *See Davis*, supra; *Hadix v. Johnson*, 230 F.3d 840, 843 (6th Cir. 2000); *Tigner v. Cockrell*, 264 F.3d 521, 526 (5th Cir.2001); *Pitsonbarger v. Gramley*, 141 F.3d 728, 739 (7th Cir.1998).
[57] *Coyle*, supra, at 780.

THERE SHALL BE NO PAGE LIMITS IN DEATH PENALTY CASES IN EITHER THE PETITION FILED WITH THE COMMON PLEAS COURT OR ON APPEALS FROM THE DENIAL OF SUCH PETITIONS.

The majority recommends the removal of page limitations in capital cases on petitions for post-conviction relief and on briefs in subsequent appeals. The majority's recommendation is ill-advised and should be rejected.

Rule 35(A) of the Ohio Rules of Criminal Procedure provides that each ground for relief in a post-conviction petition shall not exceed three pages in length. However, the trial court may extend the page limit, request further briefing on any ground for relief presented, or direct the petitioner to file a supplemental petition. Appellate Rule 19(A) provides a 35-page limit on initial and answering briefs, and a 15-page limit on briefs in reply, exclusive of the table of contents, tables of cases, statutes and other authorities cited, and appendices. The limits may be extended with leave of court.

The Supreme Court of Ohio has recognized that courts have inherent power to supervise the proceedings before them to ensure the orderly and efficient exercise of jurisdiction, and that page limitations are a valid exercise of that power. "Even in capital cases, we have upheld page limitations, finding that they force counsel to winnow out weaker arguments and focus on key issues."[58] As the Supreme Court of California recently noted in upholding its limitations, page limits in petitions for post-conviction relief are not uncommon.[59]

There is no evidence that the current limitations prevent capitally-sentenced prisoners from obtaining full and fair adjudications of their post-conviction claims for relief. There is no reported case in Ohio in which it has been found that a trial or appellate court abused its discretion in setting or enforcing page limitations on petitions or appellate briefs. Indeed, as noted previously, the courts have recognized that such limitations promote effective advocacy by focusing attention on the law and facts in issue.

By the same token, the potential harm posed by the majority's "no limits rule" is real. It should go without saying that death row inmates have an incentive to delay the assertion and adjudication of their claims that is not shared by other prisoners, thereby frustrating the state's legitimate interest in enforcing capital punishment. Lawyers representing capitally-sentenced prisoners are exhorted to make every conceivable argument, frivolous or not.[60] These exhortations are contrary to long-established norms of ethical advocacy. "Neither paid nor appointed counsel may . . . consume the time and

---

[58] *See Ziegler v. Wendel Poultry Services, Inc*., 67 Ohio St.3d 10 (1993), citing *State v. Davis*, 62 Ohio St.3d 326, 352 (1991); *State v. Bonnell*, 61 Ohio St.3d 179, 186 (1991) (Succinctness of argument is a beneficial trait in the art of appellate advocacy.").

[59] *In re Reno*, 55 Cal.4th 428, 517 (2012).

[60] Freedman, The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases, 31 Hofstra L.Rev. 1167 (2003).

the energies of the court or the opposing party by advancing frivolous arguments."[61]

Yet the potential harm is not exclusive to the state, but could also extend to prisoners who have colorable grounds for relief. As recently observed by the Supreme Court of California, "Some death row inmates with meritorious legal claims may languish in prison for years waiting for this court's review while we evaluate petitions raising dozens or even hundreds of frivolous and untimely claims. We are not the only state court of last resort concerned that abusive exhaustion petitions threaten the court's ability to function."[62]

In short, the majority's recommendation conflicts with long established rules of practice, which permit the courts to ensure the orderly and efficient exercise of jurisdiction, while promoting the interests of justice. At the same time, the majority ignores the grave harm to justice posed by prisoners who may be expected to abuse the "no limits" rule by pleading hundreds of repetitive and obviously meritless claims.

XVII. Recommendations 11 & 12 – Post-Conviction Review – Standards for Trial Counsel Effectiveness

The Task Force majority recommends that Ohio:

(1.) ADOPT THE 2003 AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES.

(2.) ADOPT THE SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES.

