

STATE OF OKLAHOMA

The Report of the
Oklahoma
Death Penalty
Review
Commission



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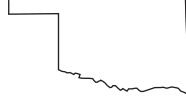


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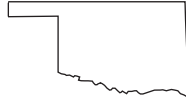
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A Letter from the Co-Chairs

For a period spanning over a year, the Oklahoma Death Penalty Review Commission, a group of eleven Oklahomans of diverse backgrounds, worked hard to study virtually all aspects of the death penalty, from initial arrest and interrogation through the execution stage, as implemented in the United States and, in particular, in Oklahoma. Commissioners gathered data, reviewed scholarly articles, commissioned studies, and conducted interviews. They met, discussed, debated, and reached consensus, and the following report and its recommendations are the result of the Commission's work.

Commission members included five women and six men. They came from both urban and rural communities. They included Republicans and Democrats, prosecutors, and defense attorneys, individuals who have served in each of the three branches of government, law school professors and law school deans, victims' advocates, and advocates for Native Americans.

The Commission met ten times for intense, full-day meetings. Commission members heard from experts, both from around the country and throughout Oklahoma. A full list of all who made presentations, provided expert guidance, or otherwise assisted the Commission through logistical support appears in the Acknowledgements section following the report. We are especially grateful to the following individuals who met with the Commission to discuss, in detail, their work as it relates to Oklahoma's death penalty: Shannon Butler, Charles Curtis, Michelle Feldman, Patti Palmer Ghezzi, Steve Kunzweiler, Robert Nigh, David Prater, Robert Ravitz, Craig Sutter, and Nancy Vollertson. All were helpful. All contributed to the report. We wish to thank them for the significant time and effort they spent to help the Commission better understand the issues, their work, their areas of expertise, and their perspectives.

Commission meetings, however, constituted only a fraction of the work Commissioners undertook. Some met with various public officials. Others interviewed experts. All read and studied volumes of information. Commissioners reviewed, edited, and re-edited the text of the report. Commissioners arrived at every meeting well-prepared to discuss, to advocate, to compromise, and, ultimately, to reach consensus.

State and local agencies throughout Oklahoma provided helpful data and other assistance. These include the Office of Governor Mary Fallin, the Oklahoma Supreme Court, the Oklahoma Court of Criminal Appeals, the Oklahoma Attorney General, the Office of the Speaker of the Oklahoma House of Representatives, the Office of the President Pro Tempore of the Oklahoma State Senate, the Oklahoma Department of Corrections, the Oklahoma Indigent Defense System, the Oklahoma District Attorneys Council, several district attorneys, district court clerks, sheriffs and police departments, and many others. Without their help, the Commission's undertaking would have been impossible.

A number of individuals and entities assisted the Commission with important contextual research. Their work, which analyzes rates of error, costs, and disproportionate application of the death penalty, appears in the appendix. Many of them provided this assistance on a pro bono basis. The Commission is particularly thankful to the following individuals and entities: the law firms Norton Rose Fulbright and King & Spalding, Dr. Peter Collins, Dr. Matthew Hickman, and Professor Robert Boruchowitz, Melissa Vincent and the firm 9Tribe, and Professors Glenn Pierce, Michael Radelet, and Susan Sharp.

Several institutions made their facilities available for Commission meetings. These include Oklahoma City University School of Law, the University of Oklahoma College of Law, Langston University, the Oklahoma State Regents for Higher Education, and the law firms Spencer Fane LLP and Crowe & Dunlevy.

The Constitution Project (TCP) was critical to the Commission's work. Without TCP, the Commission could not have fulfilled its mission. TCP is a Washington, D.C., bipartisan, nonprofit organization which fosters consensus-based solutions to the most difficult constitutional challenges of our time. TCP supplied all staff and researchers to the Commission throughout its work. Virginia "Ginny" Sloan, the President and Founder of TCP, made certain the Commission had all the help and resources it needed. Madhuri "Madhu" Grewal, Senior Counsel for The Constitution Project, tirelessly worked for the Commission from start to finish. TCP staffers Alexa O'Brian, Matilde Carbia and Ryan Kent also worked hard to make the Commission's work a success. They spent untold hours coordinating Commission efforts. The Commission is especially grateful for the work and assistance of TCP and its talented and hard-working staff. We also thank Brenda Jones Barwick and her team at Jones PR for communications support.

Commission members have learned much. We hope this knowledge, as imparted in the report, will result in implementation of all or at least most of the Commission's recommendations. Commissioners trust their work will encourage, enhance, and expand the ongoing discussion among Oklahomans about the death penalty.



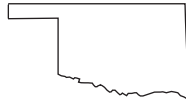
Hon. Brad Henry



Andy Lester



Hon. Reta Strubhar



The Oklahoma Death Penalty Review Commission

Co-Chairs

Governor Brad Henry serves Of Counsel to the national business law firm of Spencer Fane LLP and is a founding member of Henry-Adams Companies, LLC, a general and business development consulting firm. Governor Henry served as Oklahoma's 26th governor. He was elected governor in 2002 and served two terms through January 10, 2011. Only the third governor to serve two consecutive terms, Governor Henry, a Democrat, was re-elected in 2006 by the largest vote margin in modern times and the second largest margin in state history. During his time in office, Governor Henry consistently enjoyed high approval ratings in public opinion surveys of his governorship, earning him recognition as one of the most popular state chief executives in modern history. A charter member of the Governors' Council of the Bipartisan Policy Center, Governor Henry also served as chairman of the Council of State Governments, the Southern Growth Policies Board, and the Interstate Oil and Gas Compact Commission. He currently serves on numerous boards, including the national board of the Muscular Dystrophy Association and the board of directors of NIC Inc. (NASDAQ: EGOV). Governor Henry was a President's Leadership Scholar at the University of Oklahoma, where he received the Gold Letzeiser Medal as the Top Senior Graduate and earned a bachelor's degree in economics in 1985. In 1988, Governor Henry was awarded a juris doctorate degree from the University of Oklahoma College of Law, where he served as managing editor of the Law Review. Prior to his election, Governor Henry practiced law with his father, Charles, in Shawnee, and served ten years in the Oklahoma State Senate, chairing the Senate Judiciary Committee and serving as vice-chair of the Senate Economic Development Committee. Governor Henry and his wife, Kim, have three daughters, Leah, Laynie and Baylee.

Andy Lester is a partner in the law firm Spencer Fane LLP and has a civil litigation and appellate practice emphasizing complex business, constitutional, and government law. While in law school, he served on President Ronald Reagan's Transition Team for the Equal Employment Opportunity Commission. He is a former United States Magistrate Judge for the Western District of Oklahoma, and is an Adjunct Professor at Oklahoma City University School of Law, having taught State & Local Government, Employment, Criminal and International Law. He is an Oklahoma State Regent for Higher Education and is a former member and chairman of the Board of Regents for the Oklahoma Agricultural & Mechanical Colleges. He attended Ludwig-Maximilians-University in Munich, Germany, received his A.B. from Duke University, and his M.S. in Foreign Service and his J.D. from Georgetown University. He and his wife, Barbara, have been married for 38 years. Their daughter, Susan Lester, is a Phi Beta Kappa graduate of Oklahoma State University, received an M.A. from the University of Central Oklahoma, and works in Washington, D.C.

Judge Reta M. Strubhar was appointed on July 6, 1992 as the first woman to sit on the Oklahoma Court of Criminal Appeals since the formation of the Court in 1907. Subsequently, she served as the first woman presiding judge. She has a bachelor's degree in business education, a master's degree in English and a juris doctorate. She attended the Strauss Institute at Pepperdine University for her mediation training. Judge Strubhar worked for the FBI in Washington D.C., taught high school English and business and was an adjunct professor at Southern Nazarene University and the University of Central Oklahoma. After graduating from law school, she held positions as an assistant attorney general, an assistant district attorney, the associate district judge in Canadian County and served as a judge on the Oklahoma Court of Criminal Appeals. She is a member of numerous legal and community committees and clubs. She and her husband have 3 children and 9 grandchildren.

Commissioners

Robert H. Alexander, Jr. is a trial lawyer and national trial counsel for some of the largest manufacturing and pharmaceutical companies in the world. He is the founder of a law firm which bears his name and defends its exclusively Fortune 200 clientele in cases throughout the United States. A graduate of Harvard Law School and Phi Beta Kappa graduate of Howard University, Mr. Alexander has lived in Oklahoma since infancy and is a graduate of Oklahoma City's Douglass High School. He is a nationally recognized speaker and lecturer who has been featured in national legal publications and magazines such as *Ebony*, *Jet*, *Black Enterprise*, *Newsweek* and *Forbes*. An honorably discharged United States Army 2nd Lieutenant, Mr. Alexander is also active in civic, philanthropic and church activities. He is married to his college sweetheart Annita M. Bridges, also an attorney, and they are the parents of two daughters.

Howard Barnett was appointed by the OSU/A&M Board of Regents to succeed Dr. Gary Trennepohl as president of OSU-Tulsa on Oct. 5, 2009. Before joining OSU, President Barnett was managing director of TSF Capital in Tulsa. He earned his juris doctorate from Southern Methodist University and his bachelor's degree in business administration from the University of Tulsa. Before the sale of the company in 1998, President Barnett was CEO of T/SF Communications Corporation, an American Stock Exchange-listed company engaged in a variety of businesses directed to the information and publishing industries. A life-long Tulsan, President Barnett served as chief of staff for Governor Frank Keating and as the Oklahoma secretary of commerce. He and his wife, Billie, are involved with many local and state civic and charitable organizations including the Tulsa Ballet, the Salvation Army, The Oklahoma Academy, the Oklahoma Center for Nonprofits, and Philbrook Museum of Art.

Andrew M. Coats is Dean Emeritus and a Professor of Law at the University Of Oklahoma College Of Law. He was for many years a trial partner at the Crowe and Dunlevy Law firm in Oklahoma City, and, in public service, served as the district attorney of Oklahoma County and, later, as mayor of Oklahoma City. In 1996, he was elected and served as the national president of the American College of Trial Lawyers. In 2002, the building on the University of Oklahoma campus which houses the College of Law was named Andrew M. Coats Hall in his honor. In 2005, Dean Coats was inducted into the Oklahoma Hall of Fame, the highest honor Oklahoma can confer on an Oklahoman. In 2008, Dean Coats received the Human Rights Award from the Oklahoma Human Rights Commission in recognition of his life-long dedication to improving opportunities for women and minorities.

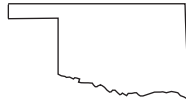
Valerie Couch took the reins as Dean of the Oklahoma City University School of Law on April 9, 2012. She is the law school's 12th dean and first woman to hold that position. For 13 years, she served as a federal magistrate judge in the Western District of Oklahoma. Prior to her service on the federal bench, she was in private practice for 16 years with the Oklahoma City firm Hartzog Conger Cason & Neville. She has served as president of the Oklahoma County Bar Association, president of the Oklahoma City Chapter of the Federal Bar Association, and president of the William J. Holloway, Jr., American Inn of Court. She currently serves as a trustee of the Oklahoma Bar Foundation and is a member of the OKC Advisory Board of the Oklahoma Center for Community and Justice.

Maria Kolar is a Visiting Assistant Professor of Law at the University of Oklahoma College of Law, where she teaches courses in criminal law, criminal procedure, and capital punishment. Professor Kolar began teaching at the OU College of Law in 2013 and previously taught legal research & writing. Kolar obtained her J.D. from Yale Law School and also has a B.A. from the University Of Notre Dame and an M.A. in Philosophy from Emory University. Following law school, Professor Kolar served as a law clerk for the Honorable Joel M. Flaum on the United States Court of Appeals for the Seventh Circuit in Chicago. She then moved to Oklahoma and worked in private practice as a litigation associate, first at McAfee & Taft and then at Hartzog, Conger & Cason. She also served as a law clerk on the United States District Court for the Western District of Oklahoma for two years, working solely on capital habeas corpus cases. Prior to joining the faculty at OU, Professor Kolar was a law clerk on the Oklahoma Court of Criminal Appeals for nearly thirteen years, first for the Honorable Charles S. Chapel and then for the Honorable Clancy Smith. Professor Kolar is married to Dr. Randall Kolar, Director of the School of Civil Engineering & Environmental Science at OU, and they have five children (John, Charlie, Sam, Katie, and Ben).

Christy Sheppard is a Licensed Professional Counselor in Ada, Oklahoma. She has been an advocate for victims of crime and criminal justice reform for many years. Her own family has dealt with the complex issues regarding the death penalty after her cousin, Debbie Carter, was murdered in 1982. Ms. Sheppard has testified before the Oklahoma legislature as well as other state legislators. She has participated in many documentaries and spoken all over the country, including before the National Institute of Justice, International Association of Chiefs of Police, Office of Victims of Crime, and the Innocence Project advocating for positive change. Ms. Sheppard is currently on the advisory board of the non-profit Healing Justice Project, a group focused on restoring those affected by wrongful conviction, started by rape survivor Jennifer Thompson of North Carolina. She is also currently working on development of trainings and support for both victims and exonerees here in Oklahoma.

Kris Steele is Executive Director of TEEM (The Education and Employment Ministry), a nonprofit dedicated to breaking the cycle of poverty and incarceration in Oklahoma. TEEM offers educational opportunities, character development courses, job training and employment placement assistance to individuals reentering the community. Speaker Steele also serves as the chair of Oklahomans for Criminal Justice Reform, a coalition comprised of community groups, business leaders, health professionals and faith leaders dedicated to advancing effective approaches to public safety by increasing access to treatment and programs designed to address root causes of crime. Speaker Steele earned a bachelor's degree in Religion from Oklahoma Baptist University, and master's degree in Education from East Central University. Prior to joining TEEM, he served as state representative from 2000-2012, and speaker of the Oklahoma House of Representatives for the 53rd Legislature. During his tenure in office, Speaker Steele led the charge on a number of reforms in the areas of health care, human services and criminal justice. He and his wife, Kellie, are blessed with two daughters, Mackenzie (15) and Madison (11), and currently reside in Shawnee.

Gena Timberman has committed her professional career for nearly 20 years to the pursuit of planning and guiding cultural projects in Indian Country toward successful completion. From 1999-2013, she championed the dream to build an American Indian Cultural Center and Museum in Oklahoma. She has been mentored by some of Indian Country's top leaders, and she has worked closely with city, state, county, federal and tribal governments in varied matters of site and project development. As director of the Native American Cultural & Educational Authority, Ms. Timberman led the development of a nearly 300-acre site on the Oklahoma River envisioned to be the future home of a world-class cultural destination, a landscaped and programmed park and trails system, commercial development and visitor welcome center. In 1996, Ms. Timberman graduated from Oklahoma State University with a B.A. in English. She received the *Outstanding Contribution to the Native American Community* award. In 1999, she graduated from the University of Oklahoma College of Law and currently focuses her practice on Indian Country business development relative to cultural tourism and managing issues related to cultural projects and museum administration. Over the years, Ms. Timberman has provided a multitude of local, statewide, national and international public keynote speeches, presentations and lectures on project development and management, as well as Oklahoma tribal cultures, cultural tourism, and economic development in Indian Country. In 2013, Ms. Timberman formed Luksi Group, LLC, a consulting business that provides cultural direction for creative design in Indian Country projects. Ms. Timberman is most recently engaged in facilitating the planning of the Choctaw Cultural Center for the Choctaw Nation of Oklahoma.



Executive Summary

The Oklahoma Death Penalty Review Commission (Commission) came together shortly after the state of Oklahoma imposed a moratorium on the execution of condemned inmates. In late 2015, Oklahoma executions were put on hold while a grand jury investigated disturbing problems involving recent executions, including departures from the execution protocols of the Department of Corrections. The report of the grand jury, released in May of 2016, was highly critical and exposed a number of deeply troubling failures in the final stages of Oklahoma's death penalty.

The Commission has spent over a year studying *all* aspects of the Oklahoma death penalty system, from arrest to execution, and even examined the costs of the system to taxpayers. The Commission was grateful to hear from those with direct knowledge of how the system operates—including law enforcement, prosecutors, defense attorneys, judges, families of murdered victims, and the families of those wrongfully convicted.

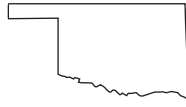
In light of the extensive information gathered from this year-long, in-depth study, the Commission members unanimously recommend that the current moratorium on the death penalty be extended.

The Commission did not come to this decision lightly. While some Commission members had disagreements with some of the recommendations contained in this report, there was consensus on each of the recommendations. Due to the volume and seriousness of the flaws in Oklahoma's capital punishment system, Commission members recommend that the moratorium on executions be extended until significant reforms are accomplished.

Many of the findings of the Commission's year-long investigation were disturbing and led Commission members to question whether the death penalty can be administered in a way that ensures no innocent person is put to death. Commission members agreed that, at a minimum, those who are sentenced to death should receive this sentence only after a fair and impartial process that ensures they deserve the ultimate penalty of death. To be sure, the United States Supreme Court has emphasized that the death penalty should be applied only to "the worst of the worst." Unfortunately, a review of the evidence demonstrates that the death penalty, even in Oklahoma, has not always been imposed and carried out fairly, consistently, and humanely, as required by the federal and state constitutions. These shortcomings have severe consequences for the accused and their families, for victims and their families, and for all citizens of Oklahoma.

Many Oklahomans support the availability of the death penalty, as evidenced by the vote in favor of State Question 776 in the November 2016 election. Nevertheless, it is undeniable that innocent people have been sentenced to death in Oklahoma. And the burden of wrongful convictions alone requires the systemic corrections recommended in this report.

This report is designed to highlight issues giving rise to urgent questions about the manner in which the death penalty is imposed and carried out in Oklahoma. The Commission hopes this report will help foster an informed discussion among all Oklahomans about whether the death penalty in our state can be implemented in a way that eliminates the unacceptable risk of executing the innocent, as well as the unacceptable risks of inconsistent, discriminatory, and inhumane application of the death penalty. The Commission encourages the Oklahoma Legislature, executive branch, and judiciary to take actions to address the systemic flaws in Oklahoma's death penalty system. In submitting these recommendations, we adhere faithfully to important Oklahoma values and aspirations of innocence protection, procedural fairness, and justice for all.



Findings and Recommendations

Chapter 1: Overview

Overall Recommendation:

In light of the extensive information gathered from this year-long, in-depth study, the Commission members unanimously recommend that the current moratorium on the death penalty be extended until significant reforms have been accomplished.

Chapter 2: Forensics Recommendations

Recommendation 1:

Oklahoma should adopt the forensics reform recommendations of the 2013 Oklahoma Justice Commission report that have not yet been implemented.

Recommendation 2:

Oklahoma should follow best practices with respect to certification of forensics experts.

Recommendation 3:

With respect to capital cases, the Legislature should amend Oklahoma law to require that all biological evidence, and any evidence that may be the source of biological evidence, be retained until 60 days after the death of the inmate. Sources of biological evidence that may fall outside of the existing statute include, but are not limited to, clothing, ligatures, bedding, drinking containers, and cigarettes.

Recommendation 4:

The Oklahoma Supreme Court's judicial training sessions for judges should include forensics training, including updates regarding developments in commonly used forensics fields.

Recommendation 5:

Oklahoma should provide an avenue for post-conviction relief based on changing science that casts doubt on either the accuracy of an inmate's conviction or the evidence used to obtain a sentence of death.

Chapter 3: Innocence Protection Recommendations

Recommendation 1:

Courts should exercise their gatekeeping authority to permit, in appropriate cases, qualified expert testimony on the limitations and use of eyewitness testimony.

Recommendation 2:

In cases in which expert testimony on eyewitness identification is allowed, the Oklahoma Uniform Jury Instructions should be amended to direct the jury to consider such expert testimony.

Recommendation 3:

Law enforcement agencies should have written procedures that follow best practices techniques called for by current scientific research. These best practices techniques should, at a minimum, include the following:

- (a) Law enforcement agencies should use double-blind procedures or the official should be “blinded” when conducting photo arrays and live lineups.
- (b) In lineups and photo arrays, non-suspect fillers should resemble the suspect (clothing, build, characteristics, etc.).
- (c) In lineups and photo arrays, officials should be required to document the procedure (by video, or if video is not possible, by audio recording), and the procedure should include written instructions for the official to read to the eyewitness. The written instructions should seek a statement from the eyewitness (either a written or recorded verbal statement) noting his or her degree of confidence at the time of any identification.
- (d) Law enforcement agencies should use sequential—not simultaneous—lineups and photo arrays.
- (e) Law enforcement agencies should eliminate the use of show-ups (when a single suspect is presented).

Recommendation 4:

Training on the limitations of eyewitness identification should be required of law enforcement, prosecutors, and defense counsel. Law enforcement agencies should regularly schedule ongoing training and update procedures (at least annually) according to the latest studies and research regarding eyewitness identification.

Recommendation 5:

Law enforcement officials should record the entire interrogation of any suspect or potential suspect in a homicide case, including any representations or promises made to the person interviewed. There should be a rebuttable presumption of inadmissibility if an entire interrogation is not recorded.

Recommendation 6:

Law enforcement officials should receive training that is consistent with best practices for interrogation techniques to help prevent wrongful convictions, such as “information gathering” interrogation methods, and should encourage a culture that enforces following best practices.

Recommendation 7:

When the state intends to offer testimony from a jailhouse informant, the trial court should hold a pre-testimony reliability hearing to determine the admissibility of the jailhouse informant’s testimony. Such testimony should be excluded in its entirety if it is found to be unreliable by the trial court. If the trial court finds that the proposed jailhouse informant testimony is reliable and admissible, the judge should still give the appropriate cautionary jury instruction.

Recommendation 8:

Training on reliability issues surrounding jailhouse informant testimony and the discovery requirements for jailhouse informants—as set forth by the Oklahoma Court of Criminal Appeals in *State v. Dodd*—should be provided for defense attorneys, prosecutors, and judges.

Recommendation 9:

The Legislature should create a system of adequate compensation, separate from The Governmental Tort Claims Act, for those who have been convicted of murder and sentenced to death and who are subsequently exonerated. Compensation for those wrongfully convicted and placed on death row should be indexed to the federal level. The current cap on compensation should be eliminated. The compensation should be available regardless of the plea entered in the case, and the compensation should be exempt from state taxes. The compensation should apply to future exonerations, regardless of the date of conviction. Any compensation for a wrongful conviction should be filed as a public record.

Recommendation 10:

Legislation should be enacted to require the immediate update of an exonerated defendant’s government records, including immediate expungement of any conviction that has been vacated, set aside, or overturned, notwithstanding existing statutes.

Chapter 4: Role of the Prosecution Recommendations**Recommendation 1:**

Prosecutors and their investigators should be provided regular training concerning the common causes for wrongful convictions. This training should be mandatory.

Recommendation 2:

Prosecutors and law enforcement should be provided regular training concerning their obligations under the Vienna Convention on Consular Relations to notify a non-citizen’s government when a non-citizen has been arrested and charged with a capital crime.

Recommendation 3:

All Oklahoma district attorneys' offices and the Office of the Attorney General should be required to allow open-file discovery at all stages of a capital case, including during the direct appeal, state post-conviction review, federal habeas corpus review, and any clemency proceedings.

Recommendation 4:

District attorneys' offices should be required to retain all files, including protected work product, pertaining to a capital defendant's case until 60 days after the inmate is no longer on death row, whether because the inmate has been executed, died in custody, had a death sentence commuted to a sentence less than death, or been exonerated.

Chapter 5: Role of the Defense Recommendations

Recommendation 1:

To better ensure that individuals facing the death penalty in Oklahoma receive high-quality representation, the Oklahoma Bar Association should promulgate advisory guidelines for the appointment and performance of defense counsel in capital cases.

Recommendation 2:

The Oklahoma Bar Association should facilitate or provide regular training for capital defense trial counsel and appellate counsel specific to the unique demands of capital case representation.

Recommendation 3:

Attorneys, investigators, and support staff employed by the Oklahoma Indigent Defense System should receive compensation commensurate with that of attorneys, investigators, and support staff employed by district attorneys' offices in their corresponding counties.

Recommendation 4:

Adequate compensation should be provided to conflict counsel in capital cases, and the existing compensation cap should be lifted.

Recommendation 5:

Conflict counsel outside of Oklahoma and Tulsa counties (which follow a different process) should not be required to seek funding beyond any statutory cap directly from the Oklahoma Indigent Defense System. Such funds should come from the court funds of the county in which the representation takes place.

Chapter 6: Jury Issues Recommendations

Recommendation 1:

In a capital case, the state and the defendant should be guaranteed the right to individual voir dire upon request.

Chapter 7: Role of the Judiciary Recommendations

Recommendation 1:

Oklahoma judges should receive regular training on the trial of capital cases.

Recommendation 2:

Oklahoma law should be amended to clearly provide that failure to raise extra-record claims within a direct capital appeal will not constitute waiver of those same claims on capital post-conviction review.

Recommendation 3:

To obtain discovery by order of the Oklahoma Court of Criminal Appeals within either a direct appeal or a post-conviction proceeding, counsel for a death-sentenced inmate should be required to show only good cause for the requested discovery.

Recommendation 4:

The Legislature should amend Oklahoma law so that capital direct appeals and state post-conviction proceedings run consecutively, rather than concurrently; and a defendant's initial application for post-conviction relief should be filed with the Oklahoma Court of Criminal Appeals within one year from the date on which the Oklahoma Court of Criminal Appeals issues its decision and mandate on the defendant's direct appeal in the case.

Chapter 8: Death Eligibility Recommendations

Recommendation 1:

Because it is unconstitutional to execute a defendant who is intellectually disabled/mentally retarded, a defendant should be required to prove his or her intellectual disability/mental retardation only by a preponderance of the evidence, regardless of whether the determination is made by a judge or a jury and regardless of whether the determination is made before or during the defendant's murder trial.

Recommendation 2:

In light of *Hall v. Florida*, Oklahoma law and the Oklahoma Uniform Jury Instructions should be amended to clarify that capital defendants must be permitted to attempt to establish their ineligibility for a death sentence on the basis of intellectual disability/mental retardation if they have at least one IQ score in the range of 71–75 or lower. In addition, capital defendants with at least one IQ score of 75 or less should be permitted to attempt to establish intellectual disability/mental retardation regardless of whether they have one or more IQ scores of 76 or higher.

Recommendation 3:

Because it is unconstitutional to execute someone who is incompetent/insane at the time of execution, Oklahoma law should be amended to permit persons other than the warden to raise the issue of the condemned inmate's competency to be executed. The prosecution, the condemned inmate's counsel, the inmate's legal guardian, the warden of the facility where the inmate is incarcerated, or a court sua sponte should all be allowed to raise the issue of the inmate's competency to be executed, pursuant to the standards set forth in *Ford v. Wainwright* and *Panetti v. Quarterman*.

Recommendation 4:

Because it is unconstitutional to execute someone who is incompetent/insane at the time of execution, Oklahoma law should be amended to provide that if it can be shown by a preponderance of the evidence that a condemned inmate is incompetent/insane, the state should not be allowed to execute that inmate. If such a finding is made, the state should only be subsequently allowed to execute the inmate if it is able to show, by a preponderance of the evidence at a later evidentiary hearing, that the defendant has become competent to be executed.

Chapter 9: Clemency Recommendations

Recommendation 1:

The composition of the Oklahoma Pardon and Parole Board should be more open and should not be restricted to individuals with experience in the criminal justice field.

Recommendation 2:

The Oklahoma Pardon and Parole Board should compose, adopt, and publish substantive guidelines on the exercise of its clemency powers.

Recommendation 3:

The Oklahoma Pardon and Parole Board should create guidelines for recusal of any member who may have a conflict of interest in evaluating a condemned inmate's petition for clemency.

Recommendation 4:

Condemned inmates should have the option to listen to and watch (via closed-circuit television) the entire presentation of their clemency petition to the Oklahoma Pardon and Parole Board.

Recommendation 5:

The members of the Oklahoma Pardon and Parole Board should engage in a deliberative process before voting on a condemned inmate's petition for clemency.

Chapter 10: Execution Process Recommendations

Recommendation 1:

Oklahoma should adopt the most humane and effective method of execution possible, which currently appears to be the one-drug (barbiturate) lethal injection protocol. Oklahoma should develop a process for continuous review of its execution protocol to ensure that the state is using the most humane and effective method possible.

Recommendation 2:

The Oklahoma Department of Corrections should revise its execution protocol to provide clear direction to department personnel involved in preparing for and carrying out executions. These revisions should, at minimum, provide comprehensible definitions for potentially ambiguous terms within the protocol and specify who within the department's chain of command has the authority and responsibility to perform critical steps in the execution process.

Recommendation 3:

With respect to lethal injection as an execution method, the Oklahoma Department of Corrections should amend its written execution protocol to require verification—at the point of acquisition and at all stages of the execution process—that the proper drug(s) for carrying out the execution have been obtained and will be used in any execution. The protocol should prohibit drug substitutions not specified within the protocol itself and should require that all drug purchases be in writing. If necessary to protect the confidentiality of suppliers, the Legislature should amend Oklahoma law to exempt the order form and related documents from disclosure.

Recommendation 4:

All government personnel involved in carrying out an execution, as well as those individuals contracted with the government to provide services related thereto, should be thoroughly trained and evaluated on all relevant aspects of the Oklahoma Department of Corrections' execution protocol.

Recommendation 5:

The director of the Oklahoma Department of Corrections (ODOC) should deliver to the governor, at least 48 hours prior to any scheduled execution, a written, signed certification that the director has confirmed that all aspects of the execution protocol have been followed, including: ensuring that all personnel who will participate in the upcoming execution have been adequately trained and prepared; ensuring that the necessary equipment and facilities that will be used are adequate and satisfy the standards promulgated within ODOC's execution protocol; and ensuring that any drugs that will be used have been obtained pursuant to and are consistent with ODOC's execution protocol.

Recommendation 6:

In the event that lethal injection will be used to carry out the execution of a condemned inmate, the inmate should be provided written notice as to which drug(s) will be used at least 20 days prior to the scheduled execution.

Recommendation 7:

Following any execution, an independent third party should conduct a thorough quality assurance review to determine whether state laws, regulations, and protocols were properly followed before, during, and immediately after the execution. It is important that the independent third party be required to maintain the confidentiality of any sources for information. The independent third party's findings should be communicated in a timely fashion to the Oklahoma Department of Corrections, the Oklahoma Legislature, and the governor's office, while also being made available to the public.

Overview

Oklahomans share a common interest in securing justice under the law for the victims of crime and those accused of criminal acts, no matter what their own personal views or political perspectives on the death penalty may be. This chapter will provide some context about the administration of the death penalty, both nationally and in the state of Oklahoma.

I. Modern Era of Capital Punishment

The United States Supreme Court's 1972 decision in *Furman v. Georgia* invalidated death penalty procedures in Georgia and Texas and began a nationwide moratorium on executions in the United States until 1976.¹ The *Furman* decision found the death penalty unconstitutional, in part because of the broad discretion given to jurors in deciding whether to sentence a defendant to death, and emphasized the arbitrariness with which the death penalty was imposed.² The decision led to a de facto national moratorium on the death penalty. Notably, *Furman* was preceded by a decline in both public support for the death penalty and the number of executions conducted by states.³

In the years following *Furman*, 35 states enacted new death penalty statutes to address the Court's concerns about arbitrariness.⁴ The moratorium ended in 1976 with the Supreme Court's decision in *Gregg v. Georgia*,⁵ which upheld Georgia's capital punishment system, finding that it provided adequate guidance and procedures to remedy the arbitrariness that resulted from unfettered discretion at the hands of the jury.

¹ See *Furman v. Georgia*, 408 U.S. 258 (1972).

² In his concurring opinion in *Furman*, Justice Douglas wrote:

In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law a Brahman was exempt from capital punishment, and under that law, '(g)enerally, in the law books, punishment increased in severity as social status diminished.' We have, I fear, taken in practice the same position, partially as a result of making the death penalty discretionary

Furman, 408 U.S. at 255-256 (Douglas, J., concurring); see also John Edens et al., *Predictions of Future Dangerousness in Capital Murder Trials: Is It Time to "Disinvent the Wheel?"*, 29 LAW AND HUM. BEHAV. 55, 56 (2005) ("In 1972, the U.S. Supreme Court judged capital punishment to be unconstitutional in part because of the 'unbridled discretion' allowed to jurors in these cases.").

³ *The Encyclopedia of American Crime* states:

Thus, while there were 152 executions in 1947, the number dropped to seven by 1965 and to just one in 1967. It was only at this stage that the Supreme Court agreed to hear arguments in two cases challenging the basic precepts of capital punishment. Certainly, the strongest evidence that the High Court follows election results or public opinion can be seen in its rulings concerning capital punishment, both pro and con. In 1967 public opinion was overwhelmingly opposed to the death penalty, and the High Court was eventually to rule that way. When by 1976 public opinion had shifted in the opposite direction, the Court veered toward that view, even while admitting that the primary argument always made for the death penalty, that it is a deterrent to murder and other capital crimes, was faulty.

Carl Sifakis, *The Encyclopedia of American Crime* (2d ed. 2001), <http://www.fofweb.com/activelink2.asp?ItemID=WE52&iPin=EAC0245&SingleRecord=True> (Apr. 11, 2016).

⁴ See Evan Mandery, *It's Been 40 Years Since the Supreme Court Tried to Fix the Death Penalty – Here's How It Failed*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2016/05/30/it-s-been-40-years-since-the-supreme-court-tried-to-fix-the-death-penalty-here-s-why-it-failed#euUqldhe>.

⁵ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

Like the *Furman* decision, the ruling in *Gregg* coincided with changing public attitudes toward capital punishment. One legal historian summarized these shifting attitudes:

In March 1972, a few months before *Furman*, supporters outnumbered opponents 50 to 42 percent. The figures had barely changed in the previous few years. In November 1972, however, a few months after *Furman*, support beat opposition 57 to 32 percent. An eight-point margin had grown into a twenty-five-point margin in seven months. By 1976 supporters outnumbered opponents 65 to 28 percent, the widest gap since the early 1950s. The shift was uniform across all regions of the country.⁶

After *Gregg*, states amended their capital punishment statutes and procedures, attempting to ensure the death penalty would not be imposed in an arbitrary or capricious fashion.⁷ Thus began the practice of splitting death penalty trials into two parts—known as a bifurcated trial—whereby the jury first hears evidence related to a defendant’s guilt or innocence (the “guilt phase”) and then in a separate trial hears evidence related to the punishment a defendant should receive (the “penalty phase”).⁸

The post-*Gregg* statutes also narrowed the scope of offenses that are eligible for capital punishment and created statutory mitigating and aggravating factors to be considered in capital cases. Mitigating factors⁹ are characteristics of the crime or defendant—such as youth, lack of a criminal history, an abusive childhood, brain damage, mental illness or poverty—that could support a life sentence in lieu of the death penalty. Aggravating factors are those that could support a sentence of death, like the status of a victim—a child or peace officer, for example—or the heinous nature of the murder or characteristics of the defendant.

Since *Gregg*, the U.S. Supreme Court has imposed greater restrictions on application of the death penalty to certain crimes or groups of people, under the Eighth Amendment’s ban on cruel and unusual punishment and the “evolving standards of decency.”¹⁰ In its 1988 ruling in *Thompson v. Oklahoma*, for example, the U.S. Supreme Court ruled that a death sentence is unconstitutional for minors.¹¹ These categories are detailed in the *Death Eligibility* chapter.

⁶ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 268 (2003).

⁷ Edens *supra* note 2, at 56.

⁸ The trial only continues to a penalty phase if the jury convicts a defendant of first-degree murder. If a defendant is convicted of a lesser charge, the judge typically determines the sentence. Jury sentencing is the norm in the state of Oklahoma.

⁹ Virtually all states with the death penalty allow jurors in a capital case to consider both statutory and non-statutory mitigating factors at the penalty phase of a trial. Aggravating factors, on the other hand, are typically limited to those provided by statute.