The majority recommends that the Supreme Court of Ohio "adopt" guidelines set forth by the American Bar Association (ABA) for defense counsel in capital cases. The majority disavows any intent to alter the constitutional standard for evaluating the performance of counsel established by the Supreme Court of the United States in *Strickland v. Washington*, 466 U.S. 668 (1984). Nevertheless, the majority describes the ABA guidelines as the standards for professional performance applied by the Supreme Court of the United States and the lower federal courts. During Task Force discussions, a member of the defense services committee argued that adopting the guidelines was consistent with *Strickland's* two-part test, which requires a showing of professional deficiency and actual prejudice, because courts remained free to determine that a failure to comply with the guidelines did not prejudice the defendant.

Contrary to the majority's assertion, in calling for "adoption" of the ABA guidelines as performance standards, the majority invites Ohio to elevate the guidelines to a status which the Supreme Court of the United States and the Supreme Court of Ohio have explicitly refused to endorse. Stressing that the ABA's standards are "only guides,"

[61] *McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U.S. 429, 435-436 (1988).
[62] *In re Reno* at 515.

the Supreme Court of the United States, in an Ohio capital case, pointedly "express[ed] no views" on whether the 2003 ABA Guidelines actually reflect "prevailing norms" or "standard practice," or, whether the guidelines were not so detailed that they would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."[63] In concurring, Justice Alito emphasized his understanding that the Court's opinion "in no way suggests" that the ABA guidelines "have special relevance in determining whether an attorney's performance meets the standard required by the *Sixth Amendment*," and that he saw no reason why the ABA guidelines "should be given a privileged position" in determining the nature of the work that a defense counsel must do in a capital case.[64]

In *State v. Maxwell*, 2014 WL 1063461, the Supreme Court of Ohio rejected the defendant's argument that trial counsel's performance must be judged by the standards set forth in the ABA Guidelines.

The 2003 Guidelines and the Supplementary Guidelines for the Mitigation Function in fact set forth extensive requirements which apply to all capital cases, regardless of the particular facts and circumstances. For example, in addition to a defense team of "at least" two lawyers, a fact investigator, and a mitigation specialist, the guidelines also require, in "most cases," additional lawyers with specialized knowledge, as well as a psychologist or mental health expert, and "almost always," "additional expert assistance."[65] "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste."[66] The guidelines' all-inclusive approach leaves little room for defense counsel to exercise his or her professional judgment in determining the best use of time and resources, given the limits within which all criminal trials must be conducted.

If accepted, the guidelines' will unnecessarily add to the already substantial costs of trial litigation. For example, in a recent capital case, in addition to attorney fees, the trial court approved $66,488.10 for forensic investigation; $5,000 for a forensic crime scene expert; $8,027.15 for a mitigation investigator; $5,830.42 for sentencing and mitigation experts; $7,060.69 for a testifying expert; $3,155.77 for a "military records expert"; $15,246.57 for a mental health expert; $1,906.50 for other investigator fees; and $8,400 for another testifying expert.[67]

While inconsistent with the *Strickland* standard[68], the guidelines' expansive and

---

[63] *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009), quoting *Strickland v. Washington*, *supra* at 688, 689, and *Wiggins v. Smith*, 539 U.S. 510, 524 (2003).
[64] *Bobby v. Van Hook, supra*, 130 S. Ct. at 20 (Alito, J. concurring).
[65] Commentary to Guideline 10.4-The Defense Team at *1004.
[66] *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 2463 (2005).
[67] *See* Electronic Docket for *State of Ohio v. Anthony Sowell*, Case No. CR-09-530885-A.
[68] The guidelines' expansive requirements also conflict with other established law. *See Lundgren v. Mitchell*, 440 F.3d 754, 773, n.6 (6th Cir. 2006) ("The dissent's conclusion that counsel's investigation was unreasonable contradicts the Supreme Court's holding that, even in capital cases, a defendant is entitled to only one qualified mental health

detailed requirements also portend increased and even more protracted post-trial litigation. For example, post-conviction counsel may be expected to claim that trial counsel's alleged "failure" to obtain "additional" lawyers and experts violated the guidelines and constituted deficient performance, regardless of the specific theory of the defense. In fact, the guidelines themselves require *post-conviction counsel* to undertake such "Monday-morning quarterbacking." "Because an appreciable portion of the task of post-conviction counsel is to change the overall picture of the case, Subsection E(3) requires that they keep under continuing review the desirability of amending the defense theory of the case, whether one has been formulated by prior counsel in accordance with Guideline 10.10.1 or not."[69]

Finally, the problem of increased post-conviction litigation is compounded by the majority's failure to recommend a mechanism through which trial courts can enforce the guidelines' expansive requirements. This failure is nothing less than a guarantee that if adopted as the standards to which reviewing courts must review trial counsel's performance, the guidelines will serve primarily as a generator of post-conviction litigation, rather than a spur to effective performance in capital cases.