¹⁰ It is well established that “the Eighth Amendment [is not] regarded as a static concept,” *Gregg*, 428 U.S. at 172-73. Indeed, “(t)he Amendment . . . must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). In evaluating whether a particular punishment comports with evolving standards, the Supreme Court looks to “objective factors” such as state legislative enactments and jury verdicts. *Atkins v. Virginia*, 536 U.S. 504, 511-12 (2002). Determining whether a punishment is constitutionally excessive or cruel and unusual is judged by current norms, not by those that existed at the time the Eighth Amendment was ratified. *Id.* An Eighth Amendment inquiry involves viewing the concept “less through a historical prism than according to ‘the evolving standards of decency that mark the progress of a maturing society.’” *Miller v. Alabama*, 132 S.Ct. 2455, 2465 (2012) (finding sentences of mandatory life in prison without the possibility of parole for juvenile homicide offenders constitutionally impermissible) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)). “It is not so much the number of . . . States that is significant, but the consistency of the direction of change.” *Roper v. Simmons*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 515). “[I]n the end, [though], [the Court’s] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” *Atkins* at 511-12 (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

¹¹ See *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

A. Oklahoma Pre-*Furman*

For the first eight years of Oklahoma's statehood,¹² counties had jurisdiction over executions.¹³ Executions were conducted by and in the counties of conviction, and all were administered by hanging.¹⁴ The state of Oklahoma conducted its first execution in 1913, when it electrocuted Henry Bookman for murder.¹⁵ The first person executed in Oklahoma for a crime other than homicide was James Edward Forrest, who was executed in 1930 for rape.¹⁶ This was followed by other executions for the crimes of rape and robbery in the 1930s and 1940s.¹⁷

By 1972, the year that *Furman* was decided, the state of Oklahoma had executed eighty-two men.¹⁸ All of them were electrocuted.¹⁹ The last execution in pre-*Furman* Oklahoma occurred in 1966.²⁰

B. Oklahoma Post-*Gregg*

Although Oklahoma did not execute anyone between 1966 and 1990, it was among the first states to adopt a new death penalty statute in 1973, in response to *Furman*.²¹ Following the Supreme Court's decision in *Gregg*, the 1973 Oklahoma statute—along with a number of other states' capital punishment laws—was determined to be unconstitutional.²²

After the Court's July 1976 ruling in *Gregg*, Oklahoma governor David L. Boren called a special legislative session the same month to rewrite the 1973 statute and restore capital punishment in the state. The measure passed the Oklahoma Legislature in 1977 by an overwhelming majority: 45-1 in the Senate, and 93-5 in the House.²³

Oklahoma was also the first state to adopt lethal injection as an execution method in 1977, although Texas was the first state to administer it (in 1982).²⁴ On September 10, 1990, Charles Troy Coleman, convicted of a 1979 murder in Muskogee County, became the first individual executed in Oklahoma in the modern era of capital punishment.²⁵ He was executed by lethal injection.

¹² In 1804, the U.S. Congress passed a statute that applied federal criminal law to the lands comprising the Louisiana Purchase, which included the territory that is now Oklahoma. The law established capital punishment in Oklahoma, stating that "[i]n all criminal prosecutions which are capital, the trial shall be by a jury of twelve good and lawful men of the vicinage." In 1895, Congress established the Oklahoma Territory courts; before that, capital crimes charged in Oklahoma—which included murder, treason, forgery, and later, rape—were tried in the federal courts for Arkansas, Kansas, and Texas. See generally *Encyclopedia of Oklahoma History and Culture*, Oklahoma Historical Society, <http://www.okhistory.org/publications/enc/entry.php?entryname=CAPITAL%20PUNISHMENT> (last visited Feb. 13, 2017); Library of Congress, "A century of lawmaking for a new nation: U.S. congressional documents and debates, 1774 – 1875," <http://memory.loc.gov/cgi-bin/ampage?collid=llsl&file=002/llsl002.db&recNum=522> (last visited Feb. 13, 2017); James Dunlop, *Digest of the General Laws of the United States, with References to the Acts Repealed, Supplied, or Modified; and Notes of the Decisions and Dicta of the Supreme Court of the Union upon Their Construction* (1856).

¹³ *Encyclopedia of Oklahoma History and Culture*, Oklahoma Historical Society, <http://www.okhistory.org/publications/enc/entry.php?entryname=CAPITAL%20PUNISHMENT> (last visited Feb. 13, 2017).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ M. Watt Espy and John Ortiz Smykla, "Executions in the United States, 1608-2002: The ESPY File," <http://deathpenalty.procon.org/view.resource.php?resourceID=004087>, (Dec. 9, 2016).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*; *Oklahoma Executions: A Look at the History of the Death Penalty in the Sooner State*, KJHR, <http://www.kjrh.com/news/state/oklahoma-executions-a-look-at-the-history-of-the-death-penalty-in-the-sooner-state> (Sept. 16, 2015).

²¹ See *State by State Database*, DPIC, http://www.deathpenaltyinfo.org/state_by_state, (last visited Feb. 13, 2017).

²² Oklahoma's 1973 death penalty statute made capital punishment mandatory for anyone convicted of capital murder. Such laws were made invalid by the Supreme Court's decision in *Gregg*. See *Old Habits Die Hard: The Death Penalty in Oklahoma*, AMNESTY INTERNATIONAL (2001), <https://www.amnesty.org/en/documents/AMR51/035/2001/en/>.

²³ Arrell Morgan Gibson, *Oklahoma, a History of Five Centuries*, <http://www.okhistory.org/publications/enc/entry.php?entryname=CAPITAL%20PUNISHMENT> (last visited Feb. 13, 2017).

²⁴ "In 1977, Oklahoma legislators passed the first lethal injection statute. Texas passed a lethal injection statute the next day." *So Long as They Die: Lethal Injections in the United States*, HUMAN RIGHTS WATCH, <https://www.hrw.org/report/2006/04/25/so-long-they-die/lethal-injections-united-states> (Jan. 22, 2017); *State by State Lethal Injection*, DPIC, <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Feb. 13, 2017).

²⁵ Kathi Thacker, Charles Troy Coleman Executed, THE OKLAHOMAN, Sept. 10, 1990, <http://newsok.com/article/2550651>.

Since 1977, when the Oklahoma Legislature adopted its post-*Gregg* death penalty statute, the state has executed a total of 109 men and three women. All of them were executed by lethal injection.²⁶

Oklahoma has long led other states in the adoption of newer, untried methods of execution. In 2010, Oklahoma became the first state to utilize pentobarbital, a sedative commonly used to euthanize animals, when it executed John David Duty, convicted of murdering a fellow inmate in 2001 while serving life in prison.²⁷ The use of pentobarbital resulted from shortages of the barbiturate sodium thiopental, the first of three drugs previously used by the state in its execution protocol.²⁸ Then, in 2013, Oklahoma became the first to adopt nitrogen asphyxiation as a method of execution, should lethal injection be ruled unconstitutional or drug shortages prevent its continued administration in the future. Nitrogen asphyxiation has never been used in capital punishment.²⁹ The execution process is discussed in greater detail later in this report.

C. Executions Nationwide Since 1977

1. Executions: States by the Numbers

In addition to the federal government and the military, 31 states currently authorize the death penalty, including Oklahoma.³⁰ However, the administration of capital punishment is declining, both in those states and nationally.

Twelve of the thirty-one states with death penalty statutes have not executed anyone since 2007³¹ Colorado, Oregon, Pennsylvania, and Washington currently have governor-imposed moratoriums on executions.³² Meanwhile, the federal government has not executed anyone since 2003, and the U.S. military has not executed anyone since 1961.³³ Only five states executed someone in 2016.³⁴

²⁶ *Searchable Execution Database*, DPIC, <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 15, 2017).

²⁷ Edecio Martinez, *John David Duty Execution: Okla. Set To Kill Inmate With Substitute Drug Used to Euthanize Animals*, CBS NEWS, <http://www.cbsnews.com/news/john-david-duty-execution-okla-set-to-kill-inmate-with-substitute-drug-used-to-euthanize-animals/> (Dec. 16, 2010); *State by State Lethal Injection*, DPIC, http://www.deathpenaltyinfo.org/state_by_state (last visited Feb. 15, 2017).

²⁸ David W. Freeman, *Pentobarbital, Euthanasia Drug, Used in Oklahoma Execution: Was It Inhumane?*, CBS NEWS, <http://www.cbsnews.com/news/pentobarbital-euthanasia-drug-used-in-oklahoma-execution-was-it-inhumane/>, (Dec. 17, 2010).

²⁹ Jake Godin, *Nitrogen Backup Plan Is Another Okla. Execution First*, NEWSY, <http://www.newsy.com/videos/nitrogen-backup-plan-is-another-okla-execution-first/>, (Apr. 18, 2013).

³⁰ As of February 2, 2017, death penalty states include Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. Non-death penalty states include Alaska, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. The District of Columbia does not allow the death penalty. See “Facts about the Death Penalty,” DPIC, <http://www.deathpenaltyinfo.org>, (last visited Feb. 15, 2017). While Delaware and New Mexico are non-death penalty states, as of February 15, 2017, 15 inmates remain on Delaware’s death row. See *Death Row*, DEP’T OF CORR., <http://www.doc.delaware.gov/deathrow/inmates.shtml> (last visited Feb. 15, 2017). As of January 9, 2017, two inmates remain on New Mexico’s death row. See Steve Terrell, *GOP to revive death penalty proposal during session*, THE NEW MEXICAN, http://www.santafenewmexican.com/news/local_news/gop-to-revive-death-penalty-proposal-during-session/article_66a64a09-d3b9-5467-87c0-2f7d46f1682b.html (Jan. 9, 2017).

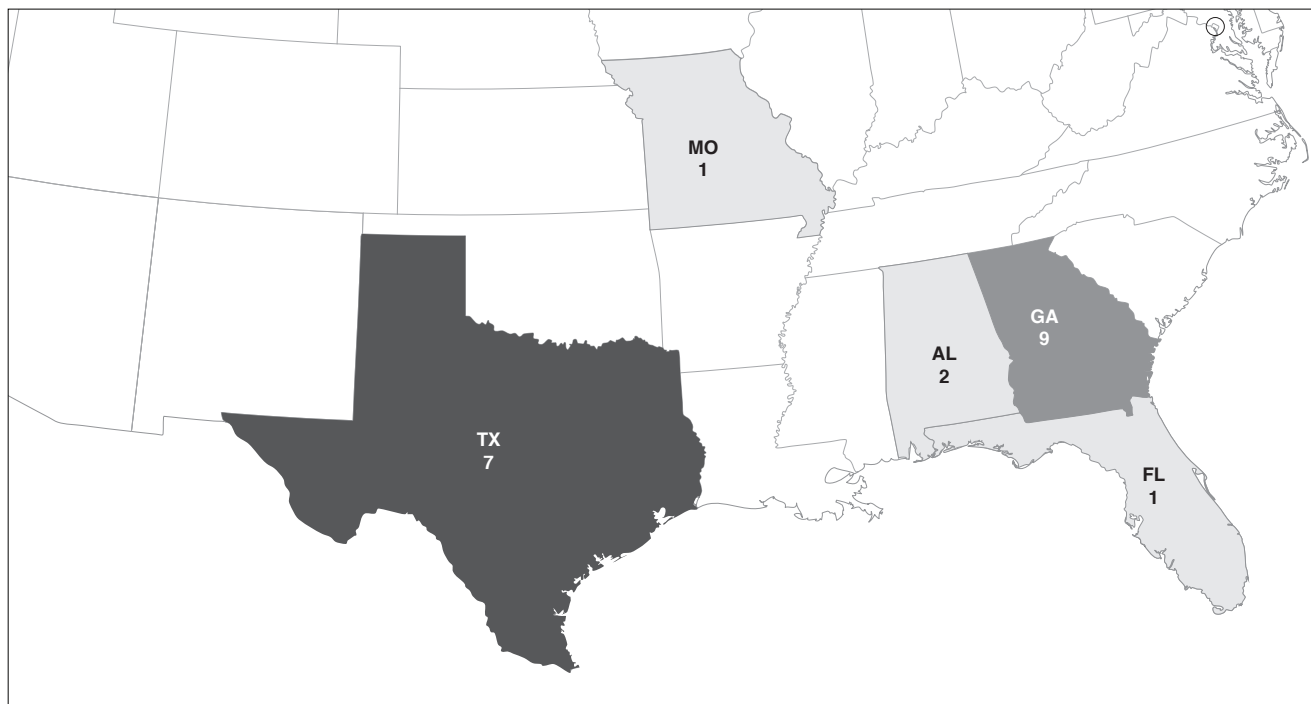
³¹ Arkansas (Nov. 28, 2005), California (Jan. 17, 2006), Colorado (Oct. 15, 1997), Kansas (June 22, 1965), Montana (Aug. 11, 2006), Nebraska (Dec. 2, 1997), Nevada (Apr. 26, 2006), New Hampshire (July 14, 1959), North Carolina (Aug. 18, 2006), Oregon (May 16, 1997), Pennsylvania (July 6, 1999), and Wyoming (January 22, 1992). See *States With and Without the Death Penalty*, DPIC, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Feb. 15, 2017); *Searchable Execution Database*, DPIC, <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 15, 2017).

³² In February 2015, Pennsylvania became the fourth state with a governor-imposed moratorium on the death penalty, joining Oregon (2011), Colorado (2015), and Washington (2014). The last execution in Pennsylvania was in 1999; Oregon and Colorado were in 1997; and Washington was in 2010. See *States With and Without the Death Penalty*, DPIC, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Feb. 15, 2017); *Searchable Execution Database*, DPIC, <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 15, 2017).

³³ *Death sentences and executions in 2015*, AMNESTY INTERNATIONAL, (2016), <https://www.amnesty.org/en/documents/act50/3487/2016/en/> [hereinafter *Death Sentences*]; Ashely Fantz, *A look at the last U.S. soldier executed by the military*, CNN, <http://www.cnn.com/2015/07/28/justice/military-execution-soldier-profile/> (July 28, 2015).

³⁴ Georgia (9), Texas (7), Missouri (1), Alabama (2), and Florida (1). See *Searchable Execution Database*, DPIC, <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 15, 2017).

Figure 1: Number of Executions by State in 2016



Source: Data obtained from the Death Penalty Information Center

2. Executions Over Time

Since the *Gregg* decision in 1976, 1,446 individuals have been executed nationwide.³⁵ As Figure 2 depicts, executions reached a national apex in 1999, but have been falling by an average of 8 percent annually ever since.³⁶ Between 1999 and 2007, executions averaged 67 per year. Between 2008 and 2016, they averaged just 38 per year.³⁷ The decrease in executions nationwide has been attributed to a number of factors, including serious concerns about wrongful convictions, the increasing tendency of jurors to favor life without parole over a death sentence, and problems with lethal injection protocols and the availability of lethal injection drugs.³⁸

3. Executions are Concentrated in a Few States

While 31 states have capital punishment laws, just four states—Texas, Oklahoma, Virginia, and Florida—account for more than half of all executions administered since 1976.³⁹ Figure 3 highlights which states lead the country in executions, as a percentage of overall executions since 1977.

³⁵ *Id.*

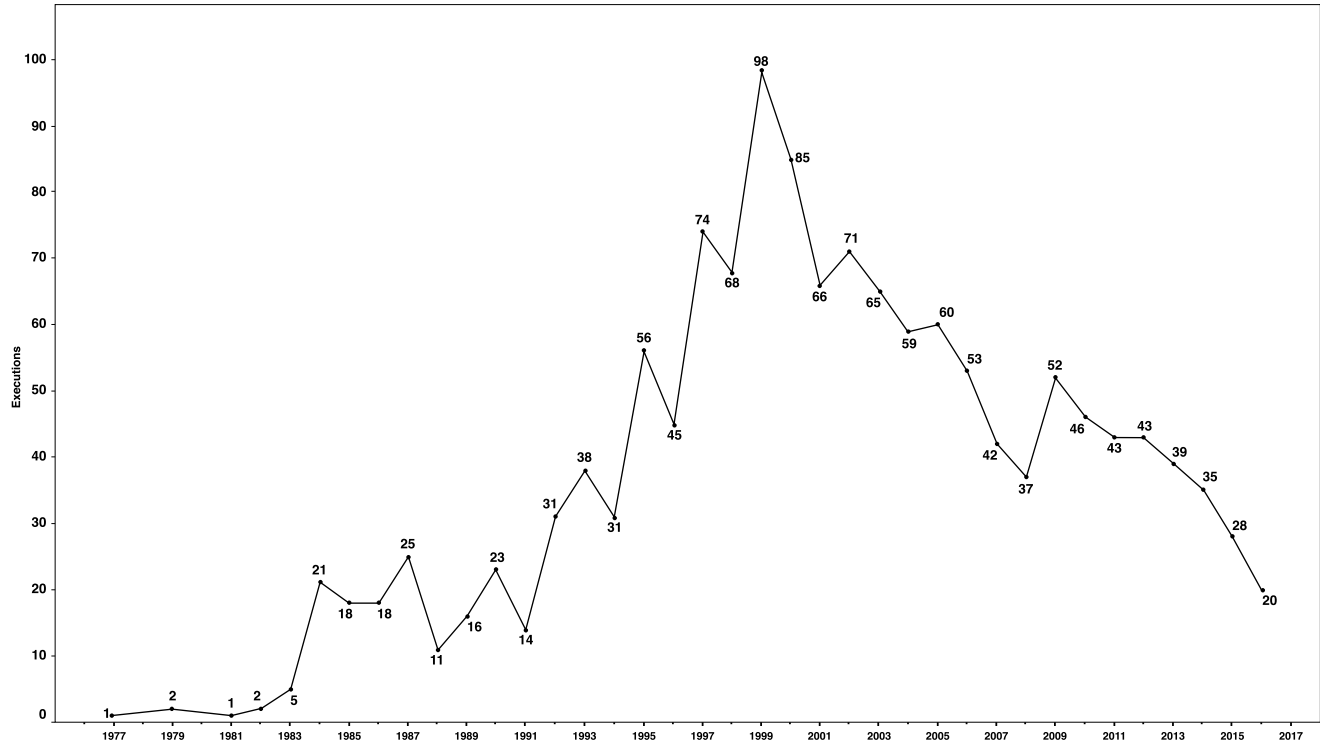
³⁶ *Id.*

³⁷ *Id.*

³⁸ Eric Nicholson, *Texas Falls Out of Love With the Death Penalty, Embraces Life Without Parole*, DALLAS OBSERVER, <http://www.dallasobserver.com/news/texas-falls-out-of-love-with-the-death-penalty-embraces-life-without-parole-7860819> (Dec. 17, 2015); Death Sentences, *supra* note 33.

³⁹ Texas (37.4%), Oklahoma (7.8%), Virginia (7.8%), and Florida (6.4%). See *Searchable Execution Database*, DPIC, <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 15, 2017).

Figure 2: Number of Executions in the U.S. between 1977 and 2016



Source: Data obtained from the Death Penalty Information Center

States with no death penalty have consistently had lower homicide rates than states with the death penalty.⁴⁰ At the height of Southern states' imposition of the death penalty, between 1976 and 1998, states like Oklahoma had higher homicide rates than their Northeastern and Northern Midwest counterparts. According to one scholar:

In most years between 1976 and 1998 the homicide rate in the region encompassing Texas, Louisiana, Arkansas, and Oklahoma was three to four times greater than in New England, for example, and two to three times greater than in the northern Midwest. The number of death sentences in a state in the decades after *Furman* was closely correlated with the number of homicides in that state. Southerners had more opportunities to impose the death sentence than northerners did, and the prevalence of murder may have made them more willing than northerners to impose the death sentence in any given case.⁴¹

This trend has continued in the last decade: the average homicide rate in death penalty states has been higher than in states without the death penalty.⁴² It is worth noting that, since 1970, national homicide rates have also seen an overall decline.⁴³ According to the National Academy of Sciences, “[r]esearch on the deterrent effect of capital punishment is uninformative about whether capital punishment increases, decreases, or has no effect on homicide rates.”⁴⁴

⁴⁰ Raymond Bonner & Ford Fessenden, *Absence of Executions: A special report; States With No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, <http://www.nytimes.com/2000/09/22/us/absence-executions-special-report-states-with-no-death-penalty-share-lower.html?pagewanted=all>, (Sept. 22, 2000); *Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates*, DPIC, <http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates> (last visited Feb. 15, 2017).

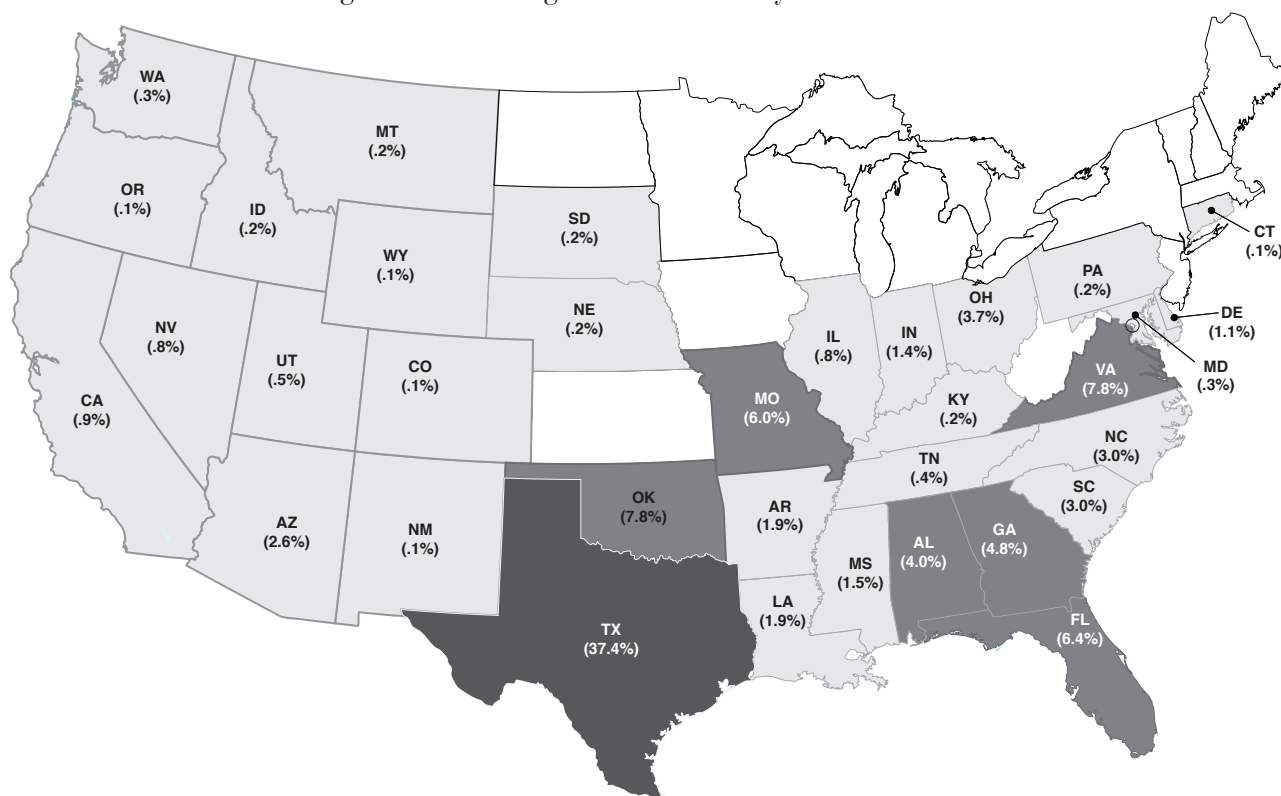
⁴¹ Banner, *supra* note 6 at 278-79.

⁴² *Deterrence: States Without the Death Penalty Have Had Consistently Lower Murder Rates*, DPIC, <http://www.deathpenaltyinfo.org/deterrence-states-without-death-penalty-have-had-consistently-lower-murder-rates#stateswithwithout> (last visited Feb. 15, 2017).

⁴³ *Murder Rates Nationally and By State*, DPIC, <http://www.deathpenaltyinfo.org/murder-rates-nationally-and-state#MRord>, (last visited Feb. 15, 2017).

⁴⁴ 42 DANIEL S. NAGIN, CRIME AND JUSTICE IN AMERICA: 1975-2025 (Michael Tonry eds., 2013) (cited in *Five Things About Deterrence*, NAT'L INST. OF JUST., (2016) <https://www.ncjrs.gov/pdffiles1/nij/247550.pdf>).

Figure 3: Percentage of Executions by State Since 1977



Source: Data obtained from the Death Penalty Information Center

D. Nationwide Decline in Death Sentences Since 1976

It is not just the number of executions that has dropped in recent years; the number of defendants sentenced to death has also dramatically decreased (Figure 4).⁴⁵ Since their peak in 1996, death sentences in the U.S. have declined annually by an average of about eleven percent,⁴⁶ echoing the trend in the rise and fall of the national rate for homicides.

Thirty people in 13 states were sentenced to death in 2016, the lowest year on record since 1977.⁴⁷ Together, Texas, Florida, and California account for more than a third of the 7,780 death sentences imposed between 1976 and 2016.⁴⁸

E. Capital Punishment in Oklahoma Since 1977

1. Execution Rates in Oklahoma

Oklahoma has the highest execution rate per capita of any state in the modern era of capital punishment.⁴⁹ Since 1990, when the state resumed executions after *Gregg*, Oklahoma has executed 112 individuals, more than

⁴⁵ *Death Sentences in the United States From 1977 By State and By Year*, DPIC, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last visited Feb. 15, 2017).

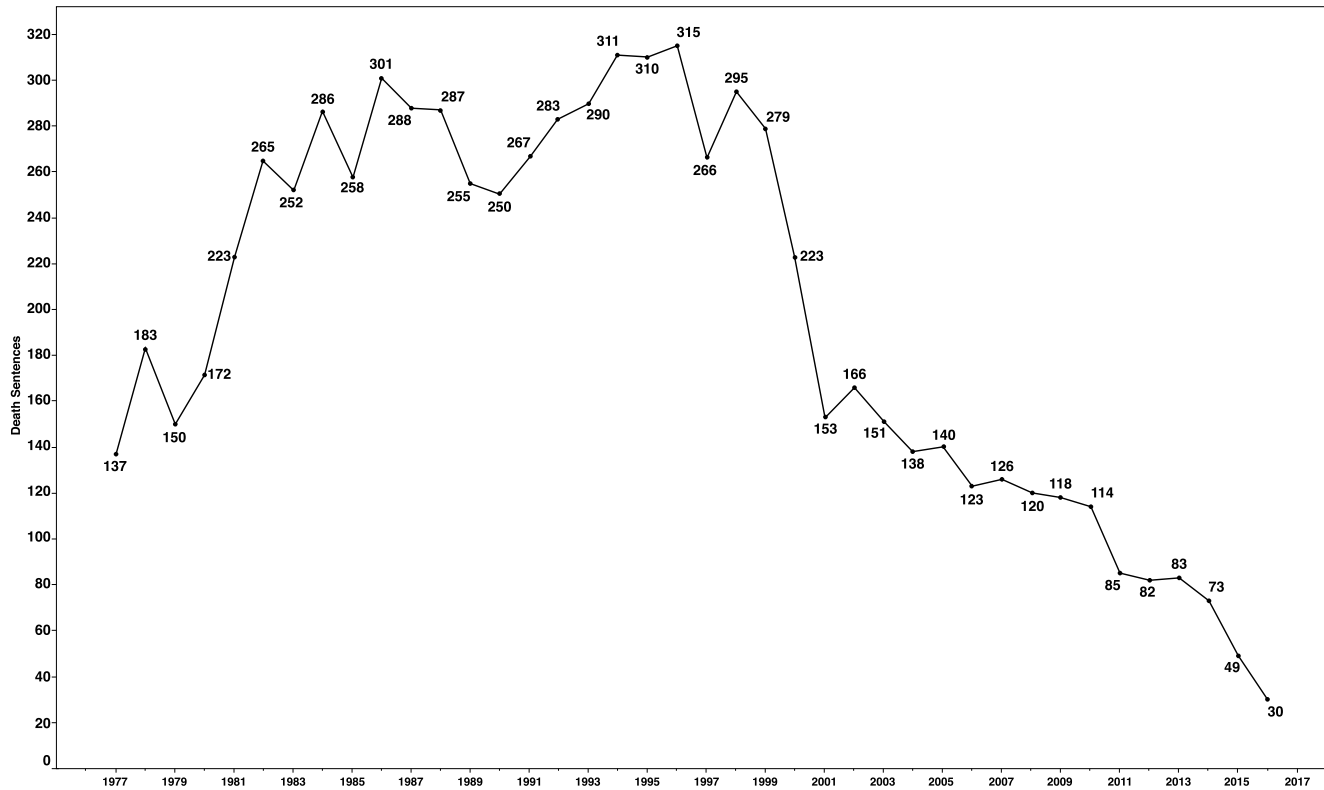
⁴⁶ Death sentences peaked at 315 in 1996. *See id.*

⁴⁷ *Id.*

⁴⁸ Texas (975 death sentences or approximately 13% of total death sentences between 1977 and 2016), Florida (961 or approximately 12%), California (960 or 12%). *Id.*

⁴⁹ *Facts About the Death Penalty*, DPIC, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Feb. 2, 2017).

Figure 4: Number of Death Sentences in the U.S. between 1977 and 2016



Source: Data obtained from the Death Penalty Information Center and the Federal Bureau of Investigation

all other states except Texas.⁵⁰ Similar to nationwide trends, executions in Oklahoma have declined from their peak in 2001 (18), to six or less each year between 2004 and 2013, to just one in 2015. (Figure 5).

2. Death Sentences in Oklahoma

Death sentences in Oklahoma have also declined 13 percent per year on average since their peak in 1996 until 2013, the year of the last execution in Oklahoma, and mirror trends in the overall rise and fall of the state's homicide rate.⁵¹ During the 12 year period between 1984 and 1996, when the homicide rate was at its zenith, Oklahoma imposed 164 death sentences—more than it imposed in the remaining 27 years since the 1977 reinstatement of the death penalty.⁵²

II. Public Opinion

As executions and death sentences have declined, so, too, has support for the death penalty. A late August to early September 2016 Pew Research Center (Pew) poll found that public support for the death penalty is at the lowest level it has been in four decades.⁵³

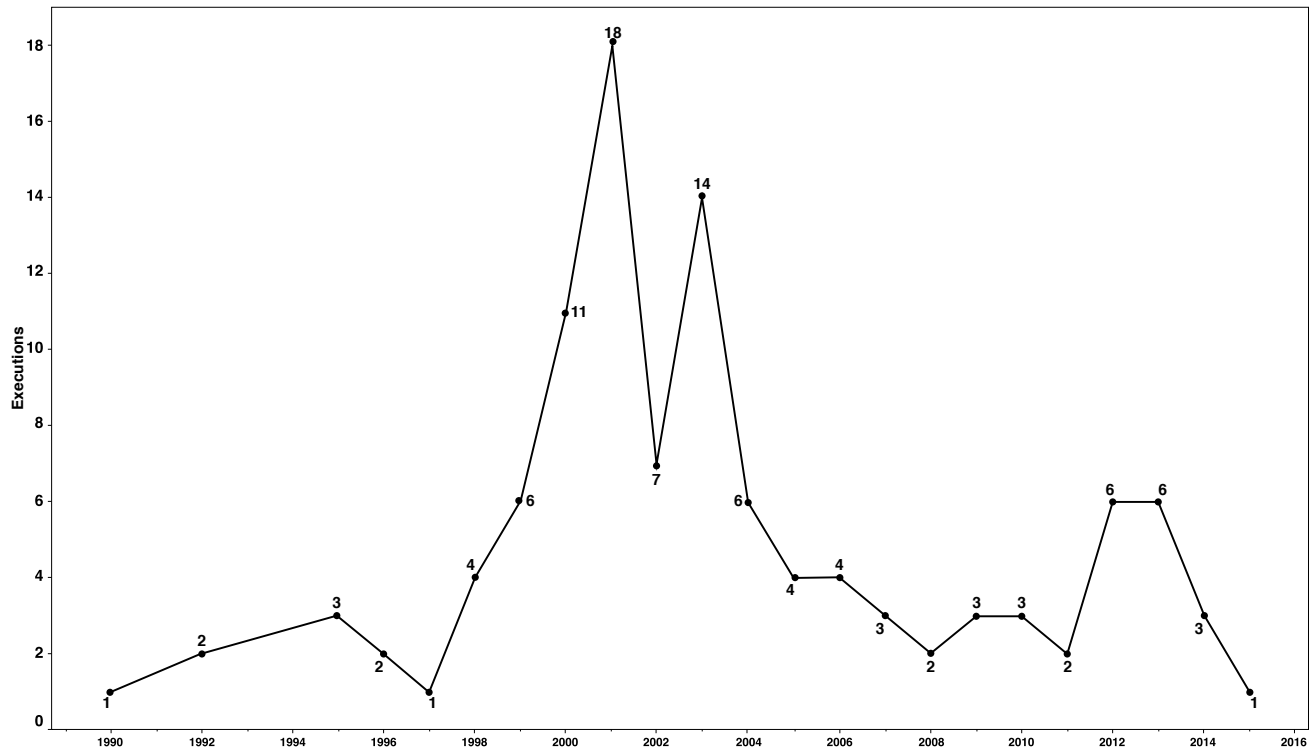
⁵⁰ Searchable Executions, DPIC, <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 17, 2017).

⁵¹ *Death Sentences in the United States From 1977 By State and By Year*, DPIC, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last visited Feb. 13, 2017); *Uniform Crime Reporting Statistics*, FED. BUREAU OF INVESTIGATION, <https://www.ucrdataatool.gov/Search/Crime/State/RunCrimeStatebyState.cfm> (last visited Feb. 17, 2017); *Murder Rates Nationally and By State*, DPIC, <http://www.deathpenaltyinfo.org/murder-rates-nationally-and-state> (last visited Feb. 17, 2017).

⁵² Specifically, Oklahoma imposed a total of 131 death sentences from the period from 1977 to 1983 and 1997 to the present. See *Death Sentences in the United States From 1977 By State and By Year*, DPIC, <http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-present> (last visited Feb. 13, 2017).

⁵³ Baxter Oliphant, & Pew Research, *Support for death penalty lowest in more than four decades*, PEW RESEARCH CENTER, <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/> (Sept. 29, 2016).

Figure 5: Number of Executions in Oklahoma Since 1990



Source: Data obtained from Death Penalty Information Center

Only about half of Americans (49%) now favor the death penalty for people convicted of murder, while 42% oppose it. Support has dropped 7 percentage points since March 2015, from 56%. Public support for capital punishment peaked in the mid-1990s, when eight-in-ten Americans (80% in 1994) favored the death penalty and fewer than two-in-ten were opposed (16%). Opposition to the death penalty is now the highest it has been since 1972.⁵⁴

According to Pew, public support for the death penalty has tracked the rate of violent crime.⁵⁵ When violent crime peaked in the early-to-mid 1990s, the public overwhelmingly supported capital punishment. In contrast, in the 1960s—when crime rates were at historic lows—public support for the death penalty also decreased. With crime rates in decline in recent years, public support for the death penalty has similarly waned.

Pew cites several other reasons for the decline in public support for the death penalty, including “greater attention to wrongful convictions,” and “revelations of faulty forensic work.” Public reports about “prolonged executions and the difficulties many states have had in procuring drugs for lethal injections also may be factors in shifting public opinion,” according to Pew.⁵⁶

A June 2015 national poll also found that “forty-eight percent of Americans prefer life without parole, with forty-three percent favoring the death penalty.”⁵⁷ In Oklahoma, a poll conducted in November 2015

⁵⁴ *Id.*

⁵⁵ Drew Desilver & Pew Research, *Lower support for death penalty tracks with falling crime rates, more exonerations*, PEW RESEARCH CENTER, <http://www.pewresearch.org/fact-tank/2014/05/28/lower-support-for-death-penalty-tracks-with-falling-crime-rates-more-exonerations/> (Mar. 28, 2014).

⁵⁶ *Id.*

⁵⁷ *Quinnipiac University Poll Release Detail*, <http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=2229> (June 1, 2015).

indicated that more than half of Oklahomans would support abolition of the death penalty in Oklahoma “if those typically given the death penalty were given life without any possibility of parole and ordered to pay mandatory restitution to the victims’ families for the rest of their life.”⁵⁸ More recently, an April 2016 poll found that a plurality of Republican voters in Oklahoma were open to replacing the death penalty with life without parole.⁵⁹

On November 8, 2016, however, 66 percent of Oklahoma voters supported State Question 776, a legislatively referred constitutional amendment.⁶⁰ The measure added a passage to the Bill of Rights of the Oklahoma State Constitution declaring that all death penalty statutes of the state are in full force and effect. The measure also declared that Oklahoma’s death penalty statute is constitutional and does not constitute the infliction of cruel or unusual punishment.⁶¹ Finally, the measure allowed for the state to use other methods of execution if the existing method is found unconstitutional.⁶²

III. Concerns about Capital Punishment Nationwide

Of the 19 states that have repealed the death penalty, seven of them have done so in the last 10 years.⁶³ As mentioned previously, four other states are presently under a governor-imposed moratorium on capital punishment.⁶⁴ These developments are due in large part to concerns that have been raised—by policymakers, stakeholders in the criminal justice system, and the public—about the cost, accuracy, and fairness of the death penalty.⁶⁵ Many of the major concerns are outlined here and discussed in greater detail in the chapters that follow.

A. Lethal Injection

Eighty-eight percent of executions nationwide since 1977 have been administered by lethal injection.⁶⁶ In recent years, state officials have cited difficulties obtaining drugs required for lethal injection protocols as the chief reason for postponing executions. “Prior to Nebraska’s repeal of the death penalty,” for example, “officials found it impossible to obtain sodium thiopental, a barbiturate used to administer lethal injections,” according to a report

⁵⁸ *News9/Newson6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONER POLL, <http://soonerpoll.com/news9newson6-more-oklahomans-oppose-death-penalty-if-given-alternative> (Nov. 19, 2015).

⁵⁹ See M. Hyden, *Conservative Support of Alternatives Underscores Death Penalty’s Failures*, NONDOC, <http://nondoc.com/2016/04/11/conservative-support-of-alternatives-underscores-death-penaltys-failures/> (Apr. 11, 2016). SoonerPoll described itself on its company website as an “independent, non-partisan pollster that performs political and issue-oriented polling for the state’s news media and various associations and interest groups in the state” of Oklahoma. See *History of SoonerPoll*, SOONER POLL, <http://soonerpoll.com/history/> (last visited Feb. 17, 2017).

⁶⁰ *Oklahoma Death Penalty, State Question 776 (2016)*, BALLOT PEDIA, [https://ballotpedia.org/Oklahoma_Death_Penalty_State_Question_776_\(2016\)](https://ballotpedia.org/Oklahoma_Death_Penalty_State_Question_776_(2016)).

⁶¹ S.J. Res. 51, 54th Leg. (Ok. 2015).

⁶² *Id.*

⁶³ Delaware (2016); Connecticut (2012); Maryland (2015); Illinois (2011); New Mexico (2009); New York (2007); New Jersey (2007); Massachusetts (1984); Rhode Island (1984); North Dakota (1975); West Virginia (1965); Iowa (1965); Vermont (1964); Alaska (1957); Hawaii (1957); Minnesota (1911); Maine (1887); Wisconsin (1855); and Michigan (1846). See *State With and Without the Death Penalty*, DPIC, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Feb. 17, 2017).

⁶⁴ They are Colorado, Oregon, Pennsylvania, and Washington. See *id.*

⁶⁵ Maurice Chammah, *The Slow Death of the Death Penalty*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/2014/12/17/the-slow-death-of-the-death-penalty#CXfZCOorDP> (Dec. 17, 2014); Memorandum from Gov. Tom Wolf declaring death penalty moratorium (Feb. 13, 2015) <https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration>; *Nebraska Votes to Repeal the Death Penalty*, 8 Am. Bar Assn., no. 2, 2015, http://www.americanbar.org/publications/project_press/2015/summer/nebraska-votes-to-repeal-the-death-penalty.html.

⁶⁶ *Searchable Execution Database*, DPIC, <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 17, 2017).

in the *New York Times*.⁶⁷ Meanwhile, executions are currently on hold in a number of states due to court or state review of lethal injection protocols.⁶⁸

B. De Facto Moratoriums in Oklahoma

Since 2014, Oklahoma has been under three de facto moratoriums on the death penalty resulting from questions and circumstances surrounding the state's lethal injection protocol. The last execution in Oklahoma occurred more than a year ago.⁶⁹

The first de facto moratorium resulted from the April 29, 2014 scheduled executions of Clayton Lockett and Charles Warner. The moratorium lasted eight months. Governor Mary Fallin postponed Warner's execution after Clayton Lockett's was halted while already underway.⁷⁰ Despite being declared unconscious during his execution, Lockett was reported to have moaned, writhed, lifted his head and shoulders off the gurney, and attempted to speak.⁷¹ Then-President Barack Obama remarked that events surrounding Lockett's execution were "deeply troubling" and tasked the Justice Department with conducting a review of how the death penalty is administered in the U.S.⁷²

On April 30, 2014, Governor Fallin issued an executive order appointing Department of Public Safety Commissioner and Secretary of Safety and Security Michael Thompson to conduct an independent examination into the circumstances surrounding the execution of Clayton Lockett.⁷³ The Oklahoma Department of Public Safety issued that report on September 4, 2014, finding that the Oklahoma Department of Corrections (ODOC) had only made minor deviations from execution protocols and that ODOC staff were under pressure because two executions had been scheduled on one day.⁷⁴ Executions resumed in Oklahoma on January 15, 2015 with the execution of Charles Warner.⁷⁵

The second de facto moratorium in Oklahoma began on January 28, 2015, when the U.S. Supreme Court ordered a stay of execution for three Oklahoma death row inmates who had challenged the state's use of the drug midazolam as a part of its lethal injection protocol.⁷⁶ Richard Glossip, one of the petitioners, had been scheduled to die the next day.⁷⁷ On June 29, 2015, the Court issued its opinion in *Glossip v. Gross*, denying

⁶⁷ Julie Bosman, *Nebraska to Vote on Abolishing Death Penalty After Petition Drive Succeeds*, N.Y. TIMES, <http://www.nytimes.com/2015/10/17/us/politics/nebraska-to-vote-on-abolishing-death-penalty-after-petition-drive-succeeds.html>, (Oct. 16, 2015).

⁶⁸ As of February 2017, these states are Arizona, California, Montana, North Carolina, Kentucky, Louisiana, and Oklahoma. The last execution in California, Montana, and North Carolina in 2006; Kentucky in 2008; Louisiana in 2010; Arizona in 2014, and Oklahoma in 2015. In February 2015, Pennsylvania became the fourth state with a governor-imposed moratorium on the death penalty, joining Oregon (2011), Colorado (2013), and Washington (2014). The last execution in Pennsylvania occurred in 1999; Oregon and Colorado in 1997; and Washington in 2010. Arkansas, Nevada, and Ohio have executions on hold due to unavailability of lethal injection drugs. See *State by State Lethal Injection*, DPIC, <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Feb. 22, 2017); *Facts about the Death Penalty*, DPIC, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Feb. 22, 2017).

⁶⁹ *Searchable Executions*, DPIC, <http://www.deathpenaltyinfo.org/views-executions> (last visited Feb. 17, 2017).

⁷⁰ *Botched execution gets inmate Charles Warner a 6-month delay*, CBCNEWS, <http://www.cbc.ca/news/world/botched-execution-gets-inmate-charles-warner-a-6-month-delay-1.2637186> (May 9, 2014).

⁷¹ Katie Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett Was 'a Bloody Mess'*, THE GUARDIAN, <http://www.theguardian.com/world/2014/dec/13/botched-oklahoma-execution-clayton-lockett-bloody-mess> (Dec. 13, 2014).

⁷² *Botched Execution 'Deeply Troubling', Says Barack Obama*, THE GUARDIAN, <http://www.theguardian.com/world/2014/may/03/botched-execution-deeply-troubling-says-barack-obama> (May 3, 2014).

⁷³ Press Release, Gov. Mary Fallin Orders Independent Review of Execution Protocols (Apr. 30, 2014), http://services.ok.gov/triton/modules/newsroom/newsroom_article.php?id=225&article_id=14154.

⁷⁴ Rick Green & Graham Lee Brewer, *Oklahoma Releases Investigation on Controversial Execution*, NEWSOK, <http://newsok.com/article/3358667> (Sept. 4, 2014).

⁷⁵ Dana Ford, *Oklahoma Executes Charles Warner*, CNN, <http://www.cnn.com/2015/01/15/us/oklahoma-execution-charles-frederick-warner/> (Jan. 16, 2015).

⁷⁶ Adam Liptak, *Justices Stay Executions of 3 in Oklahoma, Pending Decision on Lethal Drug Protocol*, N.Y. TIMES, https://www.nytimes.com/2015/01/29/us/justices-delay-executions-of-3-on-oklahomas-death-row.html?_r=0 (Jan. 28, 2015).

⁷⁷ *Supreme Court Stays Executions of Three in Oklahoma*, CNN, <http://www.cnn.com/2015/01/28/politics/supreme-court-stays-executions/> (Jan. 28, 2015).

the petitioners' request for a preliminary injunction prohibiting Oklahoma from using midazolam in its lethal injection protocol. Glossip was then scheduled to be executed on September 30, 2015.⁷⁸

Glossip's execution was called off when it was discovered that the wrong drugs had been supplied to the Oklahoma State Penitentiary in McAlester. The wrong drugs, it was later discovered, had also been previously used in the January 15, 2015 execution of Charles Warner. During Warner's execution, news accounts reported that he stated, "My body is on fire."⁷⁹

The third de facto moratorium in Oklahoma has been in effect since October 1, 2015, pursuant to an order from the Oklahoma Court of Criminal Appeals (OCCA).⁸⁰ The Oklahoma Attorney General at the time, Scott Pruitt, had requested the postponement of executions so that a multi-county grand jury could investigate the circumstances surrounding Richard Glossip's scheduled execution on September 30, 2015.⁸¹

Five Oklahoma death row inmates have exhausted their appeals and are awaiting execution dates.⁸² In a court filing on October 13, 2016, the attorney general said he would not request future execution dates until at least 150 days after the multi-county grand jury released its final report to the public and Pruitt's office received notification from ODOC that it can comply with the state's execution protocol.⁸³ The grand jury released its report in May 2016,⁸⁴ but as of the date of this publication, ODOC had not yet provided the aforementioned notification. The OCCA would still need to approve any requested execution date.



In light of the extensive information gathered from this year-long, in-depth study, the Commission members unanimously recommend that the current moratorium on the death penalty be extended until significant reforms have been accomplished.

⁷⁸ Glossip v. Gross, 135 S. Ct. 2726 (2015).

⁷⁹ Andy Campbell, *Charles Warner Executed: Baby Killer Says 'My Body Is on Fire' During Lethal Injection in Oklahoma*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2015/01/15/charles-frederick-warner-executed_n_6485040.html (Jan. 15, 2015).

⁸⁰ Graham Lee Brewer, *All Oklahoma Executions are on Hold Until at Least 2016*, NEWSOK, <http://newsok.com/article/5453954> (Oct. 16, 2015).

⁸¹ *Id.*

⁸² They are Richard Glossip, Benjamin Cole, John Grant, Jeremy Williams, and Richard Fairchild. *Bungled Executions Slow Oklahoma's Busy Death Chamber*, CBS DALLAS FORT WORTH, <http://dfw.cbslocal.com/2016/04/02/bungled-executions-slow-oklahomas-busy-death-chamber/>, (April 2, 2016).

⁸³ *Oklahoma Halts Executions until 2016 as Drug Mix-up Investigation Continues*, THE GUARDIAN, <http://www.theguardian.com/us-news/2015/oct/16/oklahoma-halts-executions-until-2016-wrong-drug-investigation> (Oct. 16, 2015).

⁸⁴ Nolan Clay, *Oklahoma Grand Jury Issues Critical Report on Execution Drug Mix-up*, NEWSOK, <http://newsok.com/article/5499152> (May 19, 2016).

Forensics

I. Introduction

Forensic science is the application of science to legal problems. It can be critical to the identification of perpetrators of crime and to safeguarding against the prosecution and conviction of innocent persons. However, contrary to popular perception, forensic science is not a panacea.

While advancements in technology have improved the reliability of some forensic disciplines over the last several decades, studies have also exposed serious and troubling weaknesses for certain forensic disciplines—with respect to both scientific underpinnings and risks of human error.¹ For example, as recently as September 2016, the President’s Council of Advisors on Science and Technology released a report (*PCAST Report*) that concluded that bite mark analysis is “far from meeting the scientific standards for foundational validity” and “the prospects of developing bite[] mark analysis into a scientifically valid method [are] low.”² The *PCAST Report* was also strongly critical of a number of other disciplines commonly used in criminal convictions, including firearms and footwear analysis.³

The unreliability of certain forensic science disciplines can have grave consequences. Oklahoma has firsthand experience in this area; in 2001, chemist Joyce Gilchrist was fired from the Oklahoma City Police Department’s crime lab for falsifying results and overstating testimony.⁴ Gilchrist had been testing forensic evidence for the department for over two decades and had testified in 23 death penalty cases, including 11 that resulted in executions.⁵

The Gilchrist scandal, detailed later in this chapter, illustrates how overreliance on forensic analysis without requiring empirical evidence to substantiate its claims—coupled with intentionally bad actors (or unintentional human error) and little oversight, accountability, training, and adherence to scientific procedures and standards—can place innocent people in jail, or even worse, on death row. To avoid such injustices, diverse

¹ For example, in recent years the FBI has alerted the public to issues with flawed hair analysis and related testimony in hundreds of criminal cases. See Spencer S. Hsu, *FBI Admits Flaws in Hair Analysis Over Decades*, WASHINGTON POST (Apr. 18, 2015) [hereinafter *FBI Admits Flaws in Hair Analysis*], https://www.washingtonpost.com/local/crime/fbi-overstated-forensic-hair-matches-in-nearly-all-criminal-trials-for-decades/2015/04/18/59c8d8c6-e515-41e4-b510-962fcfab310_story.html; see also Spencer S. Hsu, *Justice Department Issues First Standards for Forensic Expert Testimony*, WASHINGTON POST (Jun. 3, 2016) [hereinafter *Department Issues First Standards*], https://www.washingtonpost.com/amphhtml/local/public-safety/justice-department-issues-first-standards-for-forensic-science-expert-testimony/2016/06/05/04ab129a-29c4-41e6-a5c4-0724e8e24f3f_story.html; see e.g., NAT’L ASS’N OF CRIM. DEFENSE LAWYERS, CRIME LAB & FORENSIC SCANDALS, <https://www.nacdl.org/criminaldefense.aspx?id=28286> (last visited Aug. 26, 2016) (summarizing crime lab scandals nationwide).

² PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 8-9 (Sept. 2016) [hereinafter *PCAST REPORT*], https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf; see also Jordan Smith, *White House Report Concludes That Bite Mark Analysis is Junk Science*, THE INTERCEPT (Sept. 7, 2016), <https://theintercept.com/2016/09/07/white-house-report-concludes-that-bite-mark-analysis-is-junk-science/>.

³ *PCAST REPORT*, *supra* note 2 at 11-15.

⁴ Graham Lee Brewer, *Disgraced Oklahoma City police chemist Joyce Gilchrist dies*, THE OKLAHOMAN (Aug. 31, 2015), <http://newsok.com/article/5445656>.

⁵ Belinda Luscombe, *When The Evidence Lies*, TIME (May 15, 2001), <http://content.time.com/time/magazine/article/0,9171,109625,00.html>.

stakeholders—including judges, victims’ advocates, and criminal justice experts—have called for improvements in funding, standardization, certification, and training across the many fields of forensic science.

This chapter examines both the state of forensic science nationally and, where appropriate, its current application in Oklahoma.

II. Understanding Forensic Science

The field of forensic science includes a multitude of disciplines that are quite different from one another. Those disciplines cover the analysis and examination of evidence, including: DNA, coatings (e.g., paint), chemicals (including drugs), materials (including fibers), fluids, serology, fire and explosive evidence, fingerprints, firearms, toolmarks, bite marks, impressions (e.g., tires, footwear), bloodstain pattern analysis, handwriting, hair, and digital evidence.⁶ Some disciplines are well-known, like DNA and fingerprint examination. Others, such as handwriting analysis and serology (the detection and examination of bodily fluids, such as blood, saliva, and perspiration), are less familiar.⁷ Each forensic science discipline has its own methodologies, rates of accuracy, and associated research and publications.⁸

Some forensic disciplines are grounded in applied sciences—such as chemistry, biology, or medicine—and are considered “analytical evidence.”⁹ These disciplines are conducted in laboratories—for example, DNA analysis and toxicology—by trained scientists and doctors, who rely on the scientific method. Relying on principles of scientific inquiry, analytical forensic sciences (like DNA analysis) attempt to generate objective understanding of the cause and effect of phenomena by detecting, quantifying, and minimizing bias from measurements and human interpretation.¹⁰

Other forensic disciplines are grounded in the subjective interpretation of observed phenomena—like fingerprints, shoeprints, tire tracks, bite marks, glove prints, and toolmarks examination—by trained practitioners and are considered “pattern” or “impression” evidence; both terms are often used interchangeably.¹¹

The rate of variability in the results of pattern-based disciplines remains contested.¹² These disciplines have a greater likelihood of hidden bias and exhibit a lack of uniformity of results; consequently, these disciplines have a greater potential for error.¹³ For example, analysis of latent fingerprints—prints that are invisible to the naked eye¹⁴—is subject to human interpretation. One study recognized the difficulty in consistency and accuracy in the field, stating that any “complex pattern is capable of suggesting various readings, as the figuring on a wallpaper may suggest a variety of forms and faces to those who have such fancies.”¹⁵ The images on the next page are prints left by the *same finger*, demonstrating the range of skin distortion that is possible. Such distortion makes an examiner’s job extremely

⁶ *Id.*

⁷ COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCIENCES COMMUNITY, NAT’L RESEARCH COUNCIL, STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, 38 (2009) [hereinafter NAS REPORT], <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf>.

⁸ *Id.*

⁹ NAS REPORT, *supra* note 7, at 7 (noting DNA analysis, toxicology and drug analysis as examples of analytical evidence and fingerprints, writing samples, toolmarks, bite marks and hair analysis as examples of pattern evidence).

¹⁰ *See id.*

¹¹ *Id.* at 145 (using “impression evidence” interchangeably with “pattern evidence”).

¹² *Id.* at 188.

¹³ *Id.* at 7-8; see also Radley Balko, *Incredibly, prosecutors are still defending bite mark evidence*, THE WASH. POST, Jan. 30, 2017, https://www.washingtonpost.com/news/the-watch/wp/2017/01/30/incredibly-prosecutors-are-still-defending-bite-mark-evidence/?utm_term=.a0da38c4bef4#comments (noting that while strongly criticized, courts are continuing to allow bite mark evidence).

¹⁴ *Id.* at 146.

¹⁵ EXPERT WORKING GROUP ON HUMAN FACTORS IN LATENT PRINT ANALYSIS, U.S. DEP’T OF COMMERCE, NAT’L INST. OF STANDARDS & TECH., LATENT PRINT EXAMINATION & HUMAN FACTORS: IMPROVING THE PRACTICE THROUGH A SYSTEMS APPROACH 40 (Feb. 2012) [hereinafter NIST LATENT PRINT REPORT], http://www.nist.gov/customcf/get_pdf.cfm?pub_id=910745.

difficult and illustrates the potential for human error in forensic analysis.¹⁶

Figure 1: Example of Range of Distortion on Prints from the Same Finger¹⁷



Moreover, the type of expertise required can differ significantly and depends on the type of impression that must be analyzed. For example, examining patterns from tire tracks requires knowledge of tire wear and manufacturers, whereas examining bloodstain patterns does not.¹⁸ In terms of scientific foundation, the analytically-based disciplines generally hold a notable edge over disciplines based on expert interpretation.”¹⁹

Just as forensic science encompasses various disciplines, the forensic science community also includes an array of professionals. Among them are medicolegal death personnel (which includes medicolegal death investigators, coroners, and medical examiners),²⁰ scientists, laboratory technicians, crime scene investigators, and law enforcement.²¹ Even within the same forensic discipline, there are differences in education, training, and neutrality that can affect the conclusions reached.²² For example, coroners and medical examiners are often statutorily required to establish a cause or manner of death in homicide cases.²³ In many jurisdictions, coroners are elected officials, whereas medical examiners are often licensed physicians who are appointed.²⁴ Medical examiners can also be forensic pathologists, who are licensed physicians trained in both general and forensic pathology and who are required to be board certified by the American Board of Pathology.²⁵ However, the distinction between coroners and medical examiners varies by jurisdiction, and the qualifications associated with each one are not necessarily the same in all states.²⁶

As of 2009—the most current year for which data is available—there were 441 publicly funded crime labs in the United States.²⁷ In 2009 alone, these labs received roughly 4.1 million requests for forensic analysis,

¹⁶ *Id.* (stating that “examiners must predominantly rely on the knowledge gained during training and subsequent experience to recognize and interpret distortion”).

¹⁷ *Id.* at 63 (citation omitted).

¹⁸ *Id.* at 143.

¹⁹ *Id.* at 7.

²⁰ SUBCOMM. ON FORENSIC SCI., NAT’L SCIENCE & TECH. COUNCIL COMM. ON SCIENCE, STRENGTHENING THE FORENSIC SCIENCES, 14 (2014) [hereinafter SOFS REPORT]; *see also* NATIONAL COMM’N ON FORENSIC SCI., *Medicolegal Death Investigations Subcommittee*, U.S. DEP’T JUSTICE, <https://www.justice.gov/ncfs/medicolegal-death-investigation> (last visited Aug. 13, 2016) (defining the medicolegal death investigation profession).

²¹ NAS REPORT, *supra* note 7, at 7.

²² *Id.*

²³ SOFS REPORT, *supra* note 20, at 13.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUST., NCJ 238252, CENSUS OF PUBLICLY FUNDED FORENSIC CRIME LABORATORIES, 2009 (Aug. 2012), <http://www.bjs.gov/content/pub/pdf/cpfcl09.pdf>.

the majority of which were for DNA screening or analysis, controlled substance analysis, or toxicology.²⁸ As discussed in more detail below, crime labs' rules, procedures and practices can vary from one lab to another.

III. The Limits of Forensic Science

The integrity of the criminal justice system is grounded in the reliability of evidence that is used to support criminal investigations and prosecutions. Criminal justice stakeholders, such as the courts and lawyers, must be able to comprehend the applications and limitations of forensic evidence in order to determine its admissibility, utilize its capabilities, and evaluate its credibility.

To facilitate that goal, Congress funded a major study of the field prompted by high-profile wrongful convictions of innocent individuals due in part to faulty forensic science analysis and misleading testimony by forensic science practitioners.²⁹ In 2006, Congress charged³⁰ the National Academy of Sciences (NAS)—one of the most prestigious scientific organizations in the country³¹—with forming a committee to study the needs of the forensic science community and to address the “extremely complex and decentralized system” that is forensic science in the United States today.³²

The NAS committee included several forensic practitioners as well as prominent experts in the legal, science, engineering, and medical communities.³³ Committee members and staff spent over two years conducting research and taking testimony from forensic science practitioners, legal experts, law enforcement officials, and other stakeholders.³⁴ In 2009, the committee released a lengthy and comprehensive report, titled *Strengthening Forensic Science in the United States: A Path Forward (NAS Report)*.

For some, like Judge Harry Edwards—co-chair of the NAS Committee and a federal judge—the findings came as a surprise:

I simply assumed, as I suspect many of my judicial colleagues do, that forensic science disciplines typically are well-grounded in scientific methodology and that crime laboratories and forensic science practitioners follow proven practices that ensure the validity and reliability of forensic evidence offered in court. I was surprisingly mistaken in what I assumed.³⁵

The *NAS Report* highlighted the potential for mistake, error, and fraud by poorly trained technicians, who were not subject to reliable, consistent, and enforceable standards,³⁶ and concluded that, except for DNA analysis, “no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”³⁷

²⁸ *Id.*

²⁹ See NAS REPORT, *supra* note 7, at xix.

³⁰ *Id.* at 1 (noting that, in authorizing the study, Congress emphasized the dearth of analysis of forensic science disciplines outside of DNA, stating that “there exists little to no analysis of the remaining needs of the community outside of the area of DNA”).

³¹ See *Overview: NAS Mission*, NAT'L ACAD. OF SCI., <http://www.nasonline.org/about-nas/mission/> (last visited Sept. 9, 2016) (Explaining NAS membership: “Scientists are elected by their peers . . . for outstanding contributions to research. The NAS . . . members are active contributors to the international scientific community [and] [n]early 500 members of the NAS have won Nobel Prizes. . .”).

³² *Id.*

³³ See NAS REPORT, *supra* note 7, at v, App. A; see also Paul C. Giannelli, *The 2009 NAS Forensic Science Report: A Literature Review*, 48 CRIM. L. BULLETIN 578 (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2039024; see also Harry T. Edwards, *Symposium, Solving The Problems That Plague The Forensic Science Community*, 50 JURIMETRICS J. 5, 5 (2009).

³⁴ See Edwards, *supra* note 33, at 5.

³⁵ *Id.* at 7.

³⁶ NAS REPORT, *supra* note 7, at xix.

³⁷ *Id.* at 7.

The committee found that while the forensic science field involves many dedicated people, significant concerns stem from “lack of adequate resources, sound policies, and national support.”⁵⁸ And while the committee acknowledged advances in forensic science, it warned that:

Those advances, however, also have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.⁵⁹

The *NAS Report* continues to be considered an influential and “sweeping critique of many forensic methods that the police and prosecutors rely on”⁴⁰ and has led to multiple congressional hearings on forensic sciences.⁴¹ Moreover, in response to the *NAS Report*, the White House Office of Science & Technology Policy (OSTP) established the Subcommittee on Forensic Science (SoFS), an interagency committee of nearly 200 experts representing 23 federal departments and agencies and 49 “advisory members” to engage state and local partners.⁴² Four interagency working groups were created to study the 13 major recommendations of the *NAS Report*; in 2014, one of these working groups issued the SoFS’s first report (*SoFS Report*), focused on accreditation and certification and is discussed *infra*.⁴³

The more recent *PCAST Report* largely mirrors and affirms the critiques and recommendations of the *NAS Report*, further highlighting the persistent problems within the forensic science disciplines.⁴⁴ Both reports have been criticized by law enforcement agencies. Upon the release of the *PCAST Report*, the FBI was quick to dismiss it, stating that it was “erroneous” and “overbroad.”⁴⁵ The U.S. Department of Justice (DOJ) has also been reluctant to adopt forensics reforms.⁴⁶ At its core, however, the *PCAST Report* is concerned with scientific validity, reliability, and accuracy. It emphasizes in its overview that:

Neither experience, nor judgment, nor good professional practices (such as certification programs and accreditation programs, standardized protocols, proficiency testing, and codes of ethics) can substitute for actual evidence of foundational validity and reliability. The frequency with which a particular pattern or set of features will be observed in different samples, which is an essential element in drawing conclusions, is not a matter of “judgment.” It is an empirical matter for which only empirical evidence is relevant.⁴⁷

Such reports are not alone in their criticism of forensic science. Judges have been some of the most prominent criminal justice stakeholders to highlight the unreliability of forensic evidence presented in criminal cases.

⁵⁸ *Id.*

⁵⁹ *Id.* at 4.

⁴⁰ Solomon Moore, *Science Found Wanting in Nation’s Crime Labs*, N.Y. TIMES, Feb. 4, 2009, http://www.nytimes.com/2009/02/05/us/05forensics.html?_r=0.

⁴¹ Edwards, *supra* note 33, at 7.

⁴² SoFS REPORT, *supra* note 20, at 1.

⁴³ *Id.* at 1-2.

⁴⁴ Blog, John G. Malcom & John-Michael Seibler, *White House Science Squad Blasts Forensics: The Good, the Bad, and the Ugly*, THE FEDERALIST SOC’Y (Sept. 28, 2016), <http://www.fed-soc.org/blog/detail/white-house-science-squad-blasts-forensics-the-good-the-bad-and-the-ugly>.

⁴⁵ Jordan Smith, *FBI and DOJ Vow to Continue Using Junk Science Rejected by White House Report*, THE INTERCEPT (Sept. 23, 2016), <https://theintercept.com/2016/09/23/fbi-and-doj-vow-to-continue-using-junk-science-rejected-by-white-house-report/>.

⁴⁶ See Malcom, *supra* note 44 (Attorney General Lynch has stated that the current legal standards surrounding forensic disciplines evidence are “legally sound” and vowed to continue the DOJ’s use of forensics to guide juries); C.J. Ciaramella, *The Justice Department Won’t Stop Going to Bat for Bad Science*, REASON: HIT & RUN BLOG (Sep. 29, 2016 10:03 am), <http://reason.com/blog/2016/09/29/the-justice-department-wont-stop-going-t>.

⁴⁷ PCAST REPORT, *supra* note 2, at 6.

Within months of the release of the *NAS Report*, U.S. Supreme Court Justice Antonin Scalia wrote—citing specifically to the report—that “[f]orensic evidence is not uniquely immune from the risk of manipulation . . . A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution.”⁴⁸

The U.S. Court of Appeals for the Ninth Circuit Judge Alex Kozinski criticized the reliability problems in forensic science in his law review article *Criminal Law 2.0*.⁴⁹ Former federal district judge Nancy Gertner also questioned the reliability of several disciplines—including handwriting, ballistics, and arson investigation analyses—in court opinions,⁵⁰ noting that “when liberty hangs in the balance—and, in the case of the defendants facing the death penalty, life itself—the standards should be higher . . . than [those that] have been imposed across the country.”⁵¹ These concerns also place greater pressure on judges to act as “better gatekeepers” regarding the admission of flawed forensic science evidence.⁵²

IV. Evaluating Forensic Science in Oklahoma

Contrary to popular public perception that forensic science is generally reliable and accurate, the central question of the *NAS Report* was “whether—and to what extent—there is *science* in any given forensic science discipline.”⁵³ Thus, the *NAS Report* recommended a reframing of the legal inquiry to include consideration of two foundational issues:

- 1) The extent to which a particular forensic discipline is founded on a reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings; and
- 2) The extent to which practitioners in a particular forensic discipline rely on human interpretation that could be tainted by error, the threat of bias, or the absence of sound operational procedures and robust performance standards.⁵⁴

This framing led the NAS committee to identify several key areas and benchmarks for improving states’ forensic science practices. They are: 1) lack of independence, 2) fragmentation and inconsistent practices, 3) lack of standardized regulations and terminology, which can lead experts to overstate the reliability of evidence, and 4) lack of research into error rates. The following subsections describe these areas of concern—which remain (even seven years later) the most current field standards—and, where applicable, measure Oklahoma’s existing practices against them.

A. Lack of Independence of Public Forensic Laboratories

One of the most troubling areas of forensic science, particularly with respect to the death penalty, is the use of unscientific, mistaken, or even fraudulent forensic testing and evidence. The power of forensic science is corrupted when forensic experts inappropriately—whether intentionally or inadvertently—testify beyond what has been scientifically supported by empirical evidence, and when they pronounce a “match” that implicates a defendant.

⁴⁸ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 318 (2009).

⁴⁹ Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iv-vi (2015).

⁵⁰ See, e.g., *United States v. Hines*, 55 F. Supp. 2d 62 (D. Mass. 1999); *United States v. Hebshie*, 754 F. Supp. 2d 89, 114-15, 119 (D. Mass. 2010); *United States v. Green*, 405 F. Supp. 2d 104, 107-08 (D. Mass. 2003).

⁵¹ *Green*, 405 F. Supp. at 109.

⁵² Gary Fields, *White House Advisory Council Report Is Critical of Forensics Used in Criminal Trials*, WALL ST. J. (Sept. 20, 2016), <http://www.wsj.com/articles/white-house-advisory-council-releases-report-critical-of-forensics-used-in-criminal-trials-1474394743>.

⁵³ NAS REPORT, *supra* note 7, at 9 (emphasis in original).

⁵⁴ *Id.*

For example, the *NAS Report* found that experts sometimes testified that their conclusions were “100 percent certain” or had an “essentially zero” error rate, which is scientifically indefensible.⁵⁵ Such compelling testimony, particularly when it comes from an individual who is ostensibly a “scientific expert,” can determine the outcome of a case. In capital cases, such testimony may determine whether someone lives or dies. Thus, a critical safeguard is the independence of forensic laboratories. Even when labs are well-funded and accredited, equipment is up-to-date, and the procedures and training are standardized, error is more likely if lab personnel feel pressure to deliver results for the prosecution.

The *NAS Report* emphasized that independence is a cornerstone of forensic science, recommending that forensic experts work “in a scientific setting as opposed to a law enforcement setting” and that laboratories operate independently—or at the very least, autonomously—of the administrative control of law enforcement.⁵⁶ Moreover, the report unequivocally states that federal funds should be allocated to state and local jurisdictions “for the purpose of removing all public forensic laboratories and facilities from the administrative control of law enforcement agencies or prosecutors’ offices.”⁵⁷

1. Forensic Laboratories & Independence Nationwide

Since the *NAS Report*’s release in 2009, many jurisdictions have uncovered serious and systemic issues of evidence mishandling and misreporting.⁵⁸ In the last decade, dozens of crime labs have had high-profile scandals and thousands of cases have been retried, reviewed, or reversed.⁵⁹ Indeed, the National Registry of Exonerations has cited false or misleading forensic evidence as a leading cause of wrongful convictions.⁶⁰

In 2013, for example, the crime lab run by the St. Paul, Minnesota police department suspended its drug analysis and fingerprint examination after public defenders discovered troubling problems upon visiting the lab.⁶¹ The lab, described as “an old-fashioned ‘cop shop,’” was operated by a police sergeant with no expertise in science.⁶² Lab analysts used Wikipedia as a reference for their technical work, and “in their lab reports referred to ‘white junk’ clogging an instrument.”⁶³ An independent review revealed “dirty equipment, a lack of standard operating procedures, faulty testing techniques, illegible reports, and a woeful ignorance of basic scientific principles.”⁶⁴ Despite these major flaws, the “experts” running the lab routinely testified in court for the prosecution and their testimony was used to support convictions in at least 1,700 identified cases.⁶⁵

In New York, the police crime lab in Nassau County was shut down in 2011 after it became known that the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), a private accrediting organization, had issued a report detailing serious issues with the lab, particularly in its drug

⁵⁵ PCAST REPORT, *supra* note 2, at 3.

⁵⁶ NAS REPORT, *supra* note 7, at 24.

⁵⁷ *Id.*

⁵⁸ See PCAST REPORT, *supra* note 2, at 33–34.

⁵⁹ Katie Worth, *Crime Lab Scandals the Focus of New DOJ Plan*, PBS FRONTLINE (Dec. 8, 2013), <http://www.pbs.org/wgbh/frontline/article/crime-lab-scandals-the-focus-of-new-doj-plan/>.

⁶⁰ Nat’l Registry of Exonerations, % Exonerations by Contributing Factor, LAW.UMICH.EDU, <http://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> (last visited Sept. 9, 2016) (noting the leading contributing factors in the 1,879 known exonerations to date).