XVIII. Recommendation 28 – Post-Conviction Petitions – Requiring Depositions and Subpoenas

The Task Force majority recommends that Ohio:

> AMEND R.C. 2953.21, AS ATTACHED IN APPENDIX C, TO PROVIDE FOR DEPOSITIONS AND SUBPOENAS DURING DISCOVERY IN POST-CONVICTION.

The majority recommends statutory amendments which expressly authorize convicted prisoners to conduct discovery in support of petitions for post-conviction relief. The majority's proposals are inconsistent with the rules which permit limited discovery in federal habeas corpus and post-conviction in other states; and will precipitate costly and unwarranted attempts to retry the facts underlying lawful convictions and sentences.

At the outset, the proposed amendments entitle a prisoner to conduct discovery "[a]t any time prior to or in conjunction with the filing or litigation of a petition." In federal habeas corpus, a district court has discretion to grant discovery only upon a fact specific showing of good cause.[70] A prisoner must outline factual allegations in a petition before the district court will be able to determine the propriety of discovery.

---

expert at the expense of the state, even if the conclusions of that expert fail to favor the defense."), citing *Ake v. Oklahoma*, 470 U.S. 68, 71, 83 (1985).

[69] Commentary to Guideline 10.15.1-Duties of Post-Conviction Counsel at *1085.

[70] *Stanford v. Parker*, 266 F.3d 442, 460 (6th Cir. 2001), citing *Bracy v. Gramley*, 520 U.S. 899 (1997).

Accordingly, pre-petition discovery in federal habeas corpus is impermissible.[71] The proposed entitlement to pre-petition discovery is therefore in stark conflict with the habeas corpus rule.

In addition, the proposed language fails to require "good cause," as defined by the federal and state courts. The proposed amendments will entitle the prisoner to conduct discovery to show "that there is a reasonable probability of a different verdict." Contrary to the implication of the majority's proposal, the trial is "the main event," and not a try-out on the road to a post-conviction hearing.[72] The federal and state courts agree that "good cause" properly focuses on the specific claims of constitutional error alleged by the prisoner.[73] Conspicuously absent from the proposed amendments is the standard of "good cause" applied by the federal and state courts.

There is no doubt that attorneys representing capitally-sentenced prisoners will use the majority's proposed amendments to conduct costly and unwarranted retrials of the prisoners' cases. The American Bar Association's Guidelines require post-conviction counsel to "undertake a thorough investigation into the facts surrounding all phases of the case," to include investigation of the testimony and background of "most, if not all, of the critical witnesses for the prosecution," as well as all of the non-testimonial evidence. Counsel must conduct a similarly comprehensive review of the punishment phase "to verify or undermine the accuracy of all evidence presented by the prosecution." The guidelines do not limit required investigations to the discovery of legal error or violations of the prisoners' constitutional rights.[74]

In short, the statutory language proposed by the majority conflicts with the governing standards in federal habeas corpus and other states, and will transform Ohio's capital post-conviction proceedings into a virtual second trial, an approach which for good reasons should be rejected.

XIX. Recommendation 43(G) – Clemency Review – Even More Expert Funding

The Task Force majority recommends that Ohio:

> ENACT LEGISLATION OR ADMINISTRATIVE REGULATIONS WHICH IDENTIFY A FUNDING MECHANISM, SUCH AS A CAPITAL LITIGATION FUND, FOR THE INMATE'S MENTAL HEALTH EXPERT OR STATE EXPERT SO THAT AN EXPERT CAN

---

[71] *Calderon v. United States Dist. Court*, 98 F.3d 1102, 1106-07 (9th Cir.1996) (district court clearly erred in granting petitioner's discovery request before he presented specific allegations in the form of a verified petition).

[72] *Ex Parte Brown*, 205 S.W. 3d 538, 545 (Tex. 2000), citing *Herrera v. Collins*, 506 U.S. 390, 409–11 (1993).

[73] *Harris v. Nelson*, 394 U.S. 286, 295 (1969); *Canion v. Cole*, 210 Ariz. 598, 601 (2005) ("Because no petition has been filed, Canion has neither established good cause for discovery nor made a colorable claim that he is entitled to post-conviction relief.").

[74] 2003 ABA Guidelines, Commentary to Guideline 1-1.

BE HIRED IN A TIMELY MANNER FOR THE PAROLE BOARD HEARING.

The majority essentially recommends that funds be appropriated to provide for the condemned inmate's evaluation by mental health experts prior to the clemency hearing conducted by the parole board. In virtually every capital case, the condemned prisoner has undergone evaluations of his or her mental health prior to trial or during post-conviction proceedings. Ohio also has procedures for evaluation of the prisoner's mental competency to be executed. The board has access to information produced as a result of all such evaluations and inquiries, as well as information concerning the prisoner's current mental condition that is maintained at the prisoner's place of incarceration. No evidence was presented to the Task Force that additional evaluations are necessary. The majority's recommendation therefore should be rejected.

It is long been the rule that when a defendant demonstrates to the trial judge that his or her sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.[75] Ohio law provides for a psychological evaluation of a capitally-charged defendant upon the defendant's request.[76] Aside from the statutorily guaranteed evaluation, mental health experts regularly are provided to assist the defense in capital cases, for the purposes of trial and sentencing. The testimony or reports of mental health experts are regularly offered in the trial and mitigation phases.[77]

Ohio law also provides for the mental evaluation of a condemned prisoner in the event there is probable cause to believe that the prisoner does not have the mental capacity to understand the nature of the death penalty and why it was imposed.[78] The evaluation is conducted by mental health experts appointed by the trial court. The results of the evaluation, and the findings of the trial court, are a matter of public record. The prisoner is represented by counsel.[79]

The clemency board is routinely provided the results of mental evaluations of the prisoner conducted in the course of these judicial proceedings, including the reports and

---

[75] *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985); *State v. Vrabel*, 99 Ohio St.3d 184, 190 (2003) (noting that at least six mental health professionals examined the defendant prior to trial).
[76] O.R.C. §2929.03(D)(1).
[77] *See State v. Mundt*, 115 Ohio St.3d 22 (2007); *State v. Ketterer*, 111 Ohio St.3d 70 (2006); *State v. Ahmed*, 103 Ohio St.3d 27 (2004); *State v. Hughbanks*, 99 Ohio St.3d 365 (2003); *State v. LaMar*, 95 Ohio St.3d 181 (2002); *State v. Hill*, 75 Ohio St.3d 195 (1996); *State v. Murphy*, 65 Ohio St.3d 554 (1992); *State v. Smith*, 61 Ohio St.3d 284 (1991); *State v. Powell*, 49 Ohio St.3d 255 (1990); *State v. Seiber*, 56 Ohio St.3d 4 (1990); *State v. Steffen*, 31 Ohio St.3d 111 (1987); *State v. Maurer*, 15 Ohio St.3d 239 (1984).
[78] O.R.C. § 2949.28.
[79] *See State v. Awkal*, 974 N.E.2d 200 (Ohio 2102).

testimony of mental health experts. Although counsel for the prisoner may provide additional information, it is unlikely that a condemned prisoner will suffer from a serious mental illness that has been previously undetected. The board also has access to information concerning the prisoner's current mental condition that is maintained at the prisoner's place of incarceration. All prisoners have a constitutional right to adequate mental health care, and Ohio has established procedures for the evaluation of prisoners consistent with that right.

Given all of the above, there are no reasons to believe that mental health evaluations are routinely necessary prior to the board's review of a condemned prisoner's application for executive clemency. No evidence was presented to the Task Force that the board lacks sufficient information to assess whether the prisoner suffers from a mental illness that warrants a recommendation in favor of clemency. By the same token, requiring special evaluations routinely in anticipation of a clemency hearing – which the recommended "capital litigation fund" suggests is appropriate – will result in unwarranted additional costs.