⁶¹ Mark Hansen, *Crime labs under the microscope after a string of shoddy, suspect and fraudulent results*, ABA JOURNAL (Sept. 1, 2013), http://www.abajournal.com/magazine/article/crime_labs_under_the_microscope_after_a_string_of_shoddy_suspect_and_fraud/.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Worth, *supra* note 59.

chemistry and latent print analysis.⁶⁶ Both law enforcement and ASCLD/LAB had failed to notify the district attorney's office or county officials about the report.⁶⁷ An investigation conducted by the state inspector general found "weak leadership, a dysfunctional quality management system, inconsistently trained and qualified analysts, and outdated and inconsistent testing procedures."⁶⁸

In Massachusetts, a chemist at a state-run, unaccredited lab was arrested in 2012 for falsifying evidence.⁶⁹ The state is still struggling to review cases involving analyst Annie Dookhan; four years after her arrest, the state had reviewed less than 1 percent of the 24,000 cases she may have tampered with.⁷⁰ Dookhan was valued for her speed; she routinely tested 500 drug samples per month—in contrast, her peers averaged between 50 to 150 a month.⁷¹ Dookhan regularly failed to test drug samples, tampered with samples, reported false positives, forged signatures, and lied about her credentials while testifying.⁷² The lab has since been closed, and Dookhan pled guilty in 2013 to charges related to evidence tampering and was sentenced to three to five years in prison.⁷³

In 2014, the Massachusetts Inspector General published a lengthy report about Dookhan's lab.⁷⁴ It noted that the *NAS Report* had suggested that public forensic science labs should be "independent of or autonomous within" law enforcement agencies.⁷⁵ The Inspector General recommended that the Massachusetts State Police (MSP) was the appropriate agency to take on the now-closed lab's testing.⁷⁶ The report emphasized that the MSP has the highest level of accreditation (ASCLD/LAB accreditation) and determined that the MSP Crime Lab Drug Unit is "autonomous" within the MSP.⁷⁷ The *NAS Report* recommends that when a lab's independence is not feasible, its autonomy should be demonstrated before a lab is accredited.⁷⁸

The push for independence of laboratories is in part motivated by the specter of bias associated with crime laboratories embedded in law enforcement agencies and with analysts working often exclusively at the request of prosecutors.⁷⁹ The *PCAST Report* explains the potential for bias that can be particularly problematic in such settings:

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Abby Haglage, *Chemist May Have Tainted 24,000 Court Cases*, THE DAILY BEAST (Jun. 16, 2016), <http://www.thedailybeast.com/articles/2016/06/17/chemist-may-have-tainted-24-000-court-cases.html>; OFFICE OF THE INSPECTOR GEN., COMMONWEALTH OF MASS., INVESTIGATION OF THE DRUG LAB. AT THE WILLIAM A. HINTON STATE LAB. INST. 2002-2014, 1 (Mar. 4, 2014) [*hereinafter* MASS. OIG REPORT].

⁷⁰ See Haglage, *supra* note 69 (quoting one legal advocate as stating, "Just a ridiculous comment on the Commonwealth of Massachusetts to solve this crisis. We're just now getting a list of cases, five years after she was caught.").

⁷¹ *Id.*

⁷² *Id.* ("Dookhan would regularly grab a pile of 15-20 drug samples she was responsible for, test only five of them, then 'list them all as positive.'").

⁷³ John R. Ellement, *Annie Dookhan, key figure in state lab scandal, released from prison*, BOSTON GLOBE (Apr. 12, 2016), <https://www.bostonglobe.com/metro/2016/04/12/annie-dookhan-key-figure-state-lab-scandal-released-from-prison/lp7q98UmWKucv4F7O3R4DI/story.html>.

⁷⁴ MASS. OIG REPORT, *supra* note 69.

⁷⁵ *Id.* at 118.

⁷⁶ See *id.* at 117-18 (noting that the unaccredited lab was run by the Department of Public Health, not a law enforcement agency, and had failed "to provide either the necessary resources for accreditation, training and professional development or the appropriate level of management and oversight that the Drug Lab so desperately needed.").

⁷⁷ *Id.*

⁷⁸ *Id.* at 118 (noting that the "MSP Crime Lab (including the forensic drug unit) operates under its own budget, which is controlled by the Laboratory Director. Furthermore, the MSP Crime Lab Drug Unit sets its own priorities for casework and budgetary matters without undue influence from MSP management.").

⁷⁹ NAS REPORT, *supra* note 7, at xx; see also Matthew Shaer, *The False Promise of DNA Testing*, THE ATLANTIC (Jun. 2016), <http://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747/>; PCAST Report, *supra* note 2, at 49.

Cognitive bias refers to ways in which human perceptions and judgments can be shaped by factors other than those relevant to the decision at hand. It includes “contextual bias,” where individuals are influenced by irrelevant background information; “confirmation bias,” where individuals interpret information, or look for new evidence, in a way that conforms to their pre-existing beliefs or assumptions; and “avoidance of cognitive dissonance,” where individuals are reluctant to accept new information that is inconsistent with their tentative conclusion. The biomedical science community, for example, goes to great lengths to minimize cognitive bias by employing strict protocols, such as double-blinding in clinical trials. Studies have demonstrated that cognitive bias may be a serious issue in forensic science.⁸⁰

In practice, forensic disciplines that rely on subjective methods are particularly vulnerable to bias.⁸¹ Confirmation bias can occur, for example, when a lab technician analyzes evidence in a way that tends to confirm pre-existing knowledge about the evidence—such as information provided to the lab technician by a police officer who has handled the evidence.

In addition, funding for numerous forensic labs across the country is dependent on the outcomes of their cases. “In at least 14 states, state law requires that public crime labs be funded in part through court-assessed fees payable by the defendant upon conviction.”⁸² North Carolina law requires a criminal defendant, upon conviction, to pay a \$600 fee that goes to state and local law enforcement agencies operating crime labs.⁸³ Such systems create perverse incentives whereby crime labs reap financial benefits from successful prosecutions.

Although independence is a critical piece of ensuring reliable forensic science evidence, it is not a panacea; it must be accompanied by accreditation, certification, the establishment of quality control and quality assurance systems, and meaningful oversight. The New York City medical examiner’s office, for example, which operates independently of the police,⁸⁴ announced in January 2013 that it was reviewing more than 800 rape cases involving an analyst who resigned in 2011 due to mishandling of evidence.⁸⁵

In addition to a forensic lab’s accreditation, its independence safeguards the reliability of evidence it examines. A 2010 independent audit of the North Carolina State Bureau of Investigation’s crime lab⁸⁶ discovered that lab analysts “had systematically withheld or distorted evidence in more than 230 cases over a 16-year period, including three cases that resulted in executions.”⁸⁷ The lab had misrepresented blood test results and overstated results in a way that favored the prosecution.⁸⁸ Despite these systemic problems, the lab had been certified by ASCLD/LAB since 1988 and had been re-inspected five times during the 16-year period.⁸⁹ It was later revealed that the ASCLD/LAB accreditation staff included employees of the lab, who had been employed at the lab during the period of misreporting.⁹⁰

⁸⁰ See PCAST REPORT, *supra* note 2, at 51 (“In the forensic feature-comparison disciplines, cognitive bias includes the phenomena that, in certain settings, humans may tend naturally to focus on similarities between samples and discount differences and may also be influenced by extraneous information and external pressures about a case.”)

⁸¹ See PCAST REPORT, *supra* note 2, at 62.

⁸² Roger Koppl & Meghan Sacks, *The Criminal Justice System Creates Incentives for False Convictions*, 32 CRIM. J. ETHICS 126, 128 (2013).

⁸³ NC. G.S. 7A-504(a)(7) & (8) (subsection (8)(a) further provides that, upon conviction, a \$600 fee shall be paid to any private hospital contracting with a prosecutor’s office).

⁸⁴ J. David Goodman, *New York’s Chief Medical Examiner Seeks to Lead in DNA Research*, N.Y. TIMES (Feb. 9, 2013), <http://www.nytimes.com/2013/02/10/nyregion/new-yorks-chief-medical-examiner-seeks-to-lead-in-dna-research.html>.

⁸⁵ Hansen, *supra* note 61.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

A crime lab's independence must be meaningful. In 2014, Houston, Texas closed its crime lab, which had been previously overseen by the police department, and opened a new, independent agency, the Houston Forensic Science Center.⁹¹ The closure of the original crime lab was prompted by recurring problems, including “untested rape kits, destroyed DNA, faked drug evidence, inaccurate fingerprinting, a firearm forensics backlog, contaminated blood tests, [and] an indicted lab technician,” among other issues.⁹² The center is “independent from law enforcement agencies, prosecutors, elected officials, and citizen groups, any of whom could have an incentive to attempt to influence the analysis of evidence in a particular case.”⁹³ The center's independence has been hailed as “revolutionary in the field,”⁹⁴ and is overseen by a nine-member board of directors appointed by the mayor and confirmed by the city council.⁹⁵

Among the center's innovations is an “eDiscovery” website that posts lab policies, procedures, and corrective action reports.⁹⁶ The center has also established the first program in the nation to incorporate blind controls into its lab work flow.⁹⁷ In practice, however, the center still experiences challenges to its independence. Due to fiscal constraints, the center still conducts its lab work inside the Houston police headquarters, and due to separation agreement with the police department, 20 of its 26 Crime Scene Unit employees are city police officers.⁹⁸ An internal audit released in July 2016 found that the staff at the center's Crime Scene Unit lacked vital independence, noting that it “is critical that the evidence speak for itself. If the involved officer is there telling colleagues ‘what happened’ it can be very difficult to see beyond those words.”⁹⁹ The audit underscores how independence can be undermined in practice.

2. Public Forensic Laboratory Independence in Oklahoma

Contrary to the *NAS Report's* recommendation that public forensic laboratories that support criminal investigations and prosecutions operate independent of law enforcement, the majority of such labs in the United States are administered by law enforcement agencies.¹⁰⁰ This is true for the publicly funded forensic science laboratories that are involved in the investigation of capital crimes in Oklahoma.¹⁰¹ The Oklahoma Medical Examiner's Office, however, which is responsible for death investigation (i.e., determining cause and manner of death, reviewing medical records, issuing death certificates, conducting autopsies, etc.), is independent of and not directly administered by law enforcement.¹⁰²

⁹¹ Shaer, *supra* note 79.

⁹² Editorial Board, *Improving Evidence*, HOUSTON CHRONICLE (Mar. 22, 2014), <http://www.chron.com/opinion/editorials/article/Improving-evidence-3539163.php>; see also *FAQ: Independence and Governance*, HOUSTON FORENSIC SCI. CTR., [HTTP://WWW.HOUSTONFORENSICSOURCE.ORG/FAQ.PHP](http://www.houstonforensicscience.org/FAQ.PHP) (last accessed July 4, 2016) (noting that the Houston Police Department had been plagued by recurring problems with its forensic divisions, even prompting the DNA operations to be shut down and rebuilt).

⁹³ See *FAQ: Houston Forensic Science Center: Past, Present, and Future*, HOUSTON FORENSIC SCI. CTR., [HTTP://WWW.HOUSTONFORENSICSOURCE.ORG/FAQ.PHP](http://www.houstonforensicscience.org/FAQ.PHP) (last accessed Aug. 16, 2016). But see Lise Olsen & James Pinkerton, *Internal audit finds Houston crime scene technicians lack independence and proper training*, HOUSTON CHRONICLE (July 28, 2016), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Internal-audit-finds-Houston-crime-scene-8536872.php> (reporting on an internal audit that demonstrates lack of independence and noting that although the agency is “independent,” it still conducts its lab work in the police department and 20 of its 26 employees in its Crime Scene Unit are city police officers).

⁹⁴ Anita Hassan, *Lured Back to forensic science, new lab director ready for challenge in Houston*, HOUSTON CHRONICLE (Sept. 26, 2014), <http://www.houstonchronicle.com/news/houston-texas/houston/article/Lured-back-to-forensic-science-new-lab-director-3783784.php>.

⁹⁵ *About: Leadership*, HOUSTON FORENSIC SCI. CTR., [HTTP://WWW.HOUSTONFORENSICSOURCE.ORG/ABOUT-US.PHP](http://www.houstonforensicscience.org/ABOUT-US.PHP) (last accessed July 4, 2016).

⁹⁶ Press Release, Houston Forensic Sci. Ctr., HFSC Builds Website to Help Attorneys Easily Access Documents for Trial (July 6, 2016), <http://www.houstonforensicscience.org/news/377d139bZYOGcovery.pdf>.

⁹⁷ Press Release, Houston Forensic Sci. Ctr., HFSC Adds Blind Test Samples Into Workflow, Leading the Way Nationally (Sept. 14, 2015) <http://www.houstonforensicscience.org/news/376be9e2.pdf>.

⁹⁸ Olsen, *supra* note 93.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 183.

¹⁰¹ NAS REPORT, *supra* note 7, at xx.

¹⁰² See OKLA. STAT. tit. 63, § 953 (2016).

Perhaps no case better illustrates the importance of independent forensic analysis in Oklahoma than that of chemist Joyce Gilchrist, who, as mentioned earlier, was fired in 2001 from the Oklahoma City Police Department's crime lab after working on thousands of police investigations and testifying in nearly two dozen capital cases, including at least 41 that resulted in executions.¹⁰³

Gilchrist was involved in the case of Curtis McCarty, who was exonerated from death row in 2007.¹⁰⁴ Gilchrist had falsely testified that hairs found at the crime scene could have come from McCarty and placed him at the crime scene.¹⁰⁵ She further testified that sperm found on the victim's body was of the same blood type as McCarty.¹⁰⁶ In 2000, when Gilchrist was under investigation for fraudulent testimony in other cases, it was discovered that her original bench notes had excluded McCarty as a potential donor of the hair evidence found at the crime scene.¹⁰⁷ DNA testing in post-conviction proceedings also excluded McCarty as the source of the sperm found on the victim's body.¹⁰⁸ The hair evidence, however, could not be retested, because Gilchrist maintained it had been lost.¹⁰⁹

In reversing McCarty's sentence and remanding the case for a new trial, the Oklahoma Court of Criminal Appeals (OCCA) was particularly alarmed that Gilchrist had admitted during her testimony that "forensic science techniques had not advanced to the point where a person could be positively identified through blood types, secretor status, or hair examination."¹¹⁰ Despite her admission, Gilchrist had testified that forensic evidence indicated McCarty "was in fact there" during the crime.¹¹¹ The OCCA also noted that Gilchrist was found to have violated the ethical code of the Southwestern Association of Forensic Scientists, which issued a statement about Gilchrist's misconduct.¹¹² The association also remarked upon the pressure on Gilchrist from the prosecution, emphasizing that "in our system of jurisprudence, undue pressure can be placed upon the forensic scientist to offer personal opinions beyond the scope of scientific capabilities."¹¹³

Gilchrist tested evidence for the Oklahoma City Police Department for over two decades before she was suspected of wrongdoing.¹¹⁴ In 2004, Jeffrey Todd Pierce was exonerated when his defense team requested DNA testing of evidence that supported his 1986 rape conviction.¹¹⁵ Chemists subsequently pulled the evidence in Pierce's case and learned that Gilchrist's testimony did not match test results. An FBI investigation subsequently uncovered evidence that Gilchrist had "errors in identification" and the FBI recommended a review of all of her cases that resulted in a conviction.¹¹⁶

Experts in forensic science have indicated that independent laboratories can reduce the likelihood of wrongful convictions due to false testimony by forensic analysts. Independent labs can and should foster a culture of transparency, expectations of continuous review, and a duty to correct and notify. They are also better poised to

¹⁰³ David Kohn, *Under the Microscope: Forensic Scientist Accused of Mishandling Case*, CBS NEWS, May 8, 2001, <http://www.cbsnews.com/news/under-the-microscope-08-05-2001/>.

¹⁰⁴ See The Nat'l Registry of Exonerations, *Curtis McCarty*, LAW.UMICH.EDU, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3418> (last visited Oct. 3, 2016).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *McCarty v. State*, 765 P.2d 1215, 1218 (Okla. Crim. App. 1988).

¹¹¹ *Id.*

¹¹² *Id.* at 1219.

¹¹³ *Id.* (internal citations omitted).

¹¹⁴ Brewer, *supra* note 4.

¹¹⁵ The Nat'l Registry of Exonerations, *Jeffrey Todd Pierce*, LAW.UMICH.EDU, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3335> (last visited Sept. 9, 2016).

¹¹⁶ Kohn, *supra* note 103.

mitigate both actual and perceived bias.

B. Fragmentation and Inconsistent Practices

Beyond independence, the *NAS Report* repeatedly identifies “fragmentation and inconsistent practices” as a problem across all forensic science disciplines.¹¹⁷ The report also finds that the vast majority of forensic science disciplines do not possess a basis in science and are unreliable: “With the exception of nuclear DNA analysis . . . *no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.*”¹¹⁸

The reliability of bite mark evidence, for example, has been severely undermined in recent years. In early 2016, the Texas Forensic Science Commission became the first to recommend the suspension of using bite mark evidence in courtrooms until scientific criteria for the discipline are developed.¹¹⁹ In late May 2016, the California Supreme Court reversed a prisoner’s murder conviction, which had been based largely on specious bite mark testimony by a forensic dentist who later recanted.¹²⁰ California and Texas are currently the only states with statutes that specifically permit a prisoner to challenge a criminal conviction based on changed or new forensic science.¹²¹ As such, “the worrisome prospect [exists] that the quality of evidence presented in court, and its interpretation, can vary unpredictably according to jurisdiction.”¹²² This sort of inconsistency—both in the reliability of a forensic method and how states approach it—is of special concern to the litigation of death penalty cases, because of the finality of the sentence.

1. Fragmentation and Inconsistent Practices in Oklahoma

The use of unscientific forensic methods and testimony has impacted the reliability of evidence utilized to support convictions, including capital ones, in Oklahoma. For example, bite mark evidence helped lead to the conviction and death sentence of Gregory Wilhoit, who was released from Oklahoma’s death row in 1993.¹²³ Wilhoit’s conviction rested on the testimony of two forensic dental experts who attested that a bite mark on the breast of the victim—Wilhoit’s wife, from whom he had been recently separated—matched Wilhoit’s teeth.¹²⁴ On appeal to the OCCA in 1988, Wilhoit presented new evidence from 11 forensic odontologists who concluded that the bite mark on the victim did not match Wilhoit’s teeth.¹²⁵ In 1991, Wilhoit’s conviction was reversed by the OCCA and remanded for retrial based on ineffective assistance of trial counsel.¹²⁶ At Wilhoit’s retrial, a Tulsa County judge found that, without the bite mark evidence, the prosecution did not have enough evidence against him to warrant a trial.¹²⁷

¹¹⁷ *Id.* at 6.

¹¹⁸ *Id.* (emphasis added).

¹¹⁹ Brandi Grissom, *Texas Science Commission is first in the U.S. to recommend moratorium on bite mark evidence*, TRAIL BLAZERS BLOG, (Feb. 12, 2016), <http://trailblazersblog.dallasnews.com/2016/02/texas-science-commission-is-first-in-the-u-s-to-recommend-moratorium-on-bite-mark-evidence.html/>.

¹²⁰ Jordan Smith, *California Supreme Court Overturns Murder Conviction Based on Flawed Bite-Mark Evidence*, THE INTERCEPT (May 27, 2016), <https://theintercept.com/2016/05/27/california-supreme-court-overturns-bill-richardss-murder-conviction-based-on-flawed-bite-mark-evidence/>.

¹²¹ *Id.*; see also TEX. CODE. CRIM. PRO. art. 11.073(b) (2013); CAL. PEN. CODE § 1473 (2016).

¹²² NAS REPORT, *supra* note 7, at 16.

¹²³ The Nat’l Registry of Exonerations, *Gregory Wilhoit*, LAW.UMICH.EDU, <https://www.lawumich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3742> (last visited July 4, 2016).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

C. Lack of Standardized Regulations and Expert Misstatements

The quality and accuracy of forensic evidence varies significantly across disciplines in part because, as the *NAS Report* details, there is a troubling lack of “adequate training and continuing education, rigorous mandatory certification and accreditation programs, adherence to robust performance standards, and effective oversight . . . [which] obviously pose a continuing and serious threat to the quality and credibility of forensic science practice.”¹²⁸ Thus, standardizing forensic science has become a hallmark of reliability.

Standardization applies to many different aspects of the forensic sciences. This section is concerned with two areas: 1) the standardization of procedures and guidelines—through accreditation and certification—to ensure that results within each forensic discipline can be reliably reproduced;¹²⁹ and 2) the standardization of terminology for reports and testimony, such that experts are not misstating or overstating the reliability of forensic evidence.¹³⁰

1. Accreditation and Certification Nationwide

Because the interpretation of forensic evidence is not always validated by scientific principles, federal entities like the NAS and the National Commission on Forensic Science (NCFS) have recently begun advancing standards, frameworks, and “best practices” to increase the reliability of the forensic disciplines.¹³¹ Accomplishing such an objective requires coordination and participation among criminal justice and forensic science stakeholders across federal, state, and local jurisdictions.¹³²

Two techniques for increasing reliability are accreditation and certification. Accreditation is a set of regulations that apply to a laboratory, while “certification” applies to an individual practitioner.¹³³ Simply put, “individuals are certified and laboratories are accredited.”¹³⁴

In the long term, accreditation and certification help ensure that labs and practitioners are held to rigorous standards, while also saving forensic laboratories precious resources, by helping to identify reliability issues before there is a systemic problem, which in turn can prevent and reduce litigation costs, including challenges to forensic evidence at trial and after conviction.¹³⁵

a. Accreditation

A forensic laboratory can demonstrate and safeguard its adherence to a recognized set of quality standards and practices by ensuring that it is accredited.¹³⁶ Accreditation requires independent oversight, helping ensure that a laboratory’s standards and practices are consistently maintained and not merely cosmetic.¹³⁷ The *NAS Report* emphasized the critical need for accreditation, stating:

¹²⁸ See NAS REPORT, *supra* note 7, at 6.

¹²⁹ See *id.* at 25 (discussing Recommendation 7, which calls for mandatory accreditation of laboratories and mandatory certification of forensic science professionals).

¹³⁰ *Id.* at 21-22 (discussing Recommendation 2, which calls for standardization of terminology for use in reports and testimony and the establishment of model laboratory reports). The Organization for Scientific Area Committees for Forensic Science (OSAC)—an entity established in coordination with the forensic science community by the U.S. Department of Commerce, National Institute of Standards and Technology (NIST)—is working to create standards and guidelines for the forensic science community “to improve quality and consistency of work.” However, that work product is not yet complete. See *OSAC News*, ORG. OF SCIENTIFIC AREA COMMS. FOR FORENSIC SCI., <https://www.nist.gov/forensics/organization-scientific-area-committees-forensic-science> (last visited Sept. 9, 2016).

¹³¹ See generally NAS REPORT, *supra* note 7; *Work Products*, NAT’L COMM’N ON FORENSIC SCI., <https://www.justice.gov/ncfs/work-products> (last visited Sept. 9, 2016).

¹³² See NAT’L SCI. AND TECH. COUNCIL COMM. ON SCI., SUBCOMM. ON FORENSIC SCI., *STRENGTHENING FORENSIC SCIENCE* (2014), at 7.

¹³³ NAS REPORT, *supra* note 7, at 6.

¹³⁴ OKLA. JUSTICE COMM’N, OKLAHOMA JUSTICE COMMISSION REPORT TO THE OKLAHOMA BAR ASSOCIATION (Feb. 2015), at 20, http://www.okbar.org/Portals/15/PDF/2015/Commission_Final_Report.pdf [hereinafter OKLA. JUSTICE COMM’N].

¹³⁵ Frank Fitzpatrick & Detective Lieutenant Kenneth Martin, *The Need for Mandatory Accreditation and Certification*, THE POLICE CHIEF (Sept. 2009), http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1888&issue_id=92009.

¹³⁶ See NAS REPORT, *supra* note 7, at 195.

¹³⁷ *Id.*

Oversight must come from outside the participating laboratory to ensure that standards are not self-serving and superficial and to remove the option of taking shortcuts when other demands compete with quality assurance. In addition, accreditation serves as a mechanism to strengthen professional community ties, transmit best practices, and expose laboratory employees directly to the perspectives and expectations of other leaders in the profession.¹³⁸

Accreditation is most often regulated by private agencies such as ASCLD/LAB,¹³⁹ which provide important oversight of forensic labs. Last year, for instance, an accrediting body suspended DNA testing at the District of Columbia's Department of Forensic Sciences after two audits found the lab's procedures to be inadequate.¹⁴⁰ Prosecutors ordered the review of nearly 200 cases after serious errors in the lab's DNA analyses were discovered.¹⁴¹

Accreditation remains largely voluntary in the majority of states.¹⁴² According to the latest available census, 17 percent of publicly funded labs in the U.S. are not accredited.¹⁴³ In December 2015, the DOJ announced that by 2020, DOJ prosecutors will only use evidence from accredited crime laboratories "when practicable."¹⁴⁴

b. Certification

Certification is conferred by an independent body and demonstrates that an individual possesses the required skills and specialized knowledge needed to perform his or her respective duties.¹⁴⁵ The NAS recommends that all forensic science practitioners be certified.¹⁴⁶ Achieving the goal of universal *certification* is, by the *NAS Report's* own admission, more daunting than the universal *accreditation* of forensic laboratories.¹⁴⁷ In many instances, standards and practices for fields of forensic science have yet to be established.¹⁴⁸ Certification may also be cost prohibitive or otherwise impractical, since many forensic science systems and professionals are already overburdened and under-resourced.¹⁴⁹

Professional certification of individual forensic scientists complements laboratory accreditation by ensuring greater reliability in evidence involved in criminal investigations and prosecutions. Certification, however, remains uncommon among forensic science practitioners.¹⁵⁰ The *SoFS Report* estimates that only 16 to 25

¹³⁸ *Id.*

¹³⁹ See, e.g., AMERICAN SOCIETY OF CRIME LAB. DIRECTORS/LAB. ACCREDITATION BD., <http://www.ascl-d-lab.org/>.

¹⁴⁰ Keith L. Alexander & Julie Zauzmer, *Director of D.C.'s embattled DNA lab resigns after suspension of testing*, THE WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/local/director-of-dcs-embattled-dna-lab-resigns-following-suspension-of-testing/2015/04/30/1c619520-ef80-11e4-8666-a1d756d0218e_story.html.

¹⁴¹ *Id.*

¹⁴² NAS REPORT, *supra* note 7, at 48.

¹⁴³ U.S. DEPT OF JUSTICE OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, NCJ 238252, CENSUS OF PUBLICLY FUNDED FORENSIC CRIME LABORATORIES, 2009 (Aug. 2012), <http://www.bjs.gov/content/pub/pdf/cpfcl09.pdf>.

¹⁴⁴ Press Release, Dept. of Justice Office of Pub. Affairs, Justice Dept. Announces New Accreditation Policies to Advance Forensic Sci. (Dec. 7, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-new-accreditation-policies-advance-forensic-science>.

¹⁴⁵ SOFS REPORT, *supra* note 20, at 14.

¹⁴⁶ *Id.* at 11.

¹⁴⁷ See e.g., *id.* at 6-7, 13, 16-17 (acknowledging that forensic science service providers are extremely diverse and would require a wide range of tests, potentially new standards and best practices to create, and would have financial impacts that are difficult to estimate).

¹⁴⁸ See generally *id.* at 6-16 ("An overarching challenge to achieving the NAS recommendations with regard to medicolegal death investigations is that there is no single recognized set of performance standards or best practices for ME/C systems, and, as noted by the NAS, there do not currently exist adequate incentives to create and promulgate such a set.").

¹⁴⁹ See NAT'L FORENSIC SCI. TECH. CTR. & BUREAU OF JUSTICE STATISTICS, FORENSIC SCIENCE SIMPLIFIED, <http://www.forensicsciencesimplified.org/csi/how.html> (For example, there is no certification requirement or standard that must be met to perform crime scene investigation in the U.S.).

¹⁵⁰ See SOFS REPORT, *supra* note 20, at 10-11 ("The number of professionally certified forensic science practitioners is small compared to the estimated number of forensic scientists employed by traditional forensic science service providers.").

percent of forensic science practitioners in the United States are certified.¹⁵¹ The range drops to approximately 6 to 9 percent when digital evidence practitioners are excluded from the sample.¹⁵² Finally, certification for medicolegal personnel is uncommon at all levels—federal, state, and local—and requirements are inconsistent.¹⁵³

2. Accreditation and Certification in Oklahoma

The *NAS Report* noted that only a small handful of states, including Oklahoma, require accreditation.¹⁵⁴ Oklahoma is one of only nine states to have statutes mandating accreditation for at least some of the state's forensic science labs.¹⁵⁵

a. Oklahoma Crime Laboratories

In Oklahoma, forensic laboratories and the medical examiner's office are regulated by statute.¹⁵⁶ Beginning on July 1, 2005, Oklahoma law has mandated that publicly-funded forensic laboratories that examine “physical evidence in criminal matters and provides opinion testimony in a court of law” must be accredited by a “nationally recognized organization that has developed and maintained an independent system, based upon” the international standard used by accreditation agencies and recommended by NAS.¹⁵⁷ Thus, forensic analysis in Oklahoma—with some exceptions, noted below—must be performed at an accredited lab in order to be admitted in court by the State.¹⁵⁸

There are currently six accredited laboratories in Oklahoma that handle forensic evidence (excluding latent print and digital evidence) in homicide investigations. Those labs are 1) the Oklahoma City Police Department Laboratory Services Division in Oklahoma County;¹⁵⁹ 2) the Tulsa Police Department Forensic Laboratory in Tulsa County;¹⁶⁰ and 3) four laboratories administered by the Oklahoma State Bureau of Investigation (OSBI). The four OSBI labs are OSBI's Forensic Science Center in Edmond,¹⁶¹ Northeastern Regional Lab in Tahlequah,¹⁶² Northwest Regional Laboratory in Enid,¹⁶³ and the Eastern Regional Laboratory in McAlester.¹⁶⁴ Oklahoma law, however, exempts a number of significant and commonly-used forensic science disciplines from accreditation, including: “[b]reath testing for alcohol; [f]ield testing, crime scene processing, crime scene evidence collection, searches, examinations or enhancements of digital evidence, and crime scene reconstruction; [and]

¹⁵¹ *Id.* at 11.

¹⁵² *Id.*

¹⁵³ NAS REPORT, *supra* note 7, at 14 -15.

¹⁵⁴ NAS REPORT, *supra* note 7, at 193-94.

¹⁵⁵ This figure is current as of January 2011. The other states are California, Hawaii, Indiana, Maryland, Missouri, Nebraska, New York, and Texas. Only laboratories that conduct DNA analysis are required to be accredited in California, Hawaii, Indiana, and Nebraska. *See* SOFS REPORT, *supra* note 20, at 5, n.8.

¹⁵⁶ *See* OKLA. STAT. tit. 74, §150.37; *see also* OKLA. STAT. tit. 63, § 933.

¹⁵⁷ *See* OKLA. STAT. tit. 74, §150.37; *see also* NAS REPORT, *supra* note 7; SOFS REPORT, *supra* note 20, at 21 (“ISO 17025 is an international standard published by the International Organization for Standardization (ISO) that specifies the general requirements for the competence to carry out tests and/or calibrations.”).

¹⁵⁸ *See* OKLA. STAT. tit. 74, §150.37(C) (“On or after July 1, 2005, testimony, results, reports, or evidence of forensics analysis produced on behalf of the prosecution in a criminal trial shall be done by an accredited forensic laboratory” with some exceptions, including: labs established after July 1, 2005; breath testing for alcohol; latent print identification performed by an IAI certified latent print examiner; and crime scene processing, evidence collection, digital evidence, and reconstruction).

¹⁵⁹ ASCLD/LAB Accreditation for Oklahoma City Police Department Laboratory Services Division, <http://www.asclcd-lab.org/cert/ALI-161-T.pdf>.

¹⁶⁰ ASCLD/LAB Accreditation for Tulsa Police Department Forensic Laboratory, <http://www.asclcd-lab.org/cert/ALI-167-T.pdf>.

¹⁶¹ ASCLD/LAB Accreditation for OSBI Forensic Science Center, <http://www.asclcd-lab.org/cert/ALI-200-T.pdf>.

¹⁶² ASCLD/LAB Accreditation for OSBI Northeastern Regional Laboratory, <http://www.asclcd-lab.org/cert/ALI-201-T.pdf>.

¹⁶³ ASCLD/LAB Accreditation for OSBI Northwest Regional Laboratory <http://www.asclcd-lab.org/cert/ALI-202-T.pdf>.

¹⁶⁴ ASCLD/LAB Accreditation for OSBI Eastern Regional Laboratory <http://www.asclcd-lab.org/cert/ALI-110-T.pdf>. On March 7, 2016, OSBI voluntarily withdrew its accreditation and permanently closed its Southwestern Regional Lab in Lawton due to a mold problem; presently, that laboratory only receives evidence. Phone interview (Jun. 23, 2016) (on file with author).

[l]atent print identification.”¹⁶⁵ The statute does require, however, that latent print examiners be certified by the International Association for Identification,¹⁶⁶ which is recognized by the *NAS Report* as one of a number of forensic societies and organizations.¹⁶⁷ The statute further exempts from accreditation requirements any forensic testing conducted prior to July 1, 2005—and thus, impacts those on death row and those already executed whose convictions prior to July 1, 2005 were based on forensic testing.¹⁶⁸

In 2013, the Oklahoma Justice Commission (Justice Commission) recommended that the legislature amend the statute governing accreditation to require that latent print and digital evidence examination be conducted in accredited laboratories by qualified examiners.¹⁶⁹ The Justice Commission cited the increasingly key roles of latent print and digital evidence in criminal investigations and prosecutions, as well as the fact that latent print examinations are used to identify one individual to the exclusion of others.¹⁷⁰ The Justice Commission explained:

[A] latent print examiner (one who compares known prints to prints recovered from crime scenes in order to determine if they are identifiable to a particular individual) working as a member of an accredited laboratory is held to a higher standard, whether he is certified by the International Association for Identification (IAI) or not.

...

A certified latent print examiner working independently or from a non-accredited laboratory is not required to adhere to any [accreditation] standards. He or she is simply required to have 80 hours of approved training, a minimum of two years full time experience in comparisons and identifications, comparisons of 15 latent prints achieving 12 without an erroneous identification, and passing a test once every five years, with no accountability in the intervening years. On the other hand, a latent print examiner operating within an accredited laboratory has mechanisms in place to provide excellent quality control and quality assurance practices and procedures to minimize misidentifications.

However, the Justice Commission did not address the other exemptions for accreditation in Oklahoma. This is in contrast with the *NAS Report*, which does not suggest exempting any disciplines from accreditation and instead notes the importance of accrediting all laboratories to ensure oversight from outside the lab, as well as to ensure quality assurance, transmit best practices, and expose lab employees to the expectations of other leaders in their profession.¹⁷¹

b. Oklahoma Office of the Chief Medical Examiner

The Oklahoma Office of the Chief Medical Examiner (OCME) has two offices: 1) a Central Office located in Oklahoma City, and 2) an Eastern Office located in Tulsa.¹⁷² Oklahoma law requires the Board of Medicolegal Investigations to appoint a Chief Medical Examiner, who “shall be a physician licensed to practice in Oklahoma and a Diplomate of the American Board of Pathology or the American Osteopathic Board of Pathology in

¹⁶⁵ See OKLA. STAT. tit. 74, §150.37 (C)(4). While there is no accreditation requirement for evidence collection, the Oklahoma Council on Law Enforcement Education and Training (CLEET), which is responsible for training law enforcement officers in the state, currently instructs officers in best practices for evidence collection. Phone interview with Jim Elliot, the criminalistics instructor with CLEET (May 3, 2016) (on file with author).

¹⁶⁶ See OKLA. STAT. tit. 74, §150.37.

¹⁶⁷ NAS REPORT, *supra* note 7, at 76-77 (“IAI was founded in 1915 and has 6,700 members worldwide. Its members tend to be involved at the ‘front end’ of the process—crime scene investigation, evidence collection, and evidence preservation. It operates certification programs in seven disciplines and publishes the Journal of Forensic Identification. The focus of its activities is pattern evidence—for example, fingerprint, footwear, tire track, questioned documents, forensic photography, and forensic art.”).

¹⁶⁸ See OKLA. STAT. tit. 74, §150.37(C)(2).

¹⁶⁹ OKLA. JUSTICE COMM’N, *supra* note 154, at 21.

¹⁷⁰ See *id.* at 21-22.

¹⁷¹ NAS REPORT, *supra* note 7, at 195.