Therefore, the majority's recommendation should be rejected.

XX. Recommendation 41 – Delays

The Task Force adopted a proposal (12-6) indicating that "[t]he Task Force should pass a resolution urging all parties involved to work on procedures to remove any impediments to a fair and timely resolution of death penalty cases in the Ohio courts." A stronger recommendation would have been appropriate on the issue of delay.

The need to limit undue delays in Ohio courts has become an important matter. One example of such delays is the Ohio Supreme Court's failure to give priority to the direct review of death-penalty cases over all other cases as required by Ohio law under R.C. 2929.05(B). In recent years, the delays between the end of briefing and the holding of oral arguments have routinely lasted two years and longer. See, e.g., *State v. Short*, Sup.Ct.No. 06-1366 (39 months); *State v. Hunter*, Sup.Ct.No. 07-2021 (34 months); *State v. Powell*, Sup.Ct.No. 07-2027 (38 months); *State v. Wesson*, Sup.Ct.No. 09-739 (33 months); *State v. Neyland*, Sup.Ct.No. (40 months); *State v. Kirkland*, Sup.Ct.No. 10-854 (24 months); *State v. Mammone*, Sup.Ct.No. 10-576 (25 months).

In some cases, the defense attorneys themselves have noted the extensive delays and filed motions to allow interim billing during the appeals because they cannot wait until the end of the appeals to file for attorney-fee reimbursement. See, e.g., *State v. Thomas*, Sup.Ct.No. 12-2026 – 1-8-13 Motion for Interim Billing ("It is not unusual for the direct appeal process to *take 3-5 years* to complete."; emphasis added); *State v. Dean*, Sup.Ct.No. 11-2005, 2-17-12 Motion for Extraordinary Fees ("There is traditionally a *significant lapse of time* between briefing and oral argument * * *."; emphasis added); *State v. Sowell*, Sup.Ct.No. 11-1921, 5-10-13 Motion for Extraordinary Fees ("death penalty cases are *rarely resolved* by this Court *until several years after briefing* is completed"; "Counsel anticipates that it will be *several years yet before oral argument* and at least a period of several months after that before this Court issues an opinion.";

emphasis added).

These kinds of delays after the briefing is completed far exceed what is needed to review a capital case. The Court's Rules of Practice provide that the parties' briefing (with extensions) must be completed within approximately 12.5 months of the trial-court record being filed. S.Ct.Prac.R. 11.05(B). Given the head start provided by such briefing, and given the narrowing of issues provided by such briefing, the Ohio Supreme Court's review should take much less time. Every death-penalty case in which briefing has been completed should be the first priority in terms of the oral arguments next to be scheduled and in terms of cases to be disposed of. But the Supreme Court is not giving these capital cases such priority.

Another source of delay occurs in the setting of execution dates. After the defendant has finished his state-court and federal-court reviews and the death sentence has been upheld by all such courts, the prosecution will file a motion to set execution date in the Ohio Supreme Court. Given that all court reviews are completed, the Court should be setting execution dates in a prompt manner that should occur within six months or less. But significant delays are occurring and have occurred. It can take the Court several months before the Court even rules on the motion to set execution date. See *State v. Van Hook*, Sup.Ct.No. 87-1159 (*unopposed* motion to set execution date; six-month delay before being granted); *State v. Landrum*, Sup.Ct. No. 89-454 (motion pending 16 months before ruling); *State v. Jackson*, Sup.Ct.No. 98-726 (motion pending 7 months). And, even then, the Court is setting dates that are usually over two years later. *Van Hook* (setting execution over 24 months later); *Jackson* (26 months).

Such delays are unnecessary. The motions themselves are sometimes unopposed and, even when opposed, could be ruled on in a matter of a few weeks, not months upon months.

Equally so, there is no legitimate reason to be setting execution dates out over two years later. Any review by the parole board and/or the Governor can or should be able to occur within six months. Such death-sentence cases have exhausted judicial review and should receive priority over all other cases that would be reviewed by these officials. These officials, just as much as the Ohio Supreme Court, should give priority to such death-sentenced cases and devote the necessary resources to carrying out their duties regarding such cases in an expeditious manner. Setting execution dates over two years out simply does not reflect the high priority that such cases should receive by Ohio officials in the Executive and Judicial Branches.