¹⁷² *Staff & Board Members*, OKLA. OFFICE OF THE CHIEF MED. EXAM’R, https://www.ok.gov/ocme/Staff_&_Board_Members/index.html (last visited Aug. 15, 2016).

forensic pathology.”¹⁷⁵

The OCME Central Office in Oklahoma City houses toxicology (the study of poisons) and histology (study of human tissues, integral to the autopsy process) laboratories; these are not technically crime labs.¹⁷⁴ The toxicology lab, which is a forensic science laboratory, is required by Oklahoma law to be accredited by the American Board of Forensic Toxicology.¹⁷⁵

The OCME Eastern Office in Tulsa does not have a crime laboratory, other than an autopsy facility.¹⁷⁶ Oklahoma law does not explicitly state that autopsies must be performed by a medical doctor trained and certified in forensic pathology. The OCME, however, does define “Medical Examiner”—the person designated to carry out autopsies—as “a physician who is specially trained and certified in the field of forensic pathology.”¹⁷⁷

An April 2009 audit of the OCME by the National Association of Medical Examiners (NAME) resulted in the OCME’s loss of its voluntary accreditation.¹⁷⁸ NAME accreditation was named by the *NAS Report* as “the standard of quality in death investigation for medical examiner offices.”¹⁷⁹ The NAME audit cited deficiencies in both of OCME’s offices and highlighted inadequate and aging facilities and staffing shortages resulting from a chronic lack of funding.¹⁸⁰ OCME is currently attempting to regain NAME accreditation after receiving additional funding, hiring staff, and installing better equipment to address its case backlog; as recently as 2014, the agency had over 1,500 incomplete cases.¹⁸¹ OCME has recruited six additional forensic pathologists but needs at least five more to achieve reaccreditation without deficiency by 2018.¹⁸² It is unclear how many cases OCME has reviewed since it lost accreditation.

The Oklahoma Justice Commission Report (*Justice Commission Report*) recommended that the Oklahoma Legislature, Oklahoma Bar Association, and the District Attorneys Council all support the OCME in its efforts to regain national accreditation, emphasizing the need to secure additional pathologists to reach that standard.¹⁸⁵

3. Expert Exaggerations Regarding Accuracy of Forensic Science

A lack of consistent terminology among the forensic disciplines regarding what is considered a “match[]” [of] a specimen to a particular individual or other source”¹⁸⁴ raises the risk of potential misstating or overstating of testimony in criminal prosecutions. The *NAS Report* calls for standardization of terminology for use in reports

¹⁷⁵ OKLA. STAT. tit. 63, §954.

¹⁷⁴ *Id.*

¹⁷⁵ OKLA. STAT. tit. 74, § 150.57 (B)(6). The American Board of Forensic Toxicology (ABFT) has been accredited by the Forensic Specialties Accreditation Board (FSAB)—recognized in the *NAS Report*—since March 2006. *See* AM. BD. OF FORENSIC TOXICOLOGY, <http://www.abft.org/> (last visited Sept. 9, 2016); NAS REPORT, *supra* note 7, at 74-75.

¹⁷⁶ *Staff & Board Members*, *supra* note 172.

¹⁷⁷ *Pathology*, OKLA. OFFICE OF THE CHIEF MED. EXAM’R, <https://www.ok.gov/ocme/Pathology/> (last visited Oct. 6, 2016).

¹⁷⁸ BD. OF MEDICOLEGAL INVESTIGATIONS SUBCOMM. FOR ASSESSMENT AND REVITALIZATION, ASSESSMENT AND REVITALIZATION PLAN (Dec. 15, 2009), <https://assets.documentcloud.org/documents/31583/oklahoma-2009-state-assessment-and-revitalization-plan.pdf>.

¹⁷⁹ NAS REPORT, *supra* note 7, at 258.

¹⁸⁰ *Id.*

¹⁸¹ Rhett Morgan, *State Medical Examiner’s Office eliminates backlog*, TULSA WORLD, (Jan. 24, 2016), http://www.tulsaworld.com/news/government/state-medical-examiner-s-office-eliminates-backlog/article_253be4d4-9500-52d7-904a-5f4c95a149fb.html (comparing OCME’s backlog with the NAME recommendation that post-mortem examination reports be concluded within 90 days of the autopsy).

¹⁸² OFFICE OF THE CHIEF MED. EXAM’R, STATE OF OKLA., OFFICE OF THE CHIEF MED. EXAM’R 2015 BUDGET AND PERFORMANCE HEARINGS, *retrieved from* http://appropriation.oksenate.gov/SubPSnJ/Agencies/2015/FY16_Budget_Performance_Review_Hearings_BML.pdf.

¹⁸³ OKLA. JUSTICE COMM’N, *supra* note 154, at 25; *see also* Press Release, Okla. Bar Ass’n, Oklahoma Justice Commission Issues Final Report, Adjourns (Mar. 1, 2015), <http://www.okbar.org/news/Recent/2015/JusticeCommission.aspx> (highlighting this recommendation during the report’s release).

¹⁸⁴ NAS REPORT, *supra* note 7, at 7.

and testimony and the establishment of model laboratory reports.¹⁸⁵

For many forensic science disciplines, it has been common—and in fact encouraged—for analysts to testify to 100% certainty and a corresponding 0% risk of error regarding “who or what is the source of an evidentiary print or marking.”¹⁸⁶ In the first case admitting fingerprint evidence in the U.S., for example, four fingerprint examiners testified that the prints were all “made by the fingers of the same person.”¹⁸⁷ Such overreaching conclusions were strongly recommended for fingerprint examiners from 1979 to 2010.¹⁸⁸ Textbooks and other forensic authorities for multiple disciplines, including fingerprints, toolmarks and footprints, encourage this type of certainty.¹⁸⁹ “Exaggerated expert testimony of this sort is problematic not only because it is unscientific and lacks empirical support, but because it forecloses inquiry by the legal decision-maker into matters related to the reliability and accuracy of a forensic scientist’s conclusions.”¹⁹⁰

Even before the release of the 2009 *NAS Report*—which, for many, “caused an epiphany” that the forensic science disciplines are not always grounded in scientific methodology or proven practices¹⁹¹—an increasing number of cases based on overstated or exaggerated evidence had come to light. For example, in 2004, the FBI erroneously identified Oregon attorney Brandon Mayfield as the source of partial fingerprints linked to packaging for detonator devices connected to the 2004 Madrid train bombings in what is Spain’s deadliest terrorist attack to date.¹⁹² The FBI had indicated that the match to Mayfield was 100% certain and three separate FBI examiners and a court-appointed fingerprint examiner narrowed the identification to Mayfield.¹⁹³

In Mayfield’s case, the FBI maintained that its identification was correct even after Spanish authorities indicated the fingerprints did not match the suspect’s.¹⁹⁴ After Mayfield was jailed for two weeks, a federal judge dismissed the case.¹⁹⁵ Subsequently, an international team of forensic experts studied the case and found that the “error was a human error . . . [o]nce a mindset occurred with the initial examiner, the subsequent examinations were tainted. To disagree was not an expected response.”¹⁹⁶

In April 2015, the FBI revealed that members of an elite forensic unit had nearly universally overstated conclusions of hair analysis in a way that favored the prosecution over criminal defendants. 26 of 28 FBI agent/analysts—who testified in cases in 41 states—provided erroneous testimony or lab reports.¹⁹⁷ The FBI concluded that 3,000 cases were impacted; of the 500 cases it had reviewed, erroneous statements were made in 96

¹⁸⁵ *Id.* at 21-22; PCAST REPORT, *supra* note 2, at 54.

¹⁸⁶ Jonathan J. Koehler, *Forensics or Fauxrensic? Testing for Accuracy in the Forensic Sciences*, 3-4 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775255.

¹⁸⁷ *People v. Jennings*, 252 Ill. 354, 547-548 (1911).

¹⁸⁸ See Int’l Ass’n for Identification, *Resolution VII*, IDENTIFICATION NEWS, 29 (Aug. 1979) (stating that the International Association for Identification “officially oppose[s] any testimony or reporting of possible, probable or likely friction ridge identification” and that examiners who did so could have charges brought against them).

¹⁸⁹ Koehler, *supra* note 186, at 3, n.7 and accompanying text.

¹⁹⁰ *Id.* at 4-5.

¹⁹¹ Giannelli, *supra* note 33 (highlighting the statement of Judge Edwards, co-chair of the NAS Committee, regarding his surprise at learning that forensic science disciplines are not necessarily grounded in science).

¹⁹² Shaer, *supra* note 79; see also *Spain Train Bombings Fast Facts*, CNN LIBRARY, <http://www.cnn.com/2015/11/04/world/europe/spain-train-bombings-fast-facts/> (last visited July 1, 2016).

¹⁹³ *Id.*

¹⁹⁴ Associated Press, *FBI apologizes to lawyer held in Madrid bombings*, NBCNEWS.COM, May 25, 2004, http://www.nbcnews.com/id/3053007/ns/us_news-security/t/fbi-apologizes-lawyer-held-madrid-bombings/#V7UQX_krKYk.

¹⁹⁵ Sarah Kershaw & Eric Lightblau, *Bomb Case Against Lawyer is Rejected*, N.Y. TIMES (May 25, 2004), <http://www.nytimes.com/2004/05/25/us/bomb-case-against-lawyer-is-rejected.html>.

¹⁹⁶ David Stout, *Report Faults FBI Fingerprint Scrutiny in Arrest of Lawyer*, N.Y. TIMES (Nov. 17, 2004), <http://www.nytimes.com/2004/11/17/politics/report-faults-fbis-fingerprint-scrutiny-in-arrest-of-lawyer.html>.

¹⁹⁷ Press Release, FBI, *FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review* (Apr. 20, 2015), <https://www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review>.

percent of cases in which examiners provided statements used to inculcate a defendant at trial.¹⁹⁸ Defendants in at least 53 of these cases received the death penalty.¹⁹⁹ Of those, errors were identified in 33 cases, and nine of those defendants had already been executed, four died in prison, and four had been exonerated.²⁰⁰

As of September 2016, seven of the cases reviewed by the FBI were from Oklahoma;²⁰¹ one of them was a capital case and the defendant had already been executed.²⁰² The cases under review by the FBI all predate 1999, when the FBI required that microscopic hair analysis be conducted in conjunction with mitochondrial DNA testing to verify results.²⁰³

At the time that the FBI released its initial findings, there remained over 700 cases to review.²⁰⁴ As of September 2015, the FBI stated that it has reviewed 1,337 cases and has been unable to review another 389 due to a lack of response from prosecutors to requests for information.²⁰⁵

The FBI does not appear to know how many state examiners were trained incorrectly by the FBI in hair comparison practices and in providing accurate testimony. In June 2016, it sent a letter to state governors urging state labs that had sent employees to FBI hair analysis training to review hair comparison practices and testimony from the 1990s and earlier.²⁰⁶ Currently, at least North Carolina, Texas, and Massachusetts are reviewing their own hair analysis cases.²⁰⁷

In the spring of 2016, DOJ proposed an expanded review of FBI forensic testimony in criminal cases that would go beyond hair analysis to other pattern-based evidence, such as fingerprints and toolmarks. This review marks one of the broadest responses to the 2009 *NAS Report*.²⁰⁸

Standardizing terminology for reports and testimony across disciplines would further advance consistency, and thus reliability, of reported results. As of February 2014, the National Institute of Justice and the National Institute of Standards and Technology (“NIST”) were in the process of developing recommendations for the standardization of forensic reports.²⁰⁹ Most recently, in June 2016, DOJ announced proposed standards for expert testimony concerning forensic evidence.²¹⁰ The proposed standards came in response to the FBI’s announcement of flawed hair analysis in 2015.²¹¹

¹⁹⁸ As of April 2015, the FBI has reviewed 500 of the 5,000 impacted cases. Some cases ended with a guilty plea. In 268 cases, examiners provided testimony used to inculcate a defendant at trial. Erroneous statements were made by examiners in 257 cases, or 96 percent of cases. *See id.*; *see also FBI Admits Flaws in Hair Analysis*, *supra* note 1 (noting that the 268 trials spanned more than two decades).

¹⁹⁹ FBI Press Release, *supra* note 197.

²⁰⁰ *Id.*

²⁰¹ Email from the National Ass’n of Criminal Defense Lawyers (NACDL) dated Sept. 9, 2016 (on file with the author). Two of the cases are state cases and five are federal.

²⁰² *Flawed forensic hair testimony from the FBI lab*, THE WASH. POST (Apr. 19, 2015), <https://www.washingtonpost.com/graphics/local/fbi-hair/>.

²⁰³ Letter from FBI Director James B. Comey to State Governors (Jun. 10, 2016), <https://www.fbi.gov/about-us/lab/scientific-analysis/second-governor-letter-061016>.

²⁰⁴ *FBI Admits Flaws in Hair Analysis*, *supra* note 1.

²⁰⁵ Spencer S. Hsu, *In a first, judge grants retrial solely on FBI hair ‘match’*, THE WASHINGTON POST (Feb. 3, 2016), https://www.washingtonpost.com/local/public-safety/in-a-first-judge-grants-retrial-solely-on-fbi-hair-match/2016/02/02/e3adcc96-c49b-11e5-9693-933a4d31bcc8_story.html.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Spencer S. Hsu, *Justice Department Frames Expanded Review of FBI Forensic Testimony*, THE WASHINGTON POST (Mar. 21, 2016), https://www.washingtonpost.com/local/public-safety/justice-department-frames-expanded-review-of-fbi-forensic-testimony/2016/03/20/ed336702-ee9-41e5-85a6-2132cf446d0a_story.html. Additional details will be announced on June 20, 2016. *Id.*

²⁰⁹ OFFICE OF SCI. & TECH. POLICY, EXEC. OFFICE OF THE PRESIDENT, STRENGTHENING FORENSIC SCIENCE: A PROGRESS REPORT (Feb. 2014), https://www.whitehouse.gov/sites/default/files/microsites/ostp/forensicscience_progressreport_feb-2014.pdf.

²¹⁰ *Department Issues First Standards*, *supra* note 1. The draft language applies to serology, toxicology as well as fiber, glass, footprint, tire print and latent print evidence. Additional draft language will be proposed for DNA, hair analysis, handwriting and explosives. *Id.*

²¹¹ *Id.*

D. Error Rates and Proficiency Testing

The *NAS Report* also reveals that error rates—the odds that a conclusion is wrong—in the forensic sciences are woefully under-researched and largely unknown.²¹² The *NAS Report* called for further research in all forensic disciplines, noting that the “assessment of the accuracy of conclusions from forensic analyses and the estimation of relevant error rates are key components of the mission of forensic science.”²¹³ Indeed, the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*—discussed in greater detail, *infra*, Section V—recognized that the error rate of a methodology is directly linked to determining its reliability and whether it should be admissible in court.²¹⁴ As observed by two researchers, the error rate “is the only [*Daubert*] factor that speaks directly to the probative value of the evidence itself.”²¹⁵ It is a given that there is some degree of uncertainty in scientific knowledge; identifying error rates would provide a window into the risk of inaccuracy and give much-needed context for judges, lawyers, and jurors who (to varying degrees) are largely unfamiliar with the intimate details of forensics and often afford it greater weight than is warranted.²¹⁶

Some research into error rates has been undertaken in the areas of DNA evidence and fingerprint analysis.²¹⁷ DNA, as discussed above, is the forensic discipline most grounded in the scientific method.²¹⁸ However, it is worth noting that DNA evidence has its shortcomings. A 1992 NAS report on DNA evidence argued for the development of proficiency testing to identify error rates in DNA testing and emphasized the need for quality-control standards.²¹⁹ Perhaps influenced by a second *NAS Report*—the 2009 report discussed throughout this chapter—denouncing the recommendation for proficiency testing, the development of error rates for DNA or any other forensic discipline has been largely unaddressed.²²⁰ Yet DNA evidence, while more scientifically sound than other areas of forensics, is still subject to human error and becomes more prone to error when a case involves small amounts of DNA or a mixture of profiles.²²¹

While the risk of coincidental matches (i.e. the chance that a DNA profile could belong to another individual) has been studied by population geneticists, this is a narrow slice of overall false positive errors; the general risk of a false positive error (i.e. that two samples reported as a match actually came from different people) has not been closely studied.²²² Besides coincidental matches, other sources of false positive results include laboratory and human error, which can be in the form of equipment malfunction, contamination, or transfer.²²³

For example, DNA transfer happened in the case of Raveesh Kumra, a millionaire murdered in his California mansion.²²⁴ A homeless man, Lukis Anderson, was arrested for the murder after Anderson’s DNA was identified

²¹² Koehler, *supra* note 186, at 5 (“In most forensic science disciplines, there simply are no data pertaining to the rates at which forensic science procedures and forensic scientists err.”).

²¹³ NAS REPORT, *supra* note 7, at 122.

²¹⁴ *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 595-94 (1993) (listing the known or potential error rate of a scientific method as one factor to consider when determining its admissibility).

²¹⁵ John B. Meixner & Shari S. Diamond, *The Hidden Daubert Factor: How Judges Use Error Rates in Assessing Scientific Evidence*, 2014 WISC. L. REV. 1063, 1073 (2014).

²¹⁶ Koehler, *supra* note 186, 3, 6-7; *see also* Shaer, *supra* note 79 (discussing studies from Australia and the U.K. finding that the presence of DNA evidence in a case increases the likelihood of both going to trial and the likelihood of conviction).

²¹⁷ Koehler, *supra* note 186, at 5 n.9, 9.

²¹⁸ NAS REPORT, *supra* note 7, at 16; *see also* Koehler, *supra* note 186, at 9.

²¹⁹ COMM. ON DNA TECH. IN FORENSIC SCI., NAT’L ACADEMY OF SCI., DNA TECHNOLOGY IN FORENSIC SCIENCE, x, 45, 86 (1992), <http://www.nap.edu/read/1866/chapter/1> (“We regard the accreditation and proficiency testing of DNA typing laboratories as essential to the scientific accuracy, reliability, and acceptability of DNA typing evidence in the future.”).

²²⁰ Koehler, *supra* note 186, at 10-11.

²²¹ Shaer, *supra* note 79.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

in fingernail scrapings from Kumra.²²⁵ Anderson spent five months in jail before his attorney could produce records proving that he was undergoing inpatient detox at the time of the murder.²²⁶ It was later discovered that the paramedics who responded to the murder scene had also treated Anderson the same evening and had transferred his DNA to Kumra's hand on an oxygen-monitoring device.²²⁷

In another instance, during a 2011 study, two researchers asked 17 DNA analysts to examine the DNA evidence from a 2002 Georgia rape case to determine whether the defendant's DNA was present in the sample.²²⁸ The DNA evidence in the case was a mixture of profiles. At trial, the State's expert witness had testified that the defendant, who was convicted, could not be excluded as a donor.²²⁹ The results of the study were alarming: only one of the 17 analysts agreed that the defendant could not be excluded as a donor of the DNA mixture; 12 concluded that the defendant's DNA was not present, and the remaining four found the results to be inconclusive.²³⁰

With respect to fingerprint evidence, some research into error rates has been conducted in the last several years, with varying results and with disparate error rates identified.²³¹ For example, the *PCAST Report* applauded efforts to study the validity of latent fingerprint analysis. It found that latent fingerprint analysis has foundational scientific validity, but that the method has a number of issues with validity as applied in practice; the report highlights the probability of examiner bias and need for proficiency testing.²³² Although it is encouraging that such research exists, it is quite limited.²³³ Moreover, for the other forensic sciences, there is a complete dearth of research into error rates.²³⁴

Proficiency testing is a potential method to develop error rates for the forensic sciences.²³⁵ There are two types of proficiency testing. The first tests a forensic examiner's proficiency in his or her discipline and acts as an individual assessment of the examiner's qualifications;²³⁶ this type of proficiency test is often required to gain or maintain individual certification.²³⁷ The second type of proficiency test is designed to identify error rates in a discipline (i.e. the likelihood of a false positive or false negative result).²³⁸

NAS has emphasized the importance of proficiency testing to measure error rates in forensic disciplines in its 1992 report on DNA evidence, in the 2009 *NAS Report*, and in its 2010 report concerning biometrics.²³⁹ Some have argued²⁴⁰ that error rates for a given field are irrelevant and that what matters is the error rate by a specific examiner within a specific case.²⁴¹ Others believe that "the general rate of error is not only relevant to an assessment of the chance that an error occurred in a specific case, but the risk of error in the instant case

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* The analysts were not provided contextual information about the case in order to protect against bias in the results.

²²⁹ *Id.*

²³⁰ *Id.* Additionally, the *PCAST Report* concluded in 2016 that mixed DNA sample analysis is a subjective method, and thus prone to erroneous results. *PCAST REPORT*, *supra* note 2, at 75-82.

²³¹ Koehler, *supra* note 186, at 34-40.

²³² *PCAST REPORT*, *supra* note 2, at 87-103.

²³³ Koehler, *supra* note 186, at 34-40.

²³⁴ *Id.* at 5.

²³⁵ *Id.* at 25-27.

²³⁶ *Id.* at 26.

²³⁷ *Id.*

²³⁸ *Id.* at 26-27.

²³⁹ *Id.* at 10-13, 15-18. The one notable exception is a 1996 report on DNA evidence by NAS, which rejected the 1992 report's focus on error rates.

²⁴⁰ NAT'L ACAD OF SCI, NAT'L RESEARCH COUNCIL, COMM. ON DNA FORENSIC SCI, THE EVALUATION OF FORENSIC DNA EVIDENCE 86 (1996) [hereinafter 1996 NAS REPORT ON DNA].

²⁴¹ Koehler, *supra* note 186, at 15 (citing 1996 NAS REPORT ON DNA, which rejected error rate measurement).

cannot be estimated accurately without knowing the error base rate.”²⁴² While there are differences of opinion about how error rates should be evaluated, there is no doubt that the measurement of error rates is vital.

The current lack of research into error rates may be due to a number of factors, including a lack of resources, variability in education and training, or a lack of independence.²⁴³ It may also be influenced by the lack of attention paid to the error rate factor by courts in *Daubert* admissibility determinations.²⁴⁴ Regardless of the cause, without error rates for the forensic disciplines, it is nearly impossible to place reported results in context. For instance, a reported fingerprint match could be interpreted very differently depending on whether the error rate was two percent or 20 percent.

E. Additional Concerns: Access to Testing, Evidence Preservation, and DNA Exonerations

Oklahoma was the last state in the nation to adopt a post-conviction DNA testing statute, which would allow convicted individuals access to testing in order to attempt to prove their innocence. The *Justice Commission Report* included recommendations regarding DNA access laws and the preservation of evidence.²⁴⁵ Oklahoma’s post-conviction DNA statute²⁴⁶ was adopted by the Oklahoma Legislature on May 24, 2013.²⁴⁷ Since the statute was enacted, any person convicted of a violent felony with a sentence of 25 years or more, irrespective of when he or she was convicted, is eligible to apply for DNA testing, regardless of whether the defendant confessed, pled guilty, or served the imposed sentence.²⁴⁸ After a defendant has requested DNA testing under the statute and the state has responded, the presiding court holds a hearing to determine whether testing should be granted based on the following five conditions:

- 1) A reasonable probability that the petitioner would not have been convicted if favorable results had been obtained through DNA testing at the time of the original prosecution;
- 2) The request for DNA testing is made to demonstrate the innocence of the convicted person and is not made to unreasonably delay the execution of the sentence or the administration of justice;
- 3) One or more of the items of evidence the convicted person seeks to have tested still exists;
- 4) The evidence to be tested was secured in relation to the challenged conviction and either was not previously subject to DNA testing or, if previously tested for DNA, the evidence can be subjected to additional DNA testing that will provide a reasonable likelihood of more probative results; and
- 5) The chain of custody of the evidence to be tested is sufficient to establish that the evidence has not been substituted, tampered with, replaced or altered in any material respect or, if the chain of custody does not establish the integrity of the evidence, the testing itself has the potential to establish the integrity of the evidence.²⁴⁹

All five conditions must be satisfied for the court to grant the requested testing.

Following the Justice Commission’s recommendation, Oklahoma law further provides for the preservation of

²⁴² *Id.* at 15.

²⁴³ *Id.* at 52.

²⁴⁴ Meixner, *supra* note 213.

²⁴⁵ OKLA. JUSTICE COMM’N, *supra* note 154.

²⁴⁶ See OKLA. STAT. tit. 22, § 1575 et al.

²⁴⁷ See Emma Lloyd, *Post-Conviction DNA Statutes Enacted in All 50 States*, SANTA CLARA LAW (May 30, 2013), <http://law.scu.edu/northern-california-innocence-project/post-conviction-dna-testing-laws-enacted-in-all-50-states/>; see also OKLA. JUSTICE COMM’N, *supra* note 154, at 24-25.

²⁴⁸ OKLA. STAT. tit. 22, §1575.2.

²⁴⁹ See OKLA. STAT. tit. 22, §1575.4.

biological evidence in a violent felony case for as long as a person convicted of the crime may be incarcerated.²⁵⁰ Biological evidence is defined as evidence from the human body from which a nuclear DNA profile or mitochondrial DNA sequence could be developed.²⁵¹ The preservation of other types of evidence is not addressed. Testing other than DNA testing supporting an innocence claim is at the discretion of the court.

According to the National Registry of Exonerations (NRE), a nationwide study of exonerations produced by the University of Michigan Law School in conjunction with the Northwestern University School of Law, 398 individuals out of 1,600 exonerations identified between 1989 and May 18, 2013, were exonerated in part on the basis of DNA evidence.²⁵² According to the NRE's most recent data, 25 individuals who were sentenced to death were exonerated in part on the basis of DNA evidence.²⁵³ The fact that such a low percentage of exonerations were based on DNA evidence is not surprising as it is estimated that biological evidence appropriate for DNA testing is only available in five to ten percent of all criminal cases.²⁵⁴ Thus, the statute's application only to DNA may be too narrow to address the serious problems regarding forensic evidence.

In Oklahoma, there have been eleven DNA exonerations, three of which were capital cases. Death row inmates Robert Miller, Ronald Keith Williamson, and Curtis McCarty were exonerated on the basis of DNA evidence.²⁵⁵ Miller's and Williamson's cases are discussed in more detail in the chapter on Innocence Protection.

V. The Courts and Admissibility of Forensic Evidence

The role of the courts and their essential gatekeeping function for evidence becomes all the more important in light of the potential pitfalls of forensic science. In 1993, as noted above, the U.S. Supreme Court considered the admissibility of scientific evidence in *Daubert v. Merrell Dow Pharmaceuticals*,²⁵⁶ ruling that under the Federal Rules of Evidence—which applies to both civil trials and criminal prosecutions in federal courts—all scientific testimony or evidence must be both relevant and reliable. *Daubert* and Federal Rule of Evidence 702 replaced the previous legal standard of “general acceptance” in the scientific community in federal cases, and many, though not all, states followed suit by adopting *Daubert*.²⁵⁷ Oklahoma abandoned the “general acceptance” test and adopted the *Daubert* standard of relevance and reliability in 1995.²⁵⁸

In *Daubert*, the Supreme Court equated reliability with scientific validity²⁵⁹ and explained that the trial court's admissibility determination should be focused on an expert's “principles and methodology,” rather than “the conclusions that they generate.”²⁶⁰ The Supreme Court set forth several factors that trial courts, as gatekeepers, may consider in determining the admissibility of scientific evidence: 1) whether the method has or can be tested; 2) whether the method has been peer reviewed and published; 3) the error rate (known or potential) of a method; 4) the existence of standards regulating a method; and 5) the degree of acceptance of the method

²⁵⁰ OKLA. STAT. tit. 22, §1572.

²⁵¹ See OKLA. STAT. tit. 22, §1572B.1.

²⁵² Nat'l Registry of Exonerations, *The First 1,600 Exonerations*, LAW.UMICH.EDU, http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf (last visited July 4, 2016).

²⁵³ Nat'l Registry of Exonerations, *Death row exonerations involving DNA*, LAW.UMICH.EDU, <http://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View=-FAF6EDDB-5A68-4F8F-8A52-2C61F3BF9EA7&FilterField1=DNA&FilterValue1=8%3FDNA&FilterField2-Sentence&FilterValue2-Death> (last visited July 4, 2016).

²⁵⁴ The Innocence Project, *Unvalidated or Improper Forensic Science*, INNOCENCEPROJECT.ORG, <http://www.innocenceproject.org/causes/unvalidated-or-improper-forensic-science/> (last visited Oct. 4, 2016).

²⁵⁵ Nat'l Registry of Exonerations, *supra* note 253.

²⁵⁶ *Daubert*, 509 U.S. 579 (1993).

²⁵⁷ *Frye v. United States*, 293 F. 1015 (DC. Cir. 1923) (holding admissible expert testimony regarding novel scientific evidence only if the scientific method at issue was general acceptance by the scientific community).

²⁵⁸ *Taylor v. State*, 889 P.2d 319, 328 (Okla. Crim. App. 1995). Expert testimony in Oklahoma is also governed by OKLA. STAT. tit. 12, § 2702.

²⁵⁹ *Daubert*, 509 U.S. at 590, 591 n.9 (“evidentiary reliability will be based upon scientific validity”).

²⁶⁰ *Id.* at 595.

within the relevant community.²⁶¹ The Court left federal trial courts with significant discretion, emphasizing that the inquiry was “a flexible one,”²⁶² and in a later opinion held that the deferential abuse-of-discretion standard²⁶³ would apply to appellate review of the trial court’s decisions on the admissibility of forensic evidence.²⁶⁴

Daubert has had a significant impact in civil litigation, but has not been as effectively used in criminal cases and particularly capital cases.²⁶⁵ A review of reported decisions in federal criminal cases revealed that trial courts rarely restrict or exclude expert testimony offered by the prosecution and that appellate courts often deny appeals challenging the trial court’s decision to admit such evidence against criminal defendants.²⁶⁶ Reported decisions are, however, a limited snapshot of judicial decisions.²⁶⁷ Because evidentiary decisions are often made without a written ruling by the trial court or a subsequent appeal, it is unclear whether this trend would bear out when considering a larger pool of cases.²⁶⁸

The *NAS Report* recognized the disparity between civil and criminal cases²⁶⁹ and noted the limitations of criminal courts:

The adversarial process relating to the admission and exclusion of scientific evidence is not suited to the task of finding “scientific truth.” The judicial system is encumbered by, among other things, judges and lawyers who generally lack the scientific expertise necessary to comprehend and evaluate forensic evidence in an informed manner; trial judges (sitting alone) who must decide evidentiary issues without the benefit of judicial colleagues and often with little time for extensive research and reflection, and the highly deferential nature of the appellate review afforded trial courts’ *Daubert* rulings.²⁷⁰

Moreover, resources between the civil system and the criminal justice system undoubtedly play a role in the application of *Daubert*:

Unlike the extremely well-litigated civil challenges, the [often indigent] criminal defendant’s challenge is usually perfunctory. Even when the most vulnerable forensic sciences—hair microscopy, bite marks, and handwriting—are attacked, the courts routinely affirm admissibility citing earlier decisions rather than facts established at a hearing. Defense lawyers generally fail to build a challenge with appropriate witnesses and new data. Thus, even if inclined to mount a *Daubert* challenge, they lack the requisite knowledge and skills, as well as the funds, to succeed.²⁷¹

²⁶¹ *Id.* at 593-594.

²⁶² *Id.* at 594.

²⁶³ Under the abuse of discretion standard of review, a lower court’s decision will only be reversed if it is determined to be “an unjustified, unsound, unreasonable, or arbitrary action.” *Abuse of Discretion*, THE LAW DICTIONARY (7th ed. 2002).

²⁶⁴ See *General Electric Company v. Joiner*, 522 U.S. 136, 142-143 (1997).

²⁶⁵ See generally Paul C. Giannelli, *Daubert and Criminal Prosecutions*, 26 ABA Crim. J. 1 (2011), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/fa11_SciEvidence.authcheckdam.pdf; Peter J. Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107 (2005), <http://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2004.056353>.

²⁶⁶ NAS REPORT, *supra* note 7, at 11 (recognizing that most evidentiary rulings are issued without published opinion and without appeal, thus the reported opinions are not a complete sample). It appears that the playing field is more level in civil cases, where plaintiffs and defendants both typically have access to experts, and that appellate courts are more likely to reverse a trial court’s ruling on the admissibility of evidence in a civil case. See *id.* (citing 1 D.L. Faigman, M.J. Saks, J. Sanders, and E.K. Cheng, 2007-2008, *Modern Scientific Evidence: The Law and Science of Expert Testimony*. Eagan, MN: Thomson/West at § 1.25, p. 105).

²⁶⁷ NAS REPORT, *supra* note 7, at 11.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 12.

²⁷¹ Neufeld, *supra* note 265, at S110.

Daubert's focus on the reliability and the relevance of evidence is crucial to safeguarding the integrity of the criminal justice system. The *PCAST Report* also provides guidelines for judicial officers to assess the scientific validity of expert testimony.²⁷² Nevertheless, since the application of the *Daubert* factors is discretionary and trial courts' admissibility determinations are often given deference, the *NAS Report* emphasizes that "[j]udicial review, by itself, will not cure the infirmities of the forensic science community."²⁷³

In some areas of forensic science, courts are becoming more reluctant to admit certain types of evidence. Courts now recognize that testimony linking microscopic hair examination to a specific defendant is unreliable, unless that match is confirmed by DNA analysis.²⁷⁴ Three Oklahoma death row inmates convicted in the late 1980s and exonerated a decade later had evidence presented against them at trial based on microscopic hair examinations.²⁷⁵ In two of the cases, expert testimony that linked the defendants to the crime was later found to be invalid.²⁷⁶ In the third case, the microscopic hair examinations used against the capital defendant at trial could not be impeached during post-conviction review because the evidence had disappeared.²⁷⁷

Nevertheless, given their centrality to the criminal justice system, public safety, and safeguarding against wrongful convictions, the forensic sciences must continue to improve, independent of judicial review.²⁷⁸

VI. Conclusion and Recommendations

As this chapter details, most criminal justice stakeholders, public agencies, and members of the forensic science community agree there are serious concerns regarding the reliability of certain forensic science disciplines. Based on its extensive review, the Commission views the role of forensic evidence and testimony in capital trials with serious concern. As has been written elsewhere, popular television programs such as *CSI* and *Bones* have popularized the myth of iron-clad and unimpeachable forensic evidence. Both the public and stakeholders within the criminal justice system—prosecutors, defense attorneys, and judges—must be educated as to the many issues that can arise with this type of evidence. Although certain forms of forensic evidence can be of great use in solving crimes (such as DNA evidence), many others are of questionable efficacy. The high stakes of capital proceedings plainly require that any compelling scientific evidence that may be introduced against a defendant be supported by a demonstration of that evidence's validity. The Commission believes that the recommendations that follow provide some important safeguards.

²⁷² PCAST REPORT, *supra* note 2, at 145.

²⁷³ Neufeld, *supra* note 263, at S110 (citing J.L. Mnookin. Expert evidence, partisanship, and epistemic competence. 73 BROOK. L. REV. 1009, 1033 (2008)).

²⁷⁴ See NAS REPORT, *supra* note 7, at 161.

²⁷⁵ Curtis McCarty, Robert Lee Miller, Jr., and Ronald Keith Williamson, who are three of ten death row inmates released from Oklahoma death row, the prosecution presented microscopic hair evidence against them at trial. In Miller and Williamson's cases, that evidence was later discredited. In McCarty's, the hair evidence went missing, and could not be impeached post-conviction. See Nat'l Registry of Exonerations, *supra* note 107; Nat'l Registry of Exonerations, Robert Lee Miller, Jr., LAW. UMICH.EDU, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3473> (last visited Jun. 22, 2016) [hereinafter Robert Lee Miller, Jr. profile].

²⁷⁶ See Robert Lee Miller, Jr. profile, *supra* note 275; see also Nat'l Registry of Exonerations, Ronald Keith Williamson LAW.UMICH.EDU, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3752> (last visited Jun. 22, 2016).

²⁷⁷ See Nat'l Registry of Exonerations, *supra* note 104.

²⁷⁸ NAS REPORT, *supra* note 7, at 110.

Recommendation 1:

Oklahoma should adopt the forensics reform recommendations of the 2013 Oklahoma Justice Commission report that have not yet been implemented.

As discussed in this chapter, the Oklahoma Justice Commission issued a report (*Justice Commission Report*) in 2013 to the Oklahoma Bar Association (OBA) after two years of meetings and research. Originally convened to address issues in wrongful convictions, the Oklahoma Justice Commission made important recommendations that have not yet been implemented. One of the most important recommendations with respect to forensics is the establishment of “[a] committee consisting of representatives from CLEET, OSBI, Training Academies of the Oklahoma City, Tulsa, and Edmond Police Departments and the Forensic Science Institute (and possibly others).” The recommendation states that the committee “should meet to formulate a quality and enhanced training program for Crime Scene personnel [and that] [t]he program should be implemented in all Oklahoma police training academies.”

Another critical recommendation from the *Justice Commission Report*—which, to the Commission’s knowledge, has yet to be implemented—is the recommendation that “exemptions for Latent Print Examiners and Digital Forensic Analysts from current Oklahoma Law, 74 O.S. §150.37,” be removed and that “[l]atent print examinations and digital forensic examinations should be performed in an accredited laboratory [and that the] OBA should work with the Oklahoma Legislature to remove the exemptions from current state law.” The Commission agrees.

The Commission also reiterates the recommendations in the *Justice Commission Report* concerning support for “the Office of the Chief Medical Examiner (OCME) in its attempt to regain national accreditation.” As mentioned in this chapter, an audit of the OCME by the National Association of Medical Examiners (NAME) resulted in the OCME’s loss of its voluntary accreditation. The Commission recognizes that OCME has already taken steps to regain NAME accreditation. In October 2016, for example, the OCME board of directors approved a sublease agreement to move into a new facility.²⁷⁹ OCME has also reduced its caseload backlog.

The Commission agrees with the recommendations above, as well as all other recommendations concerning forensic evidence in the *Justice Commission Report*, and urges their implementation.

Recommendation 2:

Oklahoma should follow best practices with respect to certification of forensics experts.

Oklahoma should follow national standards and ethics codes for forensics practitioners as discussed in the 2009 National Academy of Sciences report (*NAS Report*) and the 2016 President’s Council of Advisors on Science and Technology report (*PCAST Report*), both of which are discussed throughout this chapter. These general standards include, but are not limited to, requirements for written examinations; supervised practice; proficiency testing; continuing education; recertification procedures; an adherence to a code of ethics; and effective disciplinary procedures.

²⁷⁹ Nadia Judith Enchassi, *Governor Mary Fallin Says Sublease Agreement For New Medical Examiner’s Office Is Vital Step In Winning Back Accreditation*, WASH. TIMES (Oct. 15, 2016).

Recommendation 3:

With respect to capital cases, the Legislature should amend Oklahoma law to require that all biological evidence, and any evidence that may be the source of biological evidence, be retained until 60 days after the death of the inmate. Sources of biological evidence that may fall outside of the existing statute include, but are not limited to, clothing, ligatures, bedding, drinking containers, and cigarettes.

The Commission applauds the Oklahoma Legislature for enacting 22 O.S. § 1372, which allows for the retention of biological evidence. In the statute, biological evidence is defined as evidence originating from the human body from which DNA evidence could be obtained.²⁸⁰ This definition excludes important evidence that may be the source of biological evidence. Other states have recognized the importance of sources of biological evidence. For example, the state of Texas has a more inclusive statute that defines biological evidence as any item that contains identifiable biological material.²⁸¹ Moreover, the Texas Department of Public Safety has issued guidance for law enforcement regarding the parameters of biological evidence, as well as best practices for storage and preservation.²⁸² When a punishment is irreversible, and to the extent that any sources of biological evidence—including items that do not originate from the human body but may still contain biological evidence—could prove innocence, Oklahoma should err on the side of preservation.

Recommendation 4:

The Oklahoma Supreme Court’s judicial training sessions for judges should include forensics training, including updates regarding developments in commonly used forensics fields.

Training on the fallibility of forensic analysis is critical. Such training should be funded for defense counsel and prosecutors as well.

Recommendation 5:

Oklahoma should provide an avenue for post-conviction relief based on changing science that casts doubt on either the accuracy of an inmate’s conviction or the evidence used to obtain a sentence of death.

Such a statute would provide an avenue of relief for individuals wrongfully convicted based on forensic analysis or testimony that has been undermined by advancements in science or newly discovered information about a faulty or unreliable forensic field.²⁸³

²⁸⁰ See OKLA. STAT., tit. 22, § 1372(B) (“‘Biological evidence’ means physical evidentiary material originating from the human body from which a nuclear DNA profile or mitochondrial DNA sequence can be obtained or representative or derivative samples of such physical evidentiary material collected by a forensic DNA laboratory.”).

²⁸¹ See TEX. CODE CRIM. PROC. Art. 38.43 (defining biological evidence as “any item that contains blood, semen, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or any other identifiable biological material that was collected as part of an investigation of an alleged felony offense or conduct constituting a felony offense”).

²⁸² See TEX. DEP’T PUB. SAFETY, BEST PRACTICES FOR COLLECTION, PACKAGING, STORAGE, PRESERVATION, AND RETRIEVAL OF BIOLOGICAL EVIDENCE (eff. Oct. 30, 2012), <http://www.crime-scene-investigator.net/collection-packaging-storage-preservation-and-retrieval-of-biological-evidence-TX-2012.pdf>).

²⁸³ See e.g., TEX. CODE CRIM. PROC. art. 11.073; CAL. PENAL CODE § 1473.

Innocence Protection

Our criminal justice system can make mistakes. Sometimes those mistakes wrongfully deprive people of their freedom. Sometimes they allow the guilty to go free. Sometimes they do both. Most troubling, mistakes in our criminal justice system can, and have, cost innocent people their lives.

This chapter explores the phenomenon of wrongful convictions—their frequency, how they come about, and their cost. Where relevant, it describes how Oklahoma’s branches of government have addressed wrongful convictions and the steps Oklahoma has taken to date to ensure innocence protection. It also sets forth continuing problems in Oklahoma’s system, which risk convicting and executing the innocent.

I. Background

Nationally, 157 people from 27 states have been exonerated from death row since 1973.¹ Of those exonerations, 10 occurred in Oklahoma,² placing it in the top five states with the highest number of individuals released from death row due to evidence of innocence.³ While it is extremely difficult to measure, a recent study estimates that at least four percent of individuals sentenced to death in the United States are innocent.⁴ The study notes:

The rate of exonerations among death sentences in the United States is far higher than for any other category of criminal convictions. Death sentences represent less than one-tenth of 1% of prison sentences in the United States, but they accounted for about 12% of known exonerations of innocent defendants from 1989 through early 2012, a disproportion of more than 130 to 1.⁵

¹ To be included on the Death Penalty Information Center’s list of death row exonerations, defendants must have been convicted, sentenced to death, and subsequently either: “Been acquitted of all charges related to the crime that placed them on death row, or [h]ad all charges related to the crime that placed them on death row dismissed by the prosecution, or [b]een granted a complete pardon based on evidence of innocence.” *Innocence List*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Mar. 7, 2017).

² *Id.* The 10 Oklahomans are Charles Ray Giddens (charges dismissed 1981); Clifford Henry Bowen (charges dismissed 1986); Richard Neal Jones (acquitted 1988); Gregory Wilhoit (acquitted 1995); Adolph Munson (acquitted 1995); Robert Lee Miller, Jr. (charges dismissed 1998); Ronald Keith Williamson (charges dismissed 1999); Curtis Edward McCarty (charges dismissed 2007); Yancy Douglas (charges dismissed 2009); and Paris Powell (charges dismissed 2009). *Id.*

³ *Id.* Florida (26), Illinois (20), Texas (15), Oklahoma (10), and Louisiana (10) make up over half of the death row exonerations, accounting for 79 out of the 156. *See Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-and-death-penalty?did=412&scid=6#inn-st>.

⁴ Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Sentenced to Death*, 111 PROCEEDINGS NAT’L ACAD. SCI. 7250, 7250 (2014), <http://www.pnas.org/content/111/20/7250.full>.

⁵ *Id.* at 7250. This is largely because of the additional resources and attention required in capital cases. *Id.*

Of the 157 death row exonerees nationwide, 52 percent (82) are black, 39 percent (61) are white, 8 percent (12) are Latino, and one percent (2) are “other.”⁶ In Oklahoma, five of the 10 individuals exonerated from death row are black and five are white.⁷ The 10 Oklahomans released from death row served a combined 96 years in prison.⁸

II. Causes of Wrongful Convictions

There is no one cause of wrongful convictions. Instead, it is most often a combination of factors that implicate multiple components and actors within the criminal justice system, as well as external factors, such as community pressure to identify a perpetrator after a high-profile murder. For the 10 men exonerated from Oklahoma’s death row, multiple factors led to their wrongful conviction, including false confessions, mistaken eyewitness identification, false or misleading forensics, the use of jailhouse informants, official misconduct, and ineffective assistance of counsel.⁹

In February 2013, the Oklahoma Justice Commission (Justice Commission) issued a report (*Justice Commission Report*) to the Oklahoma Bar Association after two years of meetings and research.¹⁰ Originally convened to address issues in wrongful convictions, the *Justice Commission Report* contains recommendations—some of which have been adopted—related to eyewitness identifications, false confessions, and jailhouse informants.¹¹ We address each of those subjects in turn. Concerns regarding ineffective lawyering and prosecutorial misconduct and error are addressed in separate chapters to this report.

A. Eyewitness Identifications

In 1981, Justice Brennan commented on the “powerful impact on juries” from eyewitness testimony.¹² Quoting Dr. Elizabeth Loftus, a pioneer in the field of cognitive psychology, he wrote: “There is almost *nothing more convincing* than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”¹³ In Oklahoma, Don Roberts and Glynn Simmons were sentenced to death on the basis of one eyewitness identification for the 1974 murder of liquor store clerk Carolyn Rogers.¹⁴ During the offense, an 18-year-old customer, Belinda Brown, suffered a gunshot wound to the head.¹⁵ Police interviewed her at the hospital three days after the crime, along with a sketch artist who developed a composite sketch.¹⁶ Brown picked several different suspects out of at least nine police line-ups.¹⁷ A month after the murder, there were still no suspects.¹⁸

⁶ *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last visited Feb. 3, 2017).

⁷ *Innocence Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence> (last visited Mar. 7, 2017).

⁸ *Id.*

⁹ *Browse Cases*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Mar. 8, 2017) (filter column titled “State” by “Oklahoma”) (please note that this list omits three Oklahoma exonerations; a full list of the ten Oklahoma death row exonerees is available at the Death Penalty Information Center); *Innocence Cases*, DEATH PENALTY INFORMATION CTR., <http://www.deathpenaltyinfo.org/node/4900> (last visited Mar. 8, 2017).

¹⁰ Press Release, Okla. Just. Comm’n, Oklahoma Justice Commission Issues Final Report, Adjourns (Mar. 1, 2013), <http://www.okbar.org/news/Recent/2013/Justice-Commission.aspx>. See also OKLA. JUSTICE COMM’N, OKLAHOMA JUSTICE COMMISSION REPORT TO THE OKLAHOMA BAR ASSOCIATION (Feb. 2013), at 20, http://www.okbar.org/Portals/13/PDF/2013/Commission_Final_Report.pdf [hereinafter OKLA. JUSTICE COMM’N].

¹¹ See OKLA. JUSTICE COMM’N, *supra* note 10, at 7, 14, 26. The Justice Commission’s recommendations regarding eyewitness identifications are discussed in Section A; its recommendations regarding false confessions and jailhouse informants are discussed later in Section B.

¹² *Watkins v. Sowders*, 449 U.S. 541, 552 (1981) (Brennan, J., dissenting).

¹³ *Id.* (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)).

¹⁴ Kim Alyce Marks, *Inmates Given Second Chance at Life*, THE OKLAHOMAN, July 6, 1986, <http://newsok.com/article/2132694>; see also *Oklahoma Prosecutor Believes Convicted Man May Be Innocent*, INNOCENCE PROJECT (May 16, 2014), <http://www.innocenceproject.org/oklahoma-prosecutor-believes-convicted-man-may-be-innocent>.

¹⁵ Ali Meyer, *Prosecutor, Family Believe Convicted Murderer Could Be Innocent*, KFOR NEWS, May 15, 2014, <http://kfor.com/2014/05/15/prosecutor-family-believe-convicted-murderer-could-be-innocent>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

Eventually, Brown picked Roberts and Simmons out of an in-person line-up, though both men maintained that they did not know one another at the time of the murder.¹⁹ There was no physical evidence linking the men to the case;²⁰ the two men were convicted on the basis of Brown's identification.²¹ Another witness testified that she only saw the gun and not the perpetrators.²² Both men's death sentences were later converted to life sentences.²³

In recent years, the trial prosecutors have expressed doubts about Roberts' and Simmons' culpability, and the Oklahoma County District Attorney's Office has been reviewing the case.²⁴ The Edmond Police Department issued a statement in 2014 stating that another juvenile witness identified Roberts in a line-up, and that other circumstantial evidence pointed to the two men, including that Roberts bought a gun matching the description of the murder weapon days before the murder.²⁵ Police reports indicate that a fingerprint and a bullet were found at the scene, though detectives testified at trial that no fingerprints were developed from the scene.²⁶ Roberts was released on parole after serving 33 years.²⁷ Simmons was denied parole in 2014 and remains in prison.²⁸

In a criminal investigation and trial, eyewitness identifications are enormously powerful.²⁹ A mock juror experiment underscores this reality. In the experiment, 150 participants were split into three groups.³⁰ One group was told that there was no eyewitness to the crime, the second group was told that there was an eyewitness whom the defense lawyer said was mistaken, and the third group was told there was an eyewitness, but the defense lawyer had discredited him based on the witness's very poor eyesight.³¹ 82 percent of the mock jurors who were told there was no eyewitness then voted to acquit.³² 72 percent of the second group, which believed there was a credible eyewitness, voted for guilt.³³ The third group, *who knew the eyewitness had been discredited*, still voted 68 percent for guilt.³⁴

Alarming, eyewitness identifications appear to be significantly more powerful than they are reliable. One academic study noted that "numerous analyses over several decades have consistently shown that mistaken eyewitness identification is the single largest source of wrongful convictions."³⁵ Indeed, since 1989, 31 percent of wrongful convictions nationwide—in capital and non-capital cases—involved mistaken eyewitness testimony.³⁶ In Oklahoma, over that same period, mistaken eyewitness identification was present in 28 percent of the 32 known wrongful convictions.³⁷

¹⁹ *Id.*

²⁰ *Id.*

²¹ Myer, *supra* note 15.

²² *Id.*

²³ *Roberts v. State*, 564 P.2d 246, 248 (Okla. Crim. App. 1977).

²⁴ Myer, *supra* note 15.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Elizabeth F. Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 15 JURIMETRICS J. 188 (1975), http://www.jstor.org/stable/29761487?origin=JSTOR-pdf&seq=1#page_scan_tab_contents.

³⁰ *Id.* at 189.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 234 (2000) (quoting Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 765 (1995)).

³⁶ *Browse Cases*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Nov. 1, 2016) (filter column titled "Contributing Factors Display" by "Mistaken Witness ID").

³⁷ *Id.* (filter column titled "State" by "Oklahoma" and column titled "Contributing Factors Display" by "Mistaken Witness ID").

The Justice Commission likewise found that misidentification hampers law enforcement investigations and has a number of harmful consequences, including both the obvious harm to the wrongfully convicted and an increased risk to public safety due to a failure to identify and apprehend those actually responsible for criminal wrongdoing.³⁸ It can also further traumatize crime victims who may experience guilt for having contributed to a wrongful conviction. Factors affecting eyewitness reliability—along with the role of the courts in guiding jurors’ assessment³⁹ of such evidence through admissibility hearings, expert testimony, and jury instructions—are discussed below.

1. Factors Affecting Eyewitness Identification Accuracy

a. Witness and Environmental Factors

Concerns with the accuracy of eyewitness identification—and, in particular, cross-racial identification—have been well-known in the scientific community for the last 50 years. In the 1970s, researchers began studying the psychology of eyewitness identifications.⁴⁰ Over the next several decades, research confirmed that eyewitness identifications are often unreliable and that their unreliability is influenced by factors such as stress, a witness’ physical condition (for example, whether they had been injured during a crime), and suggestive identification procedures.⁴¹ Of particular note, research has shown that stressful or violent events increase the chances of a misidentification.⁴² Additionally, a phenomenon called the “forgetting curve” demonstrates that a person’s ability to make an accurate identification decreases rapidly as time passes after an event.⁴³

Studies show that cross-racial eyewitness identifications—when a person identifies someone of another race—are particularly inaccurate.⁴⁴ Mistaken eyewitness identifications played a role in 72 percent of the more than 300 wrongful convictions since 1989 that have been overturned due to DNA evidence.⁴⁵ Of those DNA exonerations involving mistaken eyewitness identification, 40 percent were due to mistaken cross-racial identification.⁴⁶

³⁸ OKLA. JUSTICE COMM’N, *supra* note 10, at 14. Note that the Commission is not the only entity that has raised concerns about eyewitness identification. In 1998, the U.S. Department of Justice convened a task force to raise awareness about the need for strengthening eyewitness identification procedures. In its report, the task force cited a “growing body” of research and exonerees who were convicted primarily on the basis of flawed eyewitness testimony. OFF. JUST. PROGRAMS, DEPT OF JUSTICE, EYEWITNESS IDENTIFICATIONS: A GUIDE FOR LAW ENFORCEMENT, at iii (1999), <https://www.ncjrs.gov/pdffiles1/nij/178240.pdf> (“Recent cases in which DNA evidence has been used to exonerate individuals convicted primarily on the basis of eyewitness testimony have shown us that eyewitness evidence is not infallible.”).

³⁹ Justice Brennan noted in 1981 that

“[t]he vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: ‘What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent – not due to the brutalities of ancient criminal procedure. [Felix Frankfurter, *The Case of Sacco and Vanzetti*, THE ATLANTIC (1927)].”

Watkins, 449 U.S. at 350–51 (quoting *United States v. Wade*, 388 U.S. 218, 228 (1967)). He further noted that “[eyewitness] testimony is likely to be believed by jurors, especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all.” *Id.* at 352 (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979)). One study conducted fifteen years ago demonstrated that eyewitness identifications also has a powerful impact on prosecutors: 84 percent of prosecutors believed that eyewitness testimony was “probably correct” ninety percent of the time. John P. Rutledge, *They All Look Alike: The Inaccuracy of Cross-Racial Identifications*, 28 AM. J. CRIM. L. 207 (2001).

⁴⁰ See e.g., David B. Fishman & Elizabeth F. Loftus, *Expert Psychology Testimony on Eyewitness Identifications*, 4 LAW & PSYCHOL. REV. 87 (1978).

⁴¹ Robert Buckout, *Psychology and Eyewitness Identification*, 2 LAW & PSYCHOL. REV. 75, 77–88 (1976); see also Gary L. Wells, *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603 (1998).

⁴² Kenneth A. Deffenbacher et al., *A Meta-Analytic Review of the Effects of High Stress on Eyewitness Memory*, 28 LAW & HUM. BEHAV. 687 (2004); see also Charles Morgan III et al., *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 INT’L J.L. & PSYCHIATRY 265, 272 (2004).

⁴³ Fishman & Loftus, *supra* note 40, at 90–92.

⁴⁴ See, e.g., G.L. Rahaim & S.L. Brodsky, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 LAW AND PSYCHOL. REV. 1, 2 (1982) (concluding that cross-racial identifications are less accurate than same-race identifications), Laura Connelly, *Cross-Racial Identifications: Solutions to the “They All Look Alike” Effect*, 21 MICH. J. RACE & L. 125 (2013); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 954 (1984); John C. Brigham et al., *The Influence of Race on Eyewitness Testimony*, HANDBOOK OF EYEWITNESS PSYCHOLOGY: MEMORY FOR PEOPLE 257–81 (2007); Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect in Eyewitness Identification: What Do We Do About It?*, 7 PSYCHOL. PUB. POLY & L. 250 (2001).

⁴⁵ NAT’L RESEARCH COUNCIL, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 11 (2014), <http://www.nap.edu/catalog/18891/identifying-the-culprit-assessing-eyewitness-identification>.

⁴⁶ Connelly, *supra* note 44, at 126.

One 1988 study of “own-race” bias—the ability to more accurately identify a person of one’s own race—showed that two or three hours after an interaction store clerks were able to identify customers of their own race at higher rates than customers of other races, but these clerks still were not highly accurate.⁴⁷ Two things are striking about the 1988 study: its substantiation of own-race bias and the overall low rates of accurate eyewitness identification. Not only did the store clerks more accurately identify customers of their own race, but, even at their best, the clerks only had a 50-to-60 percent accurate identification rate.⁴⁸ Similar results have been replicated in studies over the past three decades.⁴⁹

b. Law Enforcement Factors

In May 2001, Jeffrey Todd Pierce walked out of an Oklahoma prison after having served 15 years in prison for rape and robbery—crimes he did not commit.⁵⁰ In 1986, when Pierce was accused of these crimes, the initial description did not match him. When law enforcement pointed him out to the victim, she could not identify him. Months later, Pierce was arrested and police officers presented the victim with a photo array that included a photo of Pierce wearing a tan shirt—an element of the victim’s initial description of the perpetrator. This time, the victim identified him. Pierce later was exonerated by DNA testing that conclusively proved his innocence and implicated another man in the crime.⁵¹ As Pierce’s story indicates, suggestive law enforcement techniques—often unintentional—also can increase the likelihood of misidentification and lead law enforcement to focus time and resources on the wrong suspect.⁵²

2. Indicators of Accuracy

Law enforcement, jurors, and judges tend to heavily rely on the confidence of an eyewitness as an indication of accuracy.⁵³ In fact, social science has consistently demonstrated this to be false.⁵⁴

People tend to overestimate the accuracy of their perceptions and memory. Thus, eyewitnesses are likely to be overconfident about the accuracy of their account of the crime and their identification of the suspect as the perpetrator of the crime. In addition, not only is an eyewitness’s memory of a crime highly malleable, but so is an eyewitness’s confidence in the accuracy of his or her memory of the crime. Many factors can increase eyewitness confidence, but do not in any way improve the accuracy of an eyewitness’s identification. For instance, questioning of an eyewitness by the police and prosecutor, confirmation feedback from a lineup administrator (e.g., “Good! You have identified the suspect.”), and learning that another eyewitness has also identified the suspect all increase an eyewitness’s confidence but not his or her accuracy. Post-event information has its greatest effect on the eyewitness’s confidence in erroneous information.⁵⁵

⁴⁷ *Id.* at 127–28 (citing BRIAN L. CUTLER & MARGARET BULL KOVERA, *EVALUATING EYEWITNESS IDENTIFICATION* 37 (2010)).

⁴⁸ *See id.* (noting that white clerks identified 55% of white customers, 40% of African-American customers, and 34 % of Hispanic customers correctly; African-American clerks identified 64% of African-American customers, 53% of white customers, and 43% of Hispanic customers correctly; Hispanic clerks identified 54% of Hispanic customers, 36% of white customers, and 25% of African-American customers correctly).

⁴⁹ Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 *PSYCHOL. PUB. POL’Y & LAW* 3 (2001).

⁵⁰ *Jeffrey Todd Pierce*, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3535> (last visited Nov. 1, 2016).

⁵¹ *Id.*

⁵² *See generally* Dana Him Mueller et. al., *Productive and Counterproductive Interviewing Techniques: Do Law Enforcement Investigators Know the Difference?*, 21 *PSYCHOL. PUB. POL’Y & L.* 295 (2013).

⁵³ Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 *PSYCHOL. PUB. POL’Y & LAW* 817, 817–22 (1995) (reviewing studies of the beliefs of the judiciary, jurors, law enforcement officers, and prosecutors regarding witness confidence and accuracy).

⁵⁴ Richard A. Wise et. al., *Criminal Law: A Tripartite Solution to Eyewitness Error*, 97 *J. CRIM. L. & CRIMINOLOGY* 807, 835 (2007).

⁵⁵ Richard A. Wise et. al., *How to Analyze the Accuracy of Eyewitness Testimony in a Criminal Case*, 42 *CONN. L. REV.* 435, 458–59 (2009).

Research indicates that a number of predictable and preventable variables under the control of investigators can contribute to eyewitness misidentification. For example, eyewitnesses—when presented with a lineup of individuals and asked to select the perpetrator—“have great difficulty not selecting *someone* when the culprit is not in the lineup.”⁵⁶ Simulation studies demonstrate that witnesses will attempt identification even when the actual culprit is not present unless they are given explicit instructions indicating that the witness may or may not be present and that “none of the above” is an acceptable response.⁵⁷ When such an instruction is provided, the rate of false identification drops significantly.⁵⁸

However, unbiased instructions do not completely resolve identification errors.⁵⁹ There are a number of other points during the investigation when law enforcement may influence the witness. For example, one study demonstrates how investigations resemble experiments, and, at each stage, there is room for suggestion:

[T]he police have a hypothesis (that the suspect is the culprit); they collect materials that could be used to test the hypothesis (e.g., picture of the suspect and filler pictures), they create a design (e.g., placing suspect's picture in a particular position in an array), instruct the subject(s) (eyewitness or eyewitnesses); run the procedure (show the lineup to the eyewitness), record the data (identification of the suspect or not); and interpret the hypothesis in light of the data (decide whether the identification decision changes their assessment of whether the suspect is the culprit).⁶⁰

Accordingly, eyewitness evidence—like other trace evidence—should be admitted during a trial if standard procedures are followed in producing it. These procedures can serve to minimize the chance of suggestion at each step of the process and serve as safeguards for wrongful convictions stemming from misidentification.

Recognizing the fallibility of such procedures and eyewitness identification, the *Justice Commission Report* includes extensive recommendations designed to improve the accuracy and reliability of witness identifications produced through police line-ups and photo identifications.⁶¹ The report also recommends that law enforcement use “fillers”—non-suspects presented in lineups and photo arrays—who resemble the suspect (i.e., similar build and characteristics, such as clothing worn), as described by the witness.⁶² The Justice Commission emphasized that there should be no factors in the process that would call attention to the suspect (i.e., black and white photographs for the non-suspects, but a color photograph of the suspect; different sized photos for the suspect and non-suspects; a mugshot of the suspect but snapshots of the non-suspects).⁶³ The Justice Commission also recommended that the administration be “double-blind.” This technique, designed to prevent bias, is one in which both the eyewitness and administrator of the line-up or photo array are not aware of the suspect's identity.⁶⁴ This prevents the administrator from giving the eyewitness verbal or nonverbal cues that may influence the eyewitness.

The *Justice Commission Report* included a recommendation for law enforcement training on proper identification procedures. Another recommendation suggests revising the eyewitness identification jury instruction to add additional factors for the jury to consider, including “stress, lighting, presence of a weapon at

⁵⁶ Judges, *supra* note 33, at 256 (emphasis added).

⁵⁷ *Id.* at 257.

⁵⁸ *Id.*

⁵⁹ *Id.* (noting that “witnesses will still tend to make false identifications even when given unbiased instructions”).

⁶⁰ Wise et. al., *supra* note 54, at 853 (citations and quotations omitted).

⁶¹ OKLA. JUSTICE COMM'N, *supra* note 10, at 14–19.

⁶² *Id.* at 16–17.

⁶³ *Id.*

⁶⁴ *Id.*

the scene . . . cross-racial identifications and age factors.”⁶⁵ Finally, the Justice Commission recommended that the Oklahoma Bar Association provide training on risks of unreliable eyewitness identifications to the Judicial Conference, the District Attorneys Association, and defense organizations.⁶⁶

3. Court Guidance on Eyewitness Reliability

a. Admissibility of Eyewitness Identifications

The U.S. Supreme Court, while acknowledging that reliability issues exist, has done little to ensure the reliability of eyewitness identifications and not recognized the influence of cross-racial identifications or own-race bias.⁶⁷ The Court’s decisions, when viewed as a whole, support admitting eyewitness testimony, “even where highly suggestive identification techniques are used, provided the identification is deemed reliable.”⁶⁸

In 1967, the Supreme Court recognized that “identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.”⁶⁹ Five years later, in *Neil v. Biggers*, the Court set forth “general guidelines as to the relationship between suggestiveness and misidentification” and identified factors to assist courts to evaluate “the likelihood of misidentification.”⁷⁰

In 1977, in *Manson v. Braithwaite*, the Supreme Court made clear that suggestive eyewitness identification procedures do not violate the Due Process Clause of the Fourteenth Amendment, “so long as the identification possesses sufficient aspects of reliability.”⁷¹ In *Manson*, the Court set forth a “totality of the circumstances” approach that must be considered in determining whether eyewitness testimony is reliable. This approach delineated at least five factors—from its decision in *Biggers*—to consider when making a reliability determination:

[1] the opportunity of the witness to view the criminal at the time of the crime, [2] the witness’ degree of attention, [3] the accuracy of his prior description of the criminal, [4] the level of certainty demonstrated at the confrontation, and [5] the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.⁷²

Eyewitness identifications tainted by improper police procedure are only excluded if “a very substantial likelihood of irreparable misidentification” exists.⁷³ And in 1981, the Supreme Court held that, unlike confession evidence, a judicial hearing to determine the admissibility of eyewitness testimony is not constitutionally mandated.⁷⁴ Further, suggestive eyewitness identifications are not subject to a due process analysis unless the suggestive conditions were created by law enforcement.⁷⁵ In 2012, the Court held that where there is no state action, a trial court does not need to make a pretrial reliability determination.⁷⁶

⁶⁵ *Id.*

⁶⁶ *Id.* at 49.

⁶⁷ In *Arizona v. Youngblood*, the Supreme Court did cite to a study referencing the high inaccuracy of cross-racial identifications. See *Arizona v. Youngblood*, 488 U.S. 51, 72 n.8 (1988).

⁶⁸ Wise, et. al., *supra* note 54, at 855.

⁶⁹ *United States v. Wade*, 388 U.S. 218, 228 (1967) (analyzing a case involving a post-indictment lineup conducted without counsel present and finding that to be a violation of the defendant’s Sixth Amendment right to counsel).

⁷⁰ *Neil v. Biggers*, 409 U.S. 488, 498–200 (1972).

⁷¹ *Manson v. Braithwaite*, 432 U.S. 98, 106 (1977).

⁷² *Id.* at 114.

⁷³ *Simmons v. United States*, 390 U.S. 377, 384 (1968).

⁷⁴ *Watkins*, 449 U.S. at 549.

⁷⁵ See *Perry v. New Hampshire*, 565 U.S. 228, 248 (2012).

⁷⁶ *Id.*

One academic analyzing the Supreme Court's approach to eyewitness identifications summarized the limitations established by the Court as follows:

There are two main issues with current Supreme Court case law regarding eyewitness identifications. The first is that a court will not even look at the reliability of the identification unless the procedure was police-orchestrated and unnecessarily suggestive. As a result, the scientific findings about the cross-race effect will not even be considered unless the police used an unnecessarily suggestive technique. Nevertheless, the cross-race effect will influence eyewitness testimony regardless of police procedure. The second issue builds upon the first—under current Supreme Court jurisprudence, trial judges can determine that an identification is reliable even if suggestive police practices were used, but these judges cannot determine that the identification is unreliable without suggestive police practices.⁷⁷

Because the Supreme Court has provided limited guidance, it has fallen to the states to adopt procedures that safeguard against suggestive and unreliable eyewitness identifications, whether the factors influencing reliability are created by law enforcement or are simply due to the fallibility of eyewitness testimony.

B. Oklahoma Guidance and Jury Instructions

The Oklahoma Court of Criminal Appeals (OCCA) has largely focused on the curative power of jury instructions—the judge's explanation to the jury of the laws and rules that should guide its deliberation—to provide some safeguards against faulty eyewitness identifications. The Oklahoma Uniform Jury Instruction (OUJI) on eyewitness identifications (CR-9-19) cautions that eyewitness testimony must be viewed critically and sets forth factors for the jury to consider when assessing such testimony:

Eyewitness identifications are to be scrutinized with extreme care. Testimony as to identity is a statement of a belief by a witness. The possibility of human error or mistake and the probable likeness or similarity of objects and persons are circumstances that you must consider in weighing identification testimony.⁷⁸

The standard for *when* judges must give the instruction has evolved over time through rulings by the OCCA.

In a 1975 case, the OCCA identified four factors related to the reliability of an eyewitness identification.⁷⁹ Those factors examine whether: 1) the witness had an opportunity to observe the perpetrator clearly; 2) the witness is positive in his or her identification; 3) the witness's identification is not later weakened by a prior failure to identify the perpetrator; and 4) the witness's testimony "remains positive and unqualified" and is not altered by cross-examination.⁸⁰ In this particular case—in which the witness, at trial, initially hesitated but then identified the defendant—the OCCA found that the trial court did not err in refusing to give a cautionary jury instruction.⁸¹ Because the four factors were present, the reliability of the eyewitness statement was not seriously in question.⁸²

⁷⁷ Connelly, *supra* note 44, at 155.

⁷⁸ OUJI-CR 9-19 (2016 Supp.).

⁷⁹ *Moreau v. State*, 530 P2d 1061 (Okla. Crim. App. 1975).

⁸⁰ *Id.*

⁸¹ *Id.*; *see also* *Hall v. State*, 565 P2d 57 (Okla. Crim. App. 1977) (finding no error in refusal to give cautionary instruction where witness satisfied four factor analysis for eyewitness identification reliability); *Pisano v. State*, 656 P2d 358 (Okla. Crim. App. 1981) (finding witness met four factor analysis for eyewitness identification reliability and thus no error in refusal to give cautionary instruction).

⁸² *Id.*

In 1984, the OCCA added a fifth factor to consider the reliability of eyewitness identification: the accuracy of the witness's prior identification of the perpetrator.⁸⁵ In *McDoulett v. State*, the witness made inaccurate statements about the perpetrator and was not in a position to observe the perpetrator clearly; the OCCA found that the trial court should have given a cautionary jury instruction.⁸⁴ The OCCA also stated that the factors to consider for reliability of eyewitness identification, as laid out in previous cases, were not an exhaustive list and that a cautionary instruction should be given where “identification is a critical element of the prosecution’s case and serious questions exist concerning the reliability of that identification.”⁸⁵

The OCCA, in 1987, determined that where the witness substantially met the five factors laid out in previous case law, the defendant was not prejudiced by the trial court’s refusal to give a cautionary jury instruction regarding the credibility of eyewitness identification.⁸⁶ Two years later, the OCCA held that if the witness was not in a position to clearly observe the perpetrator and the identification appeared unsure, the trial court should have instructed the jury on the reliability of eyewitness identification.⁸⁷

In 2016, OUJI CR-9-49 was amended to include a non-exhaustive list of elements to consider when determining whether the witness could properly observe the perpetrator, such as lighting, distance, stress level of the witness, and other circumstances established by the evidence.⁸⁸ The updated instruction also describes how a jury might determine the weight of the eyewitness identification, which includes looking to such things as when the identification was made and whether the witness described the perpetrator before the identification occurred.⁸⁹ The amended instructions include some—though not all— of the language recommended in the *Justice Commission Report*, discussed above.⁹⁰ It appears as though the Justice Commission’s related recommendations have not yet been adopted.

1. Expert Testimony on Eyewitness Identification Reliability

One safeguard against misidentification that the *Justice Commission Report* did not discuss—and that Oklahoma’s courts have not squarely addressed—is the admission of expert testimony on eyewitness identification. Such testimony could provide helpful context to jurors considering eyewitness-identification evidence,⁹¹ and its admissibility could be guided by the relevant sections of the evidence code and the *Daubert* factors (discussed in the *Forensics* chapter).⁹²

C. Coerced and False Confessions and Interrogation Techniques

“A defendant’s confession is ‘probably the most probative and damaging evidence that can be admitted against him,’ so damaging that a jury should not be expected to ignore it even if told to do so”⁹³ A false confession

⁸⁵ *McDoulett v. State*, 683 P.2d 978, 981 (Okla. Crim. App. 1984).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Webb v. State*, 746 P.2d 205, 206 (Okla. Crim. App. 1987).

⁸⁷ *Mathieus v. State*, 778 P.2d 491 (Okla. Crim. App. 1989).

⁸⁸ In re Adoption of the 2016 Revisions to Okla. Unif. Jury Instructions–Crim. (2d ed.), No. CCAD-2016-4, 2016 Okla. Crim. App. LEXIS 45, at *15–14 (Okla. Crim. App. June 1, 2016). The amended language of the new jury instruction largely resembles recommendations made by the Oklahoma Justice Commission Report to the Oklahoma Bar Association in 2015. OKLA. JUSTICE COMM’N, *supra* note 10, at 49, 78.