Setting execution dates within six months would not be "premature" or "rushed." The cases have invariably been delayed over many, many years while judicial review was carried out in the glacial pace as is currently occurring on the state and federal levels. It cannot be claimed that even more delay is needed to review a case that has already been reviewed for several years. And, of course, the victims never received such dispensations of delay from the defendant who murdered them. Delays of years upon years after the killing is long enough.

Whatever one thinks of the death penalty, it is the law of the land, and these death sentences have been upheld after the substantial judicial review that such cases entail. A motion to set execution date should be routine in most cases, and, even if somewhat complicated, should not take months and months to decide. Setting the execution date two years or more into the future merely compounds delay upon delay.

XXI. Hamstrung Sentencers under Current Law; Improvements Rejected by Task Force

Juries and panels are hamstrung under current law, as the system is already tilted heavily in favor of the defendant. Under current law, the sentencer's discretion is narrowly channeled into a weighing process that only allows the sentencer to weigh on the "death" side of the equation the specified aggravating circumstance(s). For example, they are not allowed to weigh in aggravation any evidence of victim impact. They are not allowed to hear or weigh evidence of the defendant's violent criminal character or violent criminal past.

In these respects, a penalty-phase jury/panel is unique in Ohio law, as all other sentencers in Ohio are allowed to consider such matters. Courts have traditionally and constitutionally considered a defendant's past criminal behavior, even when that behavior has not resulted in a conviction. *United States v. Watts*, 519 U.S. 148, 152 (1997); *Nichols v. United States*, 511 U.S. 738, 747 (1994). The traditional rule is that the sentencer should have "the fullest information possible concerning the defendant's life and characteristics." *Watts*, 519 U.S. at 151, quoting *Williams v. New York*, 337 U.S. 241, 247 (1949). As recognized by the Ohio Supreme Court, "the function of the sentencing court is to acquire a thorough grasp of the character and history of the defendant before it. * * * Few things can be so relevant as other criminal activity of the defendant * * *." *State v. Burton*, 52 Ohio St.2d 21, 23 (1977). However, under current law, death-penalty sentencers are often deprived of that full understanding of the defendant.

Likewise, in other kinds of homicide cases, sentencers often hear from the family members about the impact that the victim's killing has had on them. However, under current law, death-penalty sentencers are not allowed to receive and weigh such victim-impact information in deciding whether to impose a death sentence.

The Task Force majority rejected proposals to allow admission at the penalty phase of victim-impact evidence, evidence of the defendant's violent criminal record, and evidence of other acts that would constitute offenses of violence.

While the Task Force adopted a recommendation that the legislature should "study how to best support families of murder/homicide victims in the short and long term," a majority of the Task Force rejected (10-7) a proposal that would have given the victims an actual voice in capital sentencing by allowing the sentencer to weigh in aggravation the impact of the aggravated murder on family members of the murder victim(s).

The Task Force majority also rejected (9-8) a proposal to allow the sentencer to hear evidence of the defendant's adult criminal convictions including offenses of violence and to weigh such evidence in aggravation supporting a death sentence.

The Task Force majority also rejected a proposal (11-5) that would allow the sentencer to hear evidence of other violent criminal acts committed by the defendant and to weigh such evidence in aggravation supporting a death sentence.

These proposals would not have expanded the list of statutory aggravating circumstances that are to be listed in the indictment and proven in the guilt phase of the trial so as to make the defendant eligible for the death penalty. But such evidence would have been available for the jury/panel to weigh in favor of aggravation at the penalty phase and in favor of imposing death.

The most important of these proposals was the proposal to give victims a say in the penalty phase. Current law precludes the jury/panel from weighing victim-impact evidence in aggravation in the penalty phase because the statute simply does not provide for it. Victim-impact evidence is not currently an approved "aggravating circumstance" to be weighed on the aggravation side. This inability to give aggravating weight to victim-impact evidence is a major flaw in the death-penalty scheme that should be corrected.

The admission of victim-impact evidence on the side of aggravation is constitutional. Once the defendant is found to be eligible for the death penalty under defined criteria, the jury/panel in the penalty phase can engage in a free-wheeling assessment of a broad range of factors in deciding whether to impose the death penalty. As stated in *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994), "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, * * * the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." (quoting another case). "[T]he sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'" (quoting another case).