⁸⁹ In re Adoption of 2016 Revisions, 2016 Okla. Crim. App. LEXIS 45, at *15–14.

⁹⁰ *Id.*; see also OKLA. JUSTICE COMM’N, *supra* note 10, at 78.

⁹¹ All of the OCCA cases to address eyewitness-identification expert testimony were decided before the court adopted the *Daubert* standard in 1995. See e.g., *Bristol v. State*, 764 P.2d 887, 890 (Okla. Crim. App. 1988) (allowing expert testimony without explaining its reasoning); *Smith v. State*, 636 P.2d 277, 281 (Okla. Crim. App. 1982) (upholding exclusion under a discretionary standard); *King v. State*, 640 P.2d 985 (Okla. Crim. App. 1982).

⁹² See Sean S. Hunt, Comment, *The Admissibility of Eyewitness-Identification Expert Testimony in Oklahoma*, 65 OKLA. L. REV. 311, 325–26 (2011).

⁹³ *Arizona v. Fulminante*, 499 U.S. 279, 292 (White, J., dissenting) (quoting *Cruz v. New York*, 481 U.S. 486, 495 (1987) (White, J., dissenting)) (internal citations omitted).

is “a false admission of guilt” followed by a “postadmission narrative, which includes details about how or why the crime was committed.”⁹⁴ Confessions, even without a post-admission narrative, are incredibly powerful evidence, and juries give them great weight, even if it is known that the confession was coerced or recanted.⁹⁵

Of the 1,810 exonerations nationwide since 1989, 234 of them involved a false confession.⁹⁶ Of the 10 men exonerated from Oklahoma’s death row, two cases—those of Robert Miller, Jr., and Ronald Keith Williamson—involved false confessions.⁹⁷ In reviewing 301 wrongful convictions, including both capital and non-capital cases, the *Justice Commission Report* found that 27 percent of wrongful convictions involved false confessions.⁹⁸ These numbers are consistent with studies of known wrongful conviction that have identified false confessions as a “substantial contributor” in 15 to 25 percent of cases.⁹⁹ Most documented false confessions occur in murder cases and cases that are high profile.¹⁰⁰

1. The Supreme Court on Coerced and False Confessions

In the 1966 landmark decision of *Miranda v. Arizona*,¹⁰¹ the U.S. Supreme Court recognized the potentially coercive nature of psychological confession techniques.¹⁰² It was out of this recognition that the *Miranda* warnings were borne: prior to any custodial interrogation,¹⁰³ a suspect must be informed of the right to remain silent, that anything he says may be used as evidence against him, and that he has the right to an attorney.¹⁰⁴

The *Miranda* Court traced the history of interrogations in the U.S., acknowledging that early interrogation techniques—known as the third degree—relied on physical brutality and intimidation to obtain confessions from suspects.¹⁰⁵ A 1931 national report to Congress detailed the physical violence used against suspects by police.¹⁰⁶ The report stated, “Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence.”¹⁰⁷ The use of physical torture and sleep

⁹⁴ Steven J. Frenda et al., *Sleep Deprivation and False Confessions*, 115 PROCEEDINGS NAT’L ACAD. SCI. 2047 (2016), <http://ssrn.com/abstract=2778761>; see also Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCHIATRY & LAW 332, 333 (2009).

⁹⁵ Saul M. Kassir & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 1, 27–46 (1997); see also Lisa E. Hasel & Saul M. Kassir, *On the Presumption of Evidentiary Independence: Can Confessions Corrupt Eyewitness Identifications?*, 20 PSYCHOL. SCI. 122 (2009).

⁹⁶ *Browse Cases*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Nov. 1, 2016) (filter column titled “Contributing Factors Display” by “False Confession”).

⁹⁷ See *id.* (filter column titled “State” by “Oklahoma” and column titled “Contributing Factors Display” by “False Confession”). Of the 31 Oklahomans exonerated since 1989, false confessions were involved in five of the cases (including the two death penalty cases mentioned above).

⁹⁸ Press Release, Okla. Just. Comm’n, Oklahoma Justice Commission Issues Final Report, Adjourns (Mar. 1, 2013), <http://www.okbar.org/news/Recent/2013/Justice-Commission.aspx>.

⁹⁹ Samuel R. Gross & Michael Shaffer, EXONERATIONS IN THE UNITED STATES: 1989–2012 (Nat’l Registry of Exonerations, June 2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf; see also BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011).

¹⁰⁰ See Samuel Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 325 (2005); see also Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 NC. L. REV. 891 (2004).

¹⁰¹ 384 U.S. 436 (1966).

¹⁰² *Id.* at 464 n.53. Two years before *Miranda*, the Supreme Court decided *Jackson v. Denno*, in which the Court held that a defendant objecting to the admission of confession evidence was constitutionally entitled to a hearing to determine its voluntariness. 378 U.S. 368, 376–377 (1964).

¹⁰³ Custodial interrogation is defined as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 445 (observing that “in the early 1950’s . . . it is clear that police violence and the ‘third degree’ flourished at that time”).

¹⁰⁶ NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

¹⁰⁷ *Id.* at 5.

deprivation in interrogations continued well into the late 1960s,¹⁰⁸ though the U.S. Supreme Court ruled in 1936 that coerced confessions obtained through physical violence “vitiated the judgment” and violated a defendant’s due process rights.¹⁰⁹

Interrogation techniques shifted to psychological measures with the popularization of a method developed by Fred Inbau and John Reid—now commonly known as the Reid technique—in the early 1960s.¹¹⁰ The *Miranda* Court reiterated that “this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition.”¹¹¹ The Court noted that modern interrogations were still marked by secrecy, designed to deprive a suspect of “every psychological advantage.”¹¹² The Court reported that to disarm a suspect, law enforcement are instructed to, among other things, assume a suspect’s guilt, “maintain only an interest in confirming certain details” of the offense, actively discourage explanations of innocence, and “induce a confession out of trickery,” such as putting the suspect in a line-up to be identified by false witnesses.¹¹³

While *Miranda* tacitly accepted the use of deceptive tactics in interrogations, three years later, in *Frazier v. Cupp*, the Court held that deception was just one of many factors to consider in determining the constitutionality of an interrogation.¹¹⁴ In the 50 years since *Miranda*, studies have shown that the *Miranda* warnings are a procedural formality with no discernible effect on preventing coerced or false confessions.¹¹⁵ This concern is discussed in more detail below.

Prior to 1991, a finding that a defendant’s conviction was based, at least in part, on a coerced or involuntary confession automatically resulted in a new trial on due process grounds and was not subject to harmless error analysis.¹¹⁶ Since the Supreme Court’s decision in *Arizona v. Fulminante*,¹¹⁷ however, courts have applied harmless error analysis¹¹⁸ to the admission of a coerced confession. Now, it is possible that, although a due process violation occurred, a defendant’s conviction could nonetheless be upheld.¹¹⁹

2. Types of False Confessions

There are three types of false confessions: “voluntary” false confessions, “coerced-compliant” false confessions, and “coerced-internalized” false confessions. A voluntary false confession is one that is made in the absence of police interrogation and often involves persons with mental health issues.¹²⁰

¹⁰⁸ See, e.g., *Chambers v. Florida*, 309 U.S. 227 (1940); *Vernon v. Alabama*, 315 U.S. 547 (1941); *Pressley v. State*, 112 P.2d 809 (Okla. Crim. App. 1941); *Ward v. Texas*, 316 U.S. 547 (1942); *Lyons v. State*, 158 P.2d 142 (Okla. Crim. App. 1945), *overruled on other grounds by* *Hopper v. State*, 756 P.2d 538, 540 (Okla. Crim. App. 1987); *Ashcraft v. Tennessee*, 322 U.S. 145 (1944); *Malinski v. New York*, 324 U.S. 401 (1945); *People v. Wakat*, 114 N.E.2d 706 (Ill. 1953); *Kier v. State*, 152 A.2d 494 (Md. 1957); *People v. Matlock*, 356 P.2d 505 (Cal. 1959); *People v. Portelli*, 205 N.E.2d 837 (NY. 1963).

¹⁰⁹ *Brown*, 297 U.S. at 287.

¹¹⁰ See Robert Kolker, *Nothing but the Truth*, THE MARSHALL PROJECT (May 24, 2016 7:00 AM), <https://www.themarshallproject.org/2016/05/24/nothing-but-the-truth#6gBdOPVCg>.

¹¹¹ *Miranda*, 384 U.S. at 448 (quoting *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960)).

¹¹² *Id.* at 449.

¹¹³ *Id.* at 449–54.

¹¹⁴ 394 U.S. 751, 759 (1969).

¹¹⁵ See e.g., Tonja Jacobi, *Miranda 2.0*, 50 U.C. DAVIS L. REV. (2016) (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2656405; see also Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519 (2008).

¹¹⁶ See, e.g., *Payne v. Arkansas*, 356 U.S. 560, 568 (1958); *New Jersey v. Portash*, 440 U.S. 450, 459 (1979); *Chapman v. California*, 386 U.S. 18, 23 (1967).

¹¹⁷ 499 U.S. 279 (1991).

¹¹⁸ The standard for finding a federal constitutional violation harmless is that “the court must be able to declare a belief that it [the constitutional error] was harmless beyond a reasonable doubt.” *Chapman*, 386 U.S. at 24.

¹¹⁹ See e.g., Alan Hirsch, *Confessions and Harmless Error: A New Argument for the Old Approach*, 12 BERKELEY J. CRIM. L. 1 (2007), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1005&context=bjcl>

¹²⁰ Saul M. Kassir & Lawrence S. Wrightman, *Confession Evidence*, in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 67 (1983). The persons who claimed to have kidnapped the Lindbergh baby are an example of voluntary false confessions. See Kolker, *supra* note 110.

With a coerced-compliant false confession, a person confesses to a crime despite knowing they are innocent because of the pressures of coercive interrogation techniques.¹²¹ The situation is one in which a suspect perceives falsely confessing to be the better of two options (i.e., confessing or continuing the interrogation).¹²²

Coerced-internalized confessions occur where an innocent suspect, even if only temporarily, believes that they committed the offense.¹²³ A coerced-internalized false confession necessarily involves deception on the part of the interrogator.¹²⁴ Such a confession is often recanted shortly after or sometimes even during an interrogation.¹²⁵

A recent study on coerced-internalized confessions resulted in 70 percent of participants reporting a false memory of adolescent criminal activity that involved an interaction with police.¹²⁶ The participants met with the same researcher three times and were asked about a true and false memory at each interview.¹²⁷ Given the participants' surprisingly high rate of false memory, the study was concluded before all 60 persons participated.¹²⁸ The study has important implications for the legal system and the interrogation methods used by law enforcement: the "results align with the literature suggesting that exposure to misinformation provided by interviewers can lead to major distortions in memory."¹²⁹ The authors highlight, though, that an important distinction between this study and actual police interrogations is that there were likely no perceived negative consequences to confessing to the false criminal or noncriminal event in the study.¹³⁰

3. Basic Interrogation Tactics

a. Physical Coercion and Sleep Deprivation

It is well-established that physical coercion renders a confession involuntary. As previously discussed, the U.S. Supreme Court held in 1936 that a coerced confession obtained by means of physical violence violated the Due Process Clause of the Fourteenth Amendment and mandated reversal of a conviction.¹³¹ In that case, the three suspects had been beaten and physically tortured for days, at the end of which all three confessed.¹³²

Sleep deprivation may also play a part in false confessions. A study on sleep deprivation and false confessions found that sleep-deprived participants were 4.5 times more likely to sign a statement containing false information than rested participants.¹³³ The study further found that the results suggested that persons with an "impulsive cognitive style" were more likely to sign a false statement when sleep deprived than other persons.¹³⁴

¹²¹ Leo, *supra* note 94, at 338.

¹²² Kassir & Wrightman, *supra* note 120, at 77.

¹²³ *Id.* at 78; see also Leo, *supra* note 94, at 339 (referring to "coerced-internalized" false confessions as "persuaded" false confessions).

¹²⁴ Leo, *supra* note 94, at 339.

¹²⁵ *Id.*

¹²⁶ Julia Shaw & Stephen Porter, *Constructing Rich False Memories of Committing Crime*, PSYCHOL. SCI. 6 (2015), <https://nebulawriting.com/ce2babe46721a52c-861f1a646c2856aa?AccessKeyId=AF62ECFBCD8F6D95BACE&disposition=0&alloworigin=1>. Researchers gathered an initial group of 126 college-age participants, of which 70 met the qualifications; the first 60 students participated in the study. *Id.* at 2.

¹²⁷ *Id.* at 2–4, 6. The participants were split into two groups—one that was given a false criminal memory and one that was given a false noncriminal memory. *Id.* at 3. The results for the false noncriminal memory group, for which 76 percent of participants reported a false memory, were statistically consistent with the false criminal memory group. *Id.* at 6.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Brown v. Mississippi*, 297 U.S. 278, 284 (1936) (when asked during trial how severely one defendant was whipped, the deputy in charge testified: "Not too much for a Negro; not as much as I would have done if it were left to me").

¹³² *Id.* at 281–82.

¹³³ Frenda et al., *supra* note 94.

¹³⁴ *Id.* at 2.

Depriving a suspect of sleep—whether intentionally as part of an interrogation strategy or incidentally as part of a lengthy interrogation—may compromise the reliability of evidence obtained from an innocent suspect in an interrogation and put innocent suspects at increased risk. To this end, our findings provide an additional justification for the importance of videotaping all interrogations, thus providing judges, attorneys, experts, and jurors with additional opportunities to evaluate the probative value of any confession that is obtained.¹⁵⁵

The study also recommends that suspects' fatigue be assessed before and during an interrogation.¹⁵⁶ Further, while noting that the results suggested a correlation between false confession and sleep deprivation, the authors recognize that the study did not provide information on the impact of sleep deprivation on true confessions.¹⁵⁷

b. Psychological Coercion and False Confessions

We now know that psychological coercion can and does elicit false confessions. It may be time to more broadly consider the influence of psychological coercion on the voluntariness and reliability of a confession, especially in light of studies that conclude the *Miranda* warnings are largely ineffective in protecting one's Fifth Amendment right against self-incrimination.¹⁵⁸ The 1,810 nationwide exonerations since 1989 include 227 wrongful convictions involving false confessions, all *after* the individuals received *Miranda* warnings.¹⁵⁹ Almost three quarters of the 227 cases involving false confessions were murder cases.¹⁶⁰ One researcher recommends broad reforms to *Miranda* to guard against false confessions, including communicating *Miranda* warnings through a non-law enforcement medium, such as a video; notifying a suspect of the length of an interrogation; video recording all interrogations; and changing the strength of the *Miranda* warnings depending on the specific characteristics of a suspect (e.g., if the suspect is a juvenile or has mental health issues or intellectual disabilities).¹⁶¹

c. Common Investigative Errors Leading to False Confessions

Regardless of the method used, there are three investigative errors commonly associated with false custodial confessions: misclassification, coercion, and contamination.¹⁶² Misclassification occurs when law enforcement incorrectly decides that an innocent person is guilty.¹⁶³ This can happen for many reasons, including making an erroneous determination that a suspect's assertions of innocence are false, or identifying an innocent suspect through a description of the perpetrator or a faulty eyewitness identification.¹⁶⁴ Coercion can come into play during an interrogation relying on an accusatory style that assumes a suspect's guilt, or in extreme instances can involve physical violence or deprivation of sleep or food.¹⁶⁵ Finally, contamination occurs when a law

¹⁵⁵ *Id.* at 5.

¹⁵⁶ *Id.* at 5.

¹⁵⁷ *Id.* at 2.

¹⁵⁸ Richard A. Leo & Brian L. Cutler, *False Confessions in the Twenty-First Century*, THE CHAMPION MAGAZINE (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2763910.

¹⁵⁹ *Browse Cases*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Nov. 1, 2016) (filter column titled "Contributing Factors Display" by "False Confession"); see also Samuel Gross & Maurice Possley, *For Fifty Years, You've Had "The Right to Remain Silent"*, THE MARSHALL PROJECT (June 12, 2016 10:00 PM), <https://www.themarshallproject.org/2016/06/12/for-50-years-you-ve-had-the-right-to-remain-silent>.

¹⁶⁰ Gross & Possley, *supra* note 159.

¹⁶¹ Jacobi, *supra* note 113.

¹⁶² Leo, *supra* note 94, at 333.

¹⁶³ *Id.* at 334.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 334–35.

enforcement officer implies or provides crime-specific information to a suspect during an interrogation, which can bolster a confession's post-admission narrative.¹⁴⁶ Of course, some basic details could also be known by a suspect through media reports or other external factors.

Studies have demonstrated links between the style of interrogation and the risk of a false confession. A recent study notes:

During interviewing, asking leading questions, introducing new and inaccurate information, and pressuring or expecting the interviewee to report memory details may facilitate such an inaccurate account. In legal contexts, interviewing techniques such as guilt-presumptive and confrontational approaches are thought to facilitate false confessions and promote inaccurate witness accounts, which can ultimately lead to procedural injustice and wrongful imprisonment.¹⁴⁷

In the instance of a false confession, a suspect's post-admission narrative will likely contain multiple guesses and wrong answers and will likely contradict evidence in a case.¹⁴⁸ Most importantly, while a guilty suspect's confession and post-admission narrative will lead police to "new, missing, or derivative crime scene evidence, provide them with missing information, explain seemingly anomalous or otherwise inexplicable crime facts, and [are] likely be corroborated by objective evidence," a false confession will not.¹⁴⁹ These principles are illustrated by the case of Robert Lee Miller, Jr., an Oklahoman who falsely confessed to the 1986 rape and murder of 83-year-old Anna Laura Fowler and 92-year-old Zelma Cutler.¹⁵⁰

Robert Miller, Jr., was convicted and sentenced to death for both murders and was eventually exonerated on the basis of DNA evidence.¹⁵¹ His conviction was based in large part on his false confession.¹⁵² A drug user, it is likely that Miller was under the influence at the time of his confession.¹⁵³ His interrogation lasted roughly 12 hours, and Miller's confession was given in the form of a dream vision, with him channeling the killer.¹⁵⁴ At trial, the prosecution relied on the fact that Miller knew details only known by the true killer.¹⁵⁵ However, Miller's interrogation shows multiple guesses as to an object left behind at the scene and the way the killer entered the residences, as well as consistent assertions by Miller that he did not commit the murders.¹⁵⁶

Other Oklahoma cases demonstrate how vulnerable populations may be induced to confess based on false promises by interrogators. In 1994, Michelle Murphy was a teenage mother "from the wrong side of the tracks in west Tulsa."¹⁵⁷ Her infant son was brutally killed in her home, and, when law enforcement officers arrived at the crime scene, they took Murphy's daughter into protective custody. Under questioning, Murphy "made incriminating statements to a Tulsa police detective . . . because he badgered her and promised she could see

¹⁴⁶ *Id.* at 337.

¹⁴⁷ Shaw & Porter, *supra* note 126, at 2 (internal citations omitted).

¹⁴⁸ Leo & Cutler, *supra* note 138.

¹⁴⁹ *Id.*

¹⁵⁰ Graham Lee Brewer, *Oklahoma Executes Man for Two Rapes, Murders*, THE OKLAHOMAN, Dec. 11, 2013, <http://newsok.com/article/3913351>.

¹⁵¹ *Id.*

¹⁵² Randall T. Coyne, *Dead Wrong in Oklahoma*, 42 TULSA L. REV. 227–28 (2006).

¹⁵³ *Id.* at 227.

¹⁵⁴ *Id.*

¹⁵⁵ Brewer, *supra* note 150.

¹⁵⁶ *Id.*; see also Coyne, *supra* note 152.

¹⁵⁷ Cary A. Spinwall & Ziva Branstetter, *Released after 20 Years in Prison, Michelle Murphy Trying to Rebuild Her Life*, TULSA WORLD, Oct. 13, 2014, http://www.tulsaworld.com/newshomepage1/released-after-years-in-prison-michelle-murphy-trying-to-rebuild/article_0dbc825d-734b-5322-8710-02234058268f.html.

her daughter if she confessed.”¹⁵⁸ Murphy never saw her daughter again. Twenty years later—throughout which Murphy maintained her innocence—DNA testing revealed that blood from an unknown source found at the crime scene was not a match to Murphy. The prosecuting attorney filed a motion to vacate her conviction, and, in 2014, Murphy was released from prison and formally declared innocent.¹⁵⁹

Another investigative tactic that heightens the risk of a false confession is interrogators’ minimization of the crime through “theme development,” a process of providing moral justification or face-saving excuses, making confessions seem like an expedient means of escape.”¹⁶⁰ Social science research indicates that “people are highly influenced by perceived reinforcements” and that “suspects infer leniency in treatment from minimizing remarks that depict the crime as spontaneous, accidental, pressured by others, or otherwise excusable—even in the absence of an explicit promise.”¹⁶¹ For populations already susceptible to falsely confessing, interrogators’ use of implied false promises further increases the likelihood that a false confession will be obtained.

4. Formal Methods of Interrogation

The next sections consider a few common interrogation methods used by law enforcement.

a. Reid Technique: Accusatory Method

As discussed, *supra*,¹⁶² the shift to psychologically coercive, rather than physically coercive, interrogation methods took root with the Reid technique, which became popular in the 1960s.¹⁶³ In the 1943 case of *Lyons v. State*, the OCCA described an early version of the Reid technique, stating:

[Law enforcement officers] constituted themselves a tribunal unknown to the law and proceeded without warrant to subject the man to a secret examination, from which his friends and his counsel were carefully excluded. They assumed his guilt, and refused to credit his denials and his protestations of innocence, or to accept anything he might say in his own behalf until they had extorted from him the alleged confession. Such proceedings are without excuse or justification, and to tolerate them or to ignore them without rebuke is to bring reproach upon the law and convert the administration of justice into an engine for the perpetration of rank injustice.¹⁶⁴

The OCCA’s description follows the fundamental steps associated with the Reid technique: deprive the suspect of support, conduct an interrogation in private, assume guilt, reject assertions of innocence, and persevere until a confession is obtained.¹⁶⁵ The current president of Reid and Associates asserts that false confessions are the product of interrogators deviating from the Reid technique.¹⁶⁶ In practice, many interrogators skip the first step of the Reid technique—a non-accusatory interrogation—and instead begin with the assumption of guilt and

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Saul M. Kassir et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1485378.

¹⁶¹ *Id.*

¹⁶² See note 110 and accompanying text.

¹⁶³ See Kolker, *supra* note 110.

¹⁶⁴ *Lyons*, 158 P.2d at 149 (holding that defendant’s second confession was admitted without error where first coerced confession was excluded).

¹⁶⁵ See Eli Hager, *The Seismic Change in Police Interrogations*, THE MARSHALL PROJECT (Mar. 7, 2017 10:00 PM), <https://www.themarshallproject.org/2017/03/07/the-seismic-change-in-police-interrogations> (describing the Reid technique: “It’s tropes are familiar from any cop show: the claustrophobic room, the repeated accusations of guilt, the presentation of evidence—real or invented—and the slow build-up of pressure that makes admitting a crime seem like the easy way out”).

¹⁶⁶ *PEACE Article*, REID & ASSOCIATES, www.reid.com/pdfs/peacearticle.pdf (last accessed Nov. 10, 2016).

rejection of denials that are now associated with a Reid interrogation.¹⁶⁷ Notably, studies of law enforcement officers' ability to accurately assess a suspect's nonverbal cues reveal that officers are no better than laypersons at assessing whether someone is lying, albeit they are more confident in their conclusions.¹⁶⁸ Indeed, the Reid technique has no scientific foundation and was based, in part, on the polygraph, a test with known reliability issues.¹⁶⁹

The Reid technique remains the most widely used interrogation method in the U.S., though there are some discussions of reforms in the federal government and within some law enforcement agencies.¹⁷⁰ In fact, in March 2017, one of the country's largest police consulting firms—which trains hundreds of thousands of police officers nationwide and federal agents at nearly every major agency—announced that it will stop teaching the Reid technique to law enforcement.¹⁷¹ The firm's president and CEO stated, "More and more of our law enforcement clients have asked us to remove it from their training based on all the academic research showing other interrogation styles to be much less risky."¹⁷² The Reid technique undoubtedly produces confessions, but the law enforcement community is increasingly concerned as to whether its coercive methods play a role in false confessions.

b. Information Gathering Methods

Other countries have abandoned psychologically coercive interrogation techniques in favor of information gathering methods.¹⁷³ The United Kingdom, for example, uses a method called PEACE, which stands for Planning and preparation, Engage and explain, obtain an Account, Closure, and Evaluation.¹⁷⁴ It is not permissible for law enforcement in the U.K. to lie to suspects.¹⁷⁵ Canada has shifted to the "cognitive interview" in recent years, which is non-confrontational and uses open-ended questions designed to solicit a narrative from a suspect.¹⁷⁶

Proponents of the Reid technique assert that the PEACE method of interrogation, used in the U.K., is included within the first step of the Reid technique, which is a non-accusatory fact finding interview.¹⁷⁷ A 2012 meta-analysis of accusatory (e.g., Reid technique) and information gathering (e.g., PEACE method) interrogation methods revealed preliminary results showing that while both methods are "associated with the production of confessions . . . the information gathering method increased the likelihood of true confessions, while reducing the likelihood of false confessions."¹⁷⁸

¹⁶⁷ Douglas Starr, *The Interview: Do Police Interrogation Techniques Produce False Confessions?*, THE NEW YORKER, Dec. 9, 2013, <http://www.newyorker.com/magazine/2013/12/09/the-interview-7>. Researcher Richard A. Leo observed over 200 interrogations in the mid-1990s and noted that most law enforcement officers went straight to the interrogation. *Id.*

¹⁶⁸ Saul M. Kassin et al., *"I'd Know a False Confession If I Saw One": A Comparative Study of College Students and Police Investigators*, 29 LAW & HUM. BEHAV. 211–27 (2005); *see also* Leo & Cutler, *supra* note 158.

¹⁶⁹ *See* Starr, *supra* note 167; *see also* American Psychological Association, *The Truth About Lie Detectors (aka Polygraph Tests)* (last accessed June 15, 2016), <http://www.apa.org/research/action/polygraph.aspx>.

¹⁷⁰ Kelly McEvers, *In New Age of Interrogations, Police Focus on Building Rapport*, NAT'L PUB. RADIO (May 23, 2016), <http://www.npr.org/2016/05/23/479207853/in-new-age-of-interrogations-police-focus-on-building-rapport>.

¹⁷¹ *See* Hager, *supra* note 165.

¹⁷² *Id.*

¹⁷³ *See* Leo & Cutler, *supra* note 158; *see also* Starr, *supra* note 167.

¹⁷⁴ Leo & Cutler, *supra* note 158.

¹⁷⁵ *Id.*

¹⁷⁶ Starr, *supra* note 167.

¹⁷⁷ *See* PEACE Article, REID & ASSOCIATES, www.reid.com/pdfs/peacearticle.pdf (last accessed Nov. 10, 2016).

¹⁷⁸ Christian A. Meissner et al., *Interview and Interrogation Methods and Their Effects on True and False Confessions*, CAMPBELL SYSTEMATIC REVIEWS 8 (2012).

c. High-Value Detainee Interrogation Group: Interview-style Method

The High-Value Detainee Interrogation Group (HIG), formed in 2009, grew out of an Executive Order¹⁷⁹ intended “to improve the effectiveness of human intelligence-gathering [and] to promote the safe, lawful, and humane treatment of individuals in United States custody.” The HIG has two main functions: to collect intelligence through national security interrogations, and to develop best practices for interrogations through scientific research.¹⁸⁰

The HIG’s research program has become a major funder of public research on interrogations and has also begun to train a small number of law enforcement agencies in the U.S. in its non-coercive interrogation techniques.¹⁸¹ The Los Angeles Police Department became HIG’s first test ground; the interview-style interrogation approach championed by HIG was instrumental in obtaining information that led to charges and an eventual conviction in the infamous murder of art collector Hervey Medellin.¹⁸² In Los Angeles, officers were initially resistant to a new method, but have become convinced that the HIG’s approach and the techniques it uses work.¹⁸³ The LAPD has assessed the success rate of the HIG’s methods by asking whether interrogations have revealed new case information—rather than solely whether a confession was obtained—and estimate a 75 to 80 percent success rate.¹⁸⁴

According to the HIG, “an effective interrogation requires an individualized, flexible, rapport-based, and information-gathering approach.”¹⁸⁵ Gaining a suspect’s trust is key. Interrogations are monitored and recorded, and interrogation rooms can be designed to draw out a suspect by keeping him comfortable. For example, more open space with windows can put people at ease and make it more likely that they will disclose information.¹⁸⁶ A former HIG director, Frazier Thompson, recently disavowed waterboarding and other coercive techniques and made clear that the HIG’s practices are “humane, lawful and based on the best science available” which demonstrate that “rapport-based techniques elicit the most credible information.”¹⁸⁷

3. Vulnerable Populations and Coerced Confessions

Anyone can make a false confession, but juvenile suspects and suspects who are intellectually disabled or mentally ill are particularly susceptible to falsely confessing due to their cognitive limitations and particular vulnerability to psychological pressure.¹⁸⁸ The chart on the next page compiles information from the National Registry of Exonerations regarding the 1,810 wrongful convictions from 1989 to November 2016 and demonstrates the relationship between false confessions and intellectual disability or mental illness, as well as the relationship between false confessions and a suspect’s age at the time of the offense.¹⁸⁹

¹⁷⁹ Exec. Order No. 13491, 3 C.F.R. 199 (2009-2010).

¹⁸⁰ See *High-Value Detainee Interrogation Group*, FED. BUR. OF INVESTIGATION, <https://www.fbi.gov/about/leadership-and-structure/national-security-branch/high-value-detainee-interrogation-group> (last visited March 7, 2017); see also Bobby Ghosh, *White House Announces New Interrogation Team*, TIME, Aug. 24, 2009, <http://content.time.com/time/nation/article/0,8399,1918298,00.html>.

¹⁸¹ See Kolker, *supra* note 110.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See FED. BUR. OF INVESTIGATION, HIGH VALUE DETAINEE INTERROGATION GROUP, INTERROGATION BEST PRACTICES 1 (August 26, 2016), <https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view>.

¹⁸⁶ See Kolker, *supra* note 110.

¹⁸⁷ Carrie Johnson, *Detainee Interrogation Chief: Waterboarding Doesn’t Work*, NAT’L PUB. RADIO (Feb. 12, 2016), <http://www.npr.org/2016/02/12/466411309/detainee-interrogation-chief-waterboarding-doesnt-work>.

¹⁸⁸ Leo & Cutler, *supra* note 138; see also OKLA. JUSTICE COMM’N, *supra* note 10, at 9 (“Juveniles and suspects who are mentally ill, mentally retarded, or borderline mentally retarded are especially vulnerable to the types of psychological pressure and intimidating interrogation techniques that lead to false confessions.”).

¹⁸⁹ *Browse Cases*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Nov. 1, 2016).

Table 1: Exonerations And Rates Of False Confessions For Defendants With Mental Illness Or Intellectual Disability And Juveniles (1989-2016)

	Number Exonerated	Percent Who Falsely Confessed
Mental illness or intellectual disability	103	72%
No disability reported	1,707	9%
	Number Exonerated	Percent Who Falsely Confessed
18 or older at time of crime	1,651	10%
16–17 at time of crime	116	33%
14–15 at time of crime	36	53%
Under 14 at time of crime	7	86%

Source: Data obtained from the National Registry of Exonerations (as of Nov. 1, 2016)

6. Safeguarding Against False Confessions

The *Justice Commission Report* recommended that—in order to prevent coerced confessions and protect law enforcement from unfair accusations—legislation should be adopted requiring the videotaping of interrogations related to serious felonies when possible.¹⁹⁰ Moreover, when an interrogation is not videotaped, the report recommended a rebuttable presumption of inadmissibility.¹⁹¹ It also recommended that the Council on Law Enforcement Education and Training (CLEET) adopt a model policy based on the recommended legislation and provide training for all law enforcement agencies. Specifically, the CLEET model policy “shall include special protocols to be followed in order to guard against false confessions from juveniles, suspects who exhibit indicators of mental or cognitive deficiency, and suspects for whom English is not their native language.”¹⁹²

When the *Justice Commission Report* was issued, four Oklahoma law enforcement agencies had voluntarily adopted recording requirements: Moore Police Department, Norman Police Department, the Oklahoma County Sheriff’s Office, and Tecumseh Police Department.¹⁹³

D. Jailhouse Informants

Of the 34 exonerations in homicide cases in Oklahoma, four—two capital and two non-capital—involved jailhouse informant testimony.¹⁹⁴ According to a 2004 report, jailhouse informants are the leading cause of wrongful convictions in capital cases in the U.S.¹⁹⁵ Jailhouse informants have long been considered to be of questionable reliability. Over 60 years ago, the U.S. Supreme Court noted that “[t]he use of informers, accessories, accomplices, false friends, or any of the other betrayals which are ‘dirty business’ may raise serious

¹⁹⁰ See OKLA. JUSTICE COMM’N, *supra* note 10, at 41–43.

¹⁹¹ *Id.*

¹⁹² *Id.* at 42–43.

¹⁹³ See *id.* at 9.

¹⁹⁴ Browse Cases: Detailed View, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited March 7, 2017) (in detailed view—not summary view—filter column titled “State” by “Oklahoma” and column titled “Tags” by “JI”). The four cases are those of Ronald Williamson (capital), Dennis Fritz (Williamson’s co-defendant, non-capital), Adolph Munson (capital), and Clinton Potts (non-capital).

¹⁹⁵ NW. UNIV. L. SCH., *Ctr. on Wrongful Convictions: The Snitch System* 3 (2004), <http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/documents/SnitchSystemBooklet.pdf> (“In all there have been 111 death row exonerations since capital punishment was resumed in the 1970s. The snitch cases account for 45.9% of those. That makes snitches the leading cause of wrongful convictions in U.S. capital cases.”).

questions of credibility.”¹⁹⁶ Due to these concerns, government commissions have been formed to investigate jailhouse informants and their participation in criminal cases. From Los Angeles¹⁹⁷ to Illinois¹⁹⁸ to Canada,¹⁹⁹ these commissions have consistently reached the same conclusion—that jailhouse informants are untrustworthy and unreliable.

Confessions by co-defendants raise reliability concerns similar to the testimony of jailhouse informants, as co-defendants are often offered leniency in exchange for testifying against their co-defendant. Further, co-defendants sometimes inculcate innocent persons who are charged and convicted as co-defendants; likewise, innocent persons who falsely confess sometimes implicate others who also are innocent.²⁰⁰ The National Registry of Exonerations includes 195 exonerations involving co-defendant confessions that implicated the exonerees.²⁰¹

In 1980, the U.S. Supreme Court ruled that the prosecution’s use of a government informant who “deliberately elicited” information from a criminal defendant regarding pending charges violated a defendant’s due process rights.²⁰² Eleven years later, in *Arizona v. Fulminante*, the Court held that a coerced confession obtained by a government informant likewise violated due process but could be subject to a harmless error analysis.²⁰³

In 1999, the OCCA considered the prosecution’s use of a jailhouse informant in *Dodd v. State*.²⁰⁴ Two years earlier, Rocky Dodd had been convicted of a double homicide and sentenced to death.²⁰⁵ Among the evidence against Dodd was the testimony of jailhouse informant Kenneth Bryant. Bryant testified that Dodd confessed to him while they were incarcerated in the Oklahoma County Jail.²⁰⁶ This was not the first instance of Bryant offering testimony favorable to the prosecution: in six separate death penalty cases since 1979, Bryant had provided such help to Oklahoma County prosecutors.²⁰⁷

¹⁹⁶ *Lee v. United States*, 343 U.S. 747, 757 (1952).

¹⁹⁷ REPORT OF THE 1989–90 LOS ANGELES COUNTY GRAND JURY: INVESTIGATION OF THE INVOLVEMENT OF JAIL HOUSE INFORMANTS IN THE CRIMINAL JUSTICE SYSTEM IN LOS ANGELES COUNTY 10-41 (“The myriad benefits and favored treatment which are potentially available to informants are compelling incentives for them to offer testimony and also strong motivations to fabricate, when necessary, in order to provide such testimony. The courts have sometimes lacked adequate factual information to fully realize the potential for untrustworthiness to lie or shape testimony in favor of the prosecution.”).