Current law unduly restricts the jury/panel's ability to consider evidence it should be allowed to consider. The Task Force majority unfortunately rejected proposals that would have expanded the information presented to the jury/panel and would have freed the jury/panel to engage in the kind of free-wheeling consideration of evidence that is constitutionally allowed.

XXII. ABA "Team"

Appendix A to the majority report is taken up with a discussion of what the ABA "Ohio Death Penalty Assessment Report" of 2007 recommended. It must be emphasized that these are not the recommendations of the present Task Force. The recommendations of the Task Force are specifically set forth as "Recommendation __" in the main body of the majority report.

Moreover, the bias of the ABA project that generated the 2007 report should give anyone considerable pause before relying on it. As the majority report acknowledges in its introduction, the ABA has endorsed a death-penalty moratorium, and it organized its "Death Penalty Moratorium Implementation Project" with the goal of encouraging lawyers and bar associations to press for moratoriums and with the goal of encouraging state government leaders to establish moratoriums. The Project in turn decided to conduct examinations of individual States' death-penalty systems, using as a guide a set of protocols given the one-sided title, "Death without Justice: A Guide * * *." What resulted was the "Ohio Death Penalty Assessment Report" in 2007. The majority report here refers to the 2007 recommendations as the product of the "ABA Ohio Assessment Team."

The ABA and its associated "Project" and "Team" are plainly lobbying to stop the death penalty, a goal and topic which is specifically beyond the purview of this Task Force. There is much to disagree with in the 2007 Report by the ABA "Team." But, given that the focus here should be on the recommendations made by the Task Force, little would be served by a detailed discussion of the 2007 report.

XXIII. Identification Procedures

Appendix A to the majority report discusses identification procedures in Ohio but misstates the law in the process. Ohio law (R.C. 2933.83) does *not* require the use of a "folder system." Such a system is just one of the systems police may use for photo lineup identifications. *State v. Fields*, 8th Dist. No. 99750, 2014-Ohio-301, ¶ 11.

Appendix A also incorrectly maintains that "nothing in the law prohibits the court from conducting a pre-trial reliability hearing with the use of expert testimony on the identification issue." Absent police misconduct in using an unduly-suggestive identification procedure, there is no bar to the admission of eyewitness identification testimony, and any question surrounding the credibility or suggestiveness of an eyewitness identification "goes to weight and reliability of the testimony rather than admissibility." *State v. Brown*, 38 Ohio St.3d 305, 310-11 (1988). "[I]n the absence of any action taken by the state, there is no basis to exclude an in-court identification." *State v. Smith*, 8th Dist. No. 98280, 2013-Ohio-576, ¶ 39. "Issues of credibility are for the jury to resolve, not the trial judge." *State v. Lininger*, 6th Dist. No. L-05-1199, 2006-Ohio-4136, ¶ 62. "[T]he unreliability of the identification alone will not preclude its use as evidence at trial. Instead, such unreliability should be exposed through the rigors of cross-examination." *State v. Mitchell*, 5th Dist. No. 2013-Ohio- 3696, ¶ 26.

A trial court has no roving commission to pre-approve the reliability of particular eyewitness identifications or to have experts pre-approve such identifications. Such identifications are admissible as relevant evidence, and the defense has several tools to challenge such evidence at trial, including cross-examination and, in appropriate cases, the use of an expert witness testifying generally about factors that may impair the accuracy of a typical eyewitness identification. *State v. Buell*, 22 Ohio St.3d 124 (1986).

The majority report's ill-advised effort to jump-start a new form of pretrial motion practice in Ohio and to create yet another exclusionary rule again confirms the overall

pro-defense bent of the majority report.

XXIV. Conclusion

In sum, a committee majority, operating under the openly conceded purpose of implementing the 2007 proposals of the American Bar Association's anti-death penalty pro moratorium "Ohio Team," has produced just what anyone would expect. A large number of the recommendations would establish a series of procedural and legislative nightmares that would render Ohio's death penalty inoperable. This, of course, is a result the Death Penalty Task Force was not even permitted to consider. Sadly, these recommendations have little to do with "fairness," the stated goal of the Task Force.