¹⁹⁸ COMM’N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR’S COMMISSION ON CAPITAL PUNISHMENT (2002). The report detailed instances of both informants lying about having heard confessions from accused persons who were later exonerated as well as prosecutors lying about jailhouse informants. It included numerous recommendations designed to minimize or eliminate the use of such evidence in capital cases. *See id.*, Recommendations B4 and D7 of the Preamble, p. ii; Recommendation 46-1, pp. 40–41; Recommendation 33-1, pp. 96–97; Recommendation 45-1, p. 111; Recommendation 51, p. 121; Recommendation 52, pp. 122–23; Recommendation 53, pp. 127–29; Recommendation 37, p. 151–52; Recommendation 69, pp. 138–39.

¹⁹⁹ *See* MANITOBA COMM’N OF INQUIRY REGARDING THOMAS SOPHONOW, THE INQUIRY REGARDING THOMAS SOPHONOW: JAILHOUSE INFORMANTS, THEIR UNRELIABILITY AND THE IMPORTANCE OF COMPLETE CROWN DISCLOSURE PERTAINING TO THEM (2000). The report summarized its findings as follows:

1) Jailhouse informants are polished and convincing liars. 2) All confessions of an accused will be given great weight by jurors. 3) Jurors will give the same weight to “confessions” made to a jailhouse informant as they will to a confession made to a police officer . . . 5) Jailhouse informants rush to testify particularly in high profile cases. 6) They always appear to have evidence that could only come from one who committed the offense. 7) Their mendacity and ability to convince those who hear them of their veracity make them a threat to the principle of a fair trial and, thus, to the administration of justice.

See also ONTARIO MINISTRY OF THE ATT’Y GEN’L, EXECUTIVE SUMMARY: COMMISSION ON PROCEEDINGS INVOLVING GUY PAUL MORIN (1998).

²⁰⁰ Gross & Possley, *supra* note 139.

²⁰¹ *Browse Cases*, NAT’L REGISTRY OF EXONERATIONS <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Nov. 4, 2016) (filter column titled “Tags” by “CDC”).

²⁰² *United States v. Henry*, 447 U.S. 264 (1980); *see also Illinois v. Perkins*, 496 U.S. 292 (1990) (no due process violation where a government informer questions an inmate regarding an uncharged crime).

²⁰³ *Fulminante*, 499 U.S. at 279 (holding that while defendant’s coerced confession was inadmissible, harmless error analysis applied).

²⁰⁴ *Dodd v. State*, 995 P.2d 778 (Okla. Crim. App. 2000).

²⁰⁵ *Id.* at 780.

²⁰⁶ *Id.* at 782.

²⁰⁷ Ed Godfrey, *Appellate Ruling May Limit Use of Jailhouse Informants*, NEWSOK, Aug. 9, 1999, <http://newsok.com/article/2665151>.

After notifying investigators that Dodd had confessed, but before he testified at Dodd's trial, Bryant recanted his statement, explaining that "he told the investigator 'what she wanted to hear' in hope that she would arrange for him to get [out of jail] so he could . . . return to his dying wife."²⁰⁸ On appeal, the OCCA granted Dodd a new trial because the trial court erred in not allowing letters written by Bryant to be introduced as impeachment evidence. The OCCA also put into place safeguards for regulating the use of jailhouse informant testimony, including a pre-trial "reliability hearing" to determine the admissibility of such testimony.²⁰⁹ On the government's petition for rehearing, which the court granted on a vote of three to two,²¹⁰ the OCCA issued a second opinion in which it granted Dodd relief.²¹¹ In that ruling, the OCCA imposed notice requirements prior to the use of jailhouse informant testimony.²¹² A reliability hearing would not, however, be required in cases involving jailhouse informants.²¹³

The notice requirements in *Dodd* mandate that in all cases involving a jailhouse informant, the prosecution should provide to the defense at least 10 days before trial:

(1) The complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make *in the future* to the informant; (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.²¹⁴

Further, the OCCA in *Dodd* required that the Oklahoma jury instructions be amended to caution the jury that testimony from a jailhouse informant "must be examined and weighed by you with greater care than the testimony of an ordinary witness" and directs the jury to consider whether the informant's testimony is "affected by interest or prejudice against the defendant."²¹⁵ In adopting the new discovery requirements and amended jury instruction, the OCCA recognized the "insidious reliability problems" inherent in the prosecution's use of jailhouse informants, stating that "[i]rrespective of whether *initially* contacted by the state, most informants relay incriminating statements to the state in expectation of benefit in exchange."²¹⁶

In a special concurrence, one judge would have mandated the reliability hearing in the original opinion, which

²⁰⁸ *Dodd*, 995 P2d at 782.

²⁰⁹ See *id.* at 785 (internal citations omitted) (Strubhar, J.L., concurring) ("[T]o ensure the utmost reliability in the admission of jailhouse informant testimony, I would also mandate the reliability hearing prescribed in the original opinion in this matter.").

²¹⁰ See *Dodd v. State*, No. F-97-26, 1999 Okla. Crim. App. LEXIS 59, at *1 (Okla. Crim. App. July 22, 1999) (granting rehearing and vacating the Court's July 22, 1999, opinion).

²¹¹ *Dodd*, 995 P2d at 785.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* at 784 (emphasis added).

²¹⁵ OUJI-CR 2d. 9-43. The jury instruction reads as follows:

The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.

Dodd, 995 P2d at 784.

²¹⁶ *Id.* at 785-84 (emphasis in original).

would “allow the trial court to perform its gatekeeping function and filter out prejudicial jailhouse informant testimony that is more probably false than true.”²¹⁷

In calling for institution of a pre-trial reliability hearing, the special concurrence noted that:

We must take certain precautions to ensure a citizen is not convicted on the testimony of an unreliable professional jailhouse informant, or snitch, who routinely trades dubious information for favors. The use of such untrustworthy witnesses carries considerable costs, especially in death-penalty cases, by undermining the foundation of cases where the stakes are the highest. The misuse of such informants also adds financial costs to taxpayers when convictions based on their testimony are reversed to be retried.²¹⁸

The *Justice Commission Report* included several recommendations regarding jailhouse informants that include a minor addition to the *Dodd* jury instruction;²¹⁹ codifying and expanding the discovery mandates in *Dodd*;²²⁰ adopting the pre-trial reliability hearing discussed in *Dodd*’s special concurrence, discussed *supra*; and training for defense, prosecution and trial judges regarding jailhouse informant testimony.²²¹ In making these recommendations, the Justice Commission recognized the significant role that jailhouse informants play in wrongful convictions.²²² Since the *Justice Commission Report*, the jailhouse informant jury instruction has been modified to include the recommended addition.²²³ Its other recommendations do not appear to have been implemented.

III. Cost of Wrongful Convictions

A. Human Costs

Wrongful convictions impact the lives of victims, those wrongly convicted, and their families. One study attempted to capture the impact of wrongful convictions on victims.²²⁴ A number of victims interviewed by the researchers described the wrongful conviction as being “comparable” or “worse than [that of] their original victimization.”²²⁵ Speaking to the Oklahoma State Senate regarding the wrongful conviction of Ronald Williamson for the murder of her cousin Debbie Carter, Christy Sheppard remarked: “In our case the burden of guilt and shame will never go away. For feeling like we played a part in the wrongful conviction of an innocent man; for projecting all the tragedy of Debbie’s murder on him; for taking him away from his family; for him spending twelve years on death row and completely going insane, for a crime he did not commit.”²²⁶

As for those wrongfully convicted, the 10 Oklahomans released from death row served a combined 96 years in prison and spent an average of 10 years on death row.²²⁷ The impact is devastating. The Innocence Project

²¹⁷ *Id.* at 785.

²¹⁸ *Id.*

²¹⁹ The Justice Commission recommended adding the following underlined language to subsection 1: “whether the witness has received, been offered, or reasonably expects anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony” See OKLA. JUSTICE COMM’N, *supra* note 10, at 95.

²²⁰ The Justice Commission Report recommended adding the following language: “If the informant’s testimony is discovered within ten days or during trial, the defendant should be allowed such time to review such information as the court deems necessary and reasonable.” See *id.* at 28. The report further recommended that the prosecution be required to provide the defense with a written copy of any agreement with a jailhouse informant. *Id.*

²²¹ See *id.* at 27–28.

²²² See *id.* at 26.

²²³ See OUJI-CR 9-45A (2016 Supp.).

²²⁴ See generally SERI IRAZOLA ET AL., STUDY OF VICTIM EXPERIENCES OF WRONGFUL CONVICTION, <https://www.ncjrs.gov/pdffiles1/nij/grants/244084.pdf>.

²²⁵ *Id.* at iv.

²²⁶ Proponent Testimony of Christy Sheppard, S.B. 162, Oct. 21, 2015. Note that most prosecutors’ offices do not have policies in place for informing and assisting victims of wrongful convictions. The Dallas County Criminal District Attorney’s Office is one of few prosecutorial offices in the United States to have protocols and procedures in place for informing and assisting victims in cases of wrongful conviction. See Irazola et al., *supra* note 224.

²²⁷ *Id.*

reports that “[p]sychological research of the wrongfully convicted shows that their years of imprisonment are profoundly scarring.”²²⁸ The organization notes that:

Many suffer from post-traumatic stress disorder, institutionalization and depression, and some were victimized themselves in prison. Physically, they have aged ahead of their peers, and often their health has suffered from years of sub-standard prison health care.²²⁹

Additionally, the fear of repeat accusations may also impact the social lives of exonerees after their release, causing them to retreat from the company of others.²³⁰ “I can’t write letters. I can’t talk on the phone. I don’t like to visit. I don’t like to go anywhere. I don’t like to leave the house. What’s the point? So the days go by, and pretty soon it’s one year, it’s three years, it’s five years, it’s, you know? Don’t wanna bust out of my comfort zone. Don’t wanna grow,” recounts Gary Gauger, who spent almost three years on Illinois’ death row after being wrongfully convicted for murdering his elderly parents.²³¹

Gregory Wilhoit spent five years on death row for the 1987 rape and murder of his estranged wife, Kathy, the mother of his two daughters.²³² At Wilhoit’s original trial, the prosecution sought to link Wilhoit to the murder through bite mark evidence and the testimony of two dentists—neither of whom had any forensic experience—who testified that the mark must have come from Wilhoit.²³³ During post-conviction proceedings, however, eleven forensic odontologists testified that the bite mark did not match Wilhoit.²³⁴ He was acquitted at a retrial in 1993.²³⁵ The real perpetrator has never been found.²³⁶

Before he passed away in 2014, Greg Wilhoit told interviewers, “The toughest parts have been re-assimilating into society, and dealing with emotional and psychological damage from my experience. I lost the opportunity to raise my two daughters . . . I struggled for about five years, and have been in counseling for post-traumatic stress syndrome.”²³⁷

Exonerees often struggle to find gainful employment after their release because of the social stigma of having been incarcerated.²³⁸ Oklahoma death row exoneree Curtis McCarty recounts his experience since his release: “The reality of it is I’m an outcast. I’m unemployable. I’m damaged. I’m not the same person I was when I went in.”²³⁹ In many cases, exonerees have even less access to resources and state support after their release for wrongful incarceration than ex-offenders or parolees.²⁴⁰ “One of the biggest challenges is that once an innocent person comes out of prison, they are not equipped with the tools to reintegrate into society, and that’s something that money alone can’t solve,” New Jersey Representative Donald Payne told the *New York Times*.²⁴¹ “At a minimum,

²²⁸ *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, INNOCENCE PROJECT (Dec. 2, 2009), <http://www.innocenceproject.org/executive-summary-making-up-for-lost-time-what-the-wrongfully-convicted-endure-and-how-to-provide-fair-compensation>.

²²⁹ *Id.*

²³⁰ Sandra D. Westervelt & Kimberly J. Cook, *Coping with Innocence after Death Row*, 7 CONTEXTS 33, 35 (2008), <http://www.r-a-e.org/sites/default/files/docs/WesterveltandCook2008ContextsCopingWithInnocence.pdf>.

²³¹ *Id.*

²³² Gregory Wilhoit, National Registry of Exonerations, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3742>.

²³³ *Id.*

²³⁴ *Id.* The only other physical evidence presented against Wilhoit was bacteria recovered around the bite mark. The State’s experts incorrectly testified that such bacteria are rare when, in fact, they are common. *Id.*

²³⁵ *Id.*

²³⁶ Gregory Wilhoit, National Registry of Exonerations, June 24, 2016, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3742>.

²³⁷ Ira Saletan, *My Nightmare of a Journey Through the Criminal Justice System: An Interview with Greg Wilhoit*, DEATH PENALTY INFO. CTR., June 2003, <http://www.deathpenaltyinfo.org/node/1896>.

²³⁸ Leslie Scott, “*It Never, Ever Ends*”: *The Psychological Impact of Wrongful Conviction*, 5 AM. UNIV. CRIM. L. BRIEF 10 (2010).

²³⁹ Joanne Young, *Former Death Row Inmate Speaks about Death Penalty*, LINCOLN J. STAR, Jan. 31, 2008, http://journalstar.com/news/local/govt-and-politics/former-death-row-inmate-speaks-about-death-penalty/article_d61b5346-288f-5f2b-bc87-a7527a7af9ac.html.

²⁴⁰ Evan J. Madery et al., *Compensation Statutes and Post-exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 533 (2015).

²⁴¹ Fernanda Santos & Janet Roberts, *Putting a Price on a Wrongful Conviction*, NY. TIMES, Dec. 2, 2007, <http://www.nytimes.com/2007/12/02/weekinreview/02santos.html>.

the state and the federal government should help innocent people make the transition out,” said Theresa Newman, who runs a wrongful conviction program at Duke University Law School.²⁴²

B. Costs to Public Safety

Robert Lee Miller, Jr., an Oklahoma death row exoneree, who was acquitted by DNA evidence of the rape and murder of two elderly women at his 1998 retrial, did not receive compensation for his wrongful conviction.²⁴³ Miller spent 11 years on Oklahoma’s death row.²⁴⁴ He was one of four people whose conviction resulted from the fraudulent lab work of Joyce Gilchrist, an Oklahoma City police chemist.²⁴⁵ The real perpetrator, Ronald Lott, was subsequently prosecuted and convicted of rape and murder based on the same DNA evidence; Lott was executed in 2013.²⁴⁶ Although Miller was exonerated by DNA evidence and Lott confessed to the crime, prosecutors still contended that Miller was guilty.²⁴⁷

While the real perpetrator is found in two-thirds of cases in which DNA evidence was responsible for exonerations, many police agencies do not have procedures or guidelines in place to follow up on DNA evidence after an exoneration.²⁴⁸ The lack of procedures to pursue DNA matches makes it difficult to find the real perpetrators.²⁴⁹ Moreover, there are still cases when the innocent are convicted and the guilty go free, and DNA evidence is not available for exonerations.

C. Financial Costs

The actual financial costs of wrongful conviction are multi-faceted and difficult to easily capture. This section focuses on two areas of financial costs related to wrongful convictions: 1) costs to taxpayers and the inmate to first establish a wrongful conviction, and 2) costs to the state to compensate exonerees.

1. Financial Costs Incurred to Establish a Wrongful Conviction

In order for a prisoner to prove that he or she is wrongfully convicted, many legal costs are incurred: costs to the inmate and his or her family to pay for lawyers, experts, and filing fees related to the appeals as well as the costs to the government to pay for the time and costs associated with the judiciary and government attorneys. The latter costs are borne by taxpayers.

The total financial cost of wrongful convictions for Oklahoma taxpayers (taking into account legal counsel, court costs, and incarceration expenditures, as well as civil or statutory compensation) is currently unknown.

2. Financial Compensation for Wrongful Convictions

When individuals are found to have been wrongfully convicted, the state may have significant litigation costs

²⁴² Brad Heath, *Wrongly Convicted Inmates Freed but Get Little Help*, USA TODAY, Sept. 25, 2016, <http://usatoday30.usatoday.com/news/nation/story/2012-09-25/innocent-inmates-government-help/57842192/1>.

²⁴³ *Robert Miller*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/robert-miller> (last visited Nov. 11, 2016).

²⁴⁴ *Id.*

²⁴⁵ *How Much Money Did Exonerees Receive For Wrongful Convictions*, TULSA WORLD, http://www.tulsaworld.com/gallery/news/photo-gallery-how-much-money-did-exonerees-receive-for-wrongful/collection_142e60f5-a7cd-5419-89a8-23967c7ed2b6.html (last visited Mar. 8, 2017) (scroll through Photo Gallery for caption associated with the photograph of Robert Lee Miller Jr.).

²⁴⁶ *Ronald Lott Executed in Okla. for Two Murders in 1980s*, CBS NEWS, Dec. 11, 2013, <http://www.cbsnews.com/news/ronald-lott-executed-in-okla-for-two-murders-in-1980s>.

²⁴⁷ Ed Godfrey, *DNA Results Lead To Second Suspect, New Trial in Deaths*, THE OKLAHOMAN, Jan. 23, 1995, <http://newsok.com/article/2490425>.

²⁴⁸ Shaun Hittle, *Wrongful Conviction Cases Remain Unsolved*, OKLA. WATCH, July 14, 2014, <http://oklahomawatch.org/2014/07/14/wrongful-conviction-cases-remain-unsolved>.

²⁴⁹ *Id.*

to compensate wrongfully convicted individuals for the years spent in prison. However, many of the wrongfully convicted in the U.S.—including in Oklahoma—do not receive financial compensation after their release.²⁵⁰ While 30 states, including Oklahoma, have some form of compensation statute related to wrongful conviction, most of these statutes continue to impose significant barriers for claimants.²⁵¹

In Oklahoma, a number of wrongfully convicted individuals have received no compensation for their imprisonment. Only six out of 28 Oklahomans listed in the National Registry of Exonerations received financial compensation for their time in prison, according to a review by *Tulsa World*.²⁵² Only a quarter of those listed in the National Registry of Exonerations received compensation.²⁵³ Eighty-one percent of those received an amount that is less than the federal standard, which is \$50,000 for each year of wrongful imprisonment.²⁵⁴ Although Oklahoma financially compensates DNA exonerees—a smaller subgroup of those wrongfully convicted—at a rate higher than the national average,²⁵⁵ the process is opaque and relief appears far more limited for those wrongfully put on death row.

Since 2002, Oklahoma has paid out \$1,363,000 to settle six wrongful conviction claims or lawsuits.²⁵⁶ In California the total financial cost to taxpayers for wrongful convictions from 1989 to 2012 was \$221 million.²⁵⁷ In Illinois, the cost was \$214 million.²⁵⁸

3. Compensation for Wrongfully Convicted Individuals Placed on Death Row

Only two of the 10 Oklahoma death row exonerees have been financially compensated: Ronald Williamson and Greg Wilhoit.²⁵⁹ For both Robert Lee Miller, Jr. and Greg Wilhoit, a compensation statute for wrongful convictions did not exist at the time of their respective releases from death row.²⁶⁰ Miller—despite filing civil suits—has not received compensation for his wrongful imprisonment.²⁶¹ Wilhoit received compensation after requesting compensation for nearly 10 years; Wilhoit's compensation amount is under seal, but has been reported at one-third of the \$175,000 maximum allowed by Oklahoma law.²⁶²

Ronald Williamson was sentenced to death for the rape and murder of Debbie Carter in 1988.²⁶³ Williamson's co-defendant at trial, Dennis Fritz, was also convicted of her rape and murder, but sentenced to life without

²⁵⁰ See Branstetter, *Few Exonerees Receive Payment for Wrongful Convictions*, TULSA WORLD, Apr. 23, 2016, http://www.tulsaworld.com/newshomepage1/few-exonerees-receive-payment-for-wrongful-convictions/article_0f8f4e61-ca52-57bf-a8c5-ad5014fe4005.html.

²⁵¹ *Compensating The Wrongly Convicted*, INNOCENCE PROJECT, <http://www.innocenceproject.org/compensating-wrongly-convicted> (last visited Nov. 11, 2016).

²⁵² See Branstetter, *supra* note 250.

²⁵³ Saskia De Melker, *Four Wrongfully Convicted Men, Four Very Different Outcomes*, PBS NEWSHOUR, Nov. 9, 2014, <http://www.pbs.org/newshour/updates/life-exoneration>.

²⁵⁴ *Id.*

²⁵⁵ See Branstetter, *supra* note 250.

²⁵⁶ Curtis Killman, *National Registry: Tulsa County Ranked in Top 4 Percent for Number of Exonerations*, TULSA WORLD, May 18, 2016, http://www.tulsaworld.com/news/courts/national-registry-tulsa-county-ranked-in-top-percent-for-number/article_b21bd26d-96ce-5c76-8357-f75f44f13419.html.

²⁵⁷ *Report Says Wrongful Convictions Cost California \$221 Million*, INNOCENCE PROJECT, <http://www.innocenceproject.org/wrongful-convictions-cost-california-221-million> (last visited Nov. 11, 2016).

²⁵⁸ These costs account for 83 cases during the same time frame. See *Sun Times: DNA and the High Cost of Wrongful Convictions*, INNOCENCE PROJECT <http://www.innocenceproject.org/sun-times-dna-and-the-high-cost-of-wrongful-convictions-2> (last visited Nov. 11, 2016).

²⁵⁹ According to data available from The National Registry of Exonerations, Death Penalty Information Center, and the Innocence Project, 10 individuals have been exonerated from death row in Oklahoma. Details regarding any settlement amount from lawsuits filed by Oklahoma's death row exonerees in state or federal court are sealed or confidential. Based on public reporting, independent research, and interviews—cited throughout this chapter—it was determined that only Ron Williamson and Greg Wilhoit received compensation for their wrongful convictions. See *e.g.*, Branstetter, *supra* note 247.

²⁶⁰ Telephone interview with Mark Barrett, attorney for Greg Wilhoit and Robert Lee Miller (June 4, 2016, Nov. 25, 2016) (interview on file with author).

²⁶¹ *Id.*

²⁶² See Branstetter, *supra* note 250.

²⁶³ *Ron Williamson*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/ron-williamson> (last visited Nov. 11, 2016).

parole.²⁶⁴ In 1999, both men were exonerated by DNA evidence.²⁶⁵ Both Williamson and Fritz subsequently filed a joint civil lawsuit against the state of Oklahoma, Pontotoc County, the city of Ada, and several public officials and state employees, seeking \$100 million in damages.²⁶⁶ The pair settled for an undisclosed amount that was reported to be around \$5 million.²⁶⁷ The state's portion of the Williamson/Fritz settlement was paid from its AIG insurance policy.²⁶⁸ The city of Ada was reported to have paid Williamson and Fritz \$250,000 each.²⁶⁹ Williamson died at the age of 51, a year after receiving compensation.²⁷⁰ The prosecution's star witness, Glen Gore, who testified against Williamson and Fritz at trial, was eventually convicted of the murder by the same DNA evidence that had exonerated both. Gore is currently serving life without parole.²⁷¹

The case of the other death row exoneree who received compensation, Greg Wilhoit, illustrates the difficulty that the wrongfully condemned face in Oklahoma when seeking financial or other restitution after their release. Seven exonerees from death row, like Wilhoit, were released prior to the 2003 passage of an Oklahoma statute regarding compensation for wrongful conviction.²⁷² The law allows for compensation for wrongful conviction up to \$175,000.²⁷³ At the time of its passage, the statute could not be retroactively applied.²⁷⁴

The statute also requires that a claimant receive "a full pardon on the basis of a written finding by the Governor of actual innocence for the crime for which the claimant was sentenced or has been granted judicial relief absolving the claimant of guilt" and that the Governor or a court "specifically state, in the pardon or order, the evidence or basis on which the finding of actual innocence is based."²⁷⁵ Since Wilhoit had not been found legally guilty of a crime at his retrial, despite having been incarcerated on death row for more than five years, he was unable to obtain a pardon based on actual innocence from the Oklahoma Pardon and Parole Board (PPB) to satisfy the requirements of the claim.²⁷⁶ In other words, the PPB could not pardon a crime that did not exist.

"Legal innocence", as opposed to actual innocence, is the presumption afforded to an accused until he or she is proven guilty at trial. If a defendant is acquitted of a criminal charge, then he or she is considered to be "legally innocent" of a crime. "[I]t is only after the jury has given all the evidence in the case a full, fair, and impartial consideration, and have been able to find beyond a reasonable doubt . . . that the presumption of innocence leaves him."²⁷⁷ The burden, however, of proving actual innocence is a heavy one, as actual innocence is a factual determination, and a claim of actual innocence is only recognized by the courts if accompanied by a constitutional violation.²⁷⁸

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Rod Walton, *Ada Case Pact Is Reached*, TULSA WORLD, Nov. 7 2002, http://www.tulsaworld.com/archives/ada-case-pact-is-reached/article_4b0b8206-8b06-5413-a122-4e9f04957eb3.html.

²⁶⁷ *Books Chronicle Oklahomans' Wrongful Arrest, Conviction*, NEWS ON 6, Oct. 12, 2006, <http://www.newson6.com/story/7646672/books-chronicle-oklahomans-wrongful-arrest-conviction>; Anne Harp, *Freeing an Innocent Man*, SOONER MAGAZINE (2007), https://digital.libraries.ou.edu/sooner/articles/p20-25_2007v27n2_OCR.pdf.

²⁶⁸ Bob Doucette, *Wrongfully Convicted Pair Settle Suit Against State, Ada*, THE OKLAHOMAN, Nov. 29, 2002, <http://newsok.com/article/2816869>.

²⁶⁹ Rod Walton, *Ada Case Pact Is Reached*, TULSA WORLD, Nov. 7, 2002, http://www.tulsaworld.com/archives/ada-case-pact-is-reached/article_4b0b8206-8b06-5413-a122-4e9f04957eb3.html.

²⁷⁰ *Ron Williamson*, INNOCENCE PROJECT, <http://www.innocenceproject.org/cases/ron-williamson> (last visited Nov. 11, 2016).

²⁷¹ *Glen Gore Avoids Death Penalty in 2nd Trial*, KXII NEWS 12, June 25, 2006, <http://www.kxii.com/home/headlines/3217191.html>.

²⁷² OKLA. STAT. tit. 51, § 154 (2016).

²⁷³ *Id.*

²⁷⁴ *Wilhoit v. State*, 226 P.3d 683 (Okla. 2009).

²⁷⁵ OKLA. STAT. tit. 51, § 154 (2016).

²⁷⁶ Interview with Nancy Vollertsen (June 3, 2016) (on file with author) [hereinafter Vollertsen Interview].

²⁷⁷ *Flores v. State*, 896 P.2d 558, 561 (Okla. Crim. App. 1995) (quoting *Horn v. Territory*, 56 P. 846, 848 (Okla. 1899)).

²⁷⁸ *See Herrera v. Collins*, 506 U.S. 390 (1993).

The state challenged Wilhoit's attempt to receive compensation by means of the statute, asserting that he had not received a finding of "actual innocence" at his retrial, though the trial judge found that the prosecution had not presented enough evidence to take the case to trial.²⁷⁹ The Oklahoma Supreme Court subsequently ruled that Wilhoit, like other individuals exonerated before the 2003 compensation statute, should be eligible to file a tort claim for their wrongful conviction without a finding of actual innocence, since that specific language did not predate the statute.²⁸⁰ According to the ruling, however, claimants still must provide evidence that they did not commit the crime when making a claim or in a subsequent court proceeding.²⁸¹ Wilhoit eventually settled for an undisclosed amount, described by his sister, Nancy Vollertsen, as less than a third of the \$175,000.²⁸² He died a year later.²⁸³

IV. Conclusion and Recommendations

Wrongful convictions impact the lives of victims, exonerees, and their families. Victims have described wrongful conviction as being "comparable" or "worse than [that of] their original victimization."²⁸⁴ For the 10 men exonerated from Oklahoma's death row, multiple factors led to their wrongful convictions, including false confessions, mistaken eyewitness identification, false or misleading forensics, use of jailhouse informants, official misconduct, and ineffective assistance of counsel. In light of the many troubling issues presented in this chapter, the Commission offers the recommendations below.

Recommendation 1:

Courts should exercise their gatekeeping authority to permit, in appropriate cases, qualified expert testimony on the limitations and use of eyewitness testimony.

While eyewitness identifications are generally fraught with problems and often unreliable, they tend to be exceptionally powerful evidence before a jury. Oklahoma courts should safeguard against suggestive and unreliable eyewitness identifications, whether the factors influencing reliability stem—intentionally or not—from law enforcement practices or from the inherent fallibility of eyewitness testimony.

Recommendation 2:

In cases in which expert testimony on eyewitness identification is allowed, the Oklahoma Uniform Jury Instructions should be amended to direct the jury to consider such expert testimony.

The Oklahoma Uniform Jury Instruction (OUJI) CR-9-19 includes important cautionary instructions to the jury regarding the fallibility of eyewitness testimony. However, OUJI-CR-9-19 does not include instructions to the jury regarding the consideration of experts on eyewitness identification. Such experts can provide additional context to jurors regarding the unreliable nature of eyewitness identification, including forensics studies revealing deficiencies in eyewitness identification.

²⁷⁹ *Gregory Wilhoit*, NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3742> (last visited Nov. 11, 2016).

²⁸⁰ *Wilhoit*, 226 P.3d at 683-86 ("Based on the foregoing, we hold that 'persons whose basis for a [wrongful conviction] claim occurred prior to the effective date of the act' are not required to obtain a determination of 'actual innocence' by a pardon or judicial relief prior to filing and pursuing a claim under the Governmental Tort Claims Act. The 'basis' for such claims is the legal relief that individuals had obtained from conviction and accusation prior to the effective date of the act.").

²⁸¹ *Id.* at 686 ("Persons whose claims fall within this category must nonetheless present evidence that they did not commit the crime for which they were convicted in the course of the claims process and a subsequent court proceeding, if necessary.").

²⁸² See Branstetter, *supra* note 250.

²⁸³ Vollertsen Interview, *supra* note 276.

²⁸⁴ SERI IRAZOLA ET AL., STUDY OF VICTIM EXPERIENCES OF WRONGFUL CONVICTION, at IV, <https://www.ncjrs.gov/pdffiles1/nij/grants/244084.pdf>.

Recommendation 3:

Law enforcement agencies should have written procedures that follow best practices techniques called for by current scientific research. These best practices techniques should, at a minimum, include the following:

- (a) Law enforcement agencies should use double-blind procedures or the official should be “blinded” when conducting photo arrays and live lineups.**
- (b) In lineups and photo arrays, non-suspect fillers should resemble the suspect (clothing, build, characteristics, etc.).**
- (c) In lineups and photo arrays, officials should be required to document the procedure (by video, or if video is not possible, by audio recording), and the procedure should include written instructions for the official to read to the eyewitness. The written instructions should seek a statement from the eyewitness (either a written or recorded verbal statement) noting his or her degree of confidence at the time of any identification.**
- (d) Law enforcement agencies should use sequential—not simultaneous—lineups and photo arrays.**
- (e) Law enforcement agencies should eliminate the use of show-ups (when a single suspect is presented).**

The Oklahoma Justice Commission issued a 2013 report (*Justice Commission Report*) to the Oklahoma Bar Association. The focus of the report was to address leading causes of wrongful convictions. The *Justice Commission Report* contains recommendations which have not yet been implemented or recommendations that may have been enacted by the state, but which need continued monitoring. As discussed in this chapter and in the *Justice Commission Report*, there are a number of practices that should be followed by law enforcement agencies to safeguard against faulty eyewitness identifications. To this Commission’s knowledge, law enforcement agencies across the state have not uniformly adopted the recommendations outlined above—many of which are also discussed at length in the *Justice Commission Report*.

One of the most important recommendations in the *Justice Commission Report* and echoed by this Commission is law enforcement’s use of a double-blind lineup, in which neither the administrator of the lineup nor the eyewitness knows who the suspect is. It is designed to prevent the administrator from intentionally or unintentionally influencing the eyewitness. A blinded administrator may be used when a double-blind lineup is not possible (for example, in a small police department where all possible lineup administrators may already know the suspect’s identity). A blinded administrator cannot see who the eyewitness is viewing (for example, in a photo array, the blinded administrator could not view the photograph being shown to the eyewitness).

With respect to documentation of lineups or photo arrays, officials should read standard instructions to the eyewitness before beginning that make clear the eyewitness is not required to make an identification. Each eyewitness should state factors that influenced his or her identification of a suspect and the degree of confidence in the identification. Finally, in a sequential lineup or photo array, the potential suspects or photos should be shown to the eyewitness one at a time (rather than all at once for the eyewitness to compare and select the “best”).

As noted in the next recommendation regarding training and updating of procedures, this list of best practices for law enforcement should be updated in accordance with new research and data.

Recommendation 4:

Training on the limitations of eyewitness identification should be required of law enforcement, prosecutors, and defense counsel. Law enforcement agencies should regularly schedule ongoing training and update procedures (at least annually) according to the latest studies and research regarding eyewitness identification.

The Commission fully agrees with the *Justice Commission Report* recommendation calling for training of law enforcement on proper identification procedures. Notably, and related to the previous recommendation, the report recommends at least annual updating of procedures consistent with new research. The Commission also agrees with the recommendation that the Oklahoma Bar Association provide training on risks of unreliable eyewitness identifications to the Judicial Conference, the District Attorneys Association, and defense organizations.²⁸⁵

Recommendation 5:

Law enforcement officials should record the entire interrogation of any suspect or potential suspect in a homicide case, including any representations or promises made to the person interviewed. There should be a rebuttable presumption of inadmissibility if an entire interrogation is not recorded.

The Commission understands that, in some cases, video equipment may be prohibitive or costly to a small police department. Although video interrogation is preferred, audio recording is acceptable. With respect to the presumption of inadmissibility, the Commission defers to the Oklahoma Legislature to outline factors that could overcome a presumption of inadmissibility when an interrogation is not recorded. This recommendation comports with the *Justice Commission Report*, which provides model legislation regarding recording of interrogations.²⁸⁶

Recommendation 6:

Law enforcement officials should receive training that is consistent with best practices for interrogation techniques to help prevent wrongful convictions, such as “information gathering” interrogation methods, and should encourage a culture that enforces following best practices.

Of the 10 men exonerated from Oklahoma’s death row, two cases involved false confessions. In reviewing 301 wrongful convictions, including both capital and non-capital cases, the Oklahoma Justice Commission found that 27 percent of wrongful convictions involved false confessions. This corresponds with other studies of known wrongful convictions that have identified false confessions as a “substantial contributor” in 13 to 25 percent of cases. Most documented false confessions occur in murder cases and cases that are high profile.

The Commission agrees in full with the recommendation of the *Justice Commission Report* that urges the Council on Law Enforcement Education and Training (CLEET) to adopt a model policy based on the recommended legislation and provide training for all law enforcement agencies. Specifically, the CLEET model policy “shall include special protocols to be followed in order to guard against

²⁸⁵ OKLA. JUSTICE COMM’N, *supra* note 10, at 19.

²⁸⁶ *Id.* at 11-13.

false confessions from juveniles, suspects who exhibit indicators of mental or cognitive deficiency, and suspects for whom English is not their native language.”²⁸⁷

Recommendation 7:

When the state intends to offer testimony from a jailhouse informant, the trial court should hold a pre-testimony reliability hearing to determine the admissibility of the jailhouse informant’s testimony. Such testimony should be excluded in its entirety if it is found to be unreliable by the trial court. If the trial court finds that the proposed jailhouse informant testimony is reliable and admissible, the judge should still give the appropriate cautionary jury instruction.

The Oklahoma Justice Commission made several recommendations regarding jailhouse informants that include an amendment²⁸⁸ to the Oklahoma Uniform Jury Instruction CR-9-43A (which has since been modified²⁸⁹ to include the recommended addition); codifying and expanding the discovery mandates in *State v. Dodd*,²⁹⁰ and adopting the pre-trial reliability hearing discussed in *Dodd*’s special concurrence.²⁹¹ In making these recommendations, the Oklahoma Justice Commission recognized the significant role that jailhouse informants play in wrongful convictions.²⁹² Jailhouse informants are widely considered untrustworthy witnesses, and a pre-testimony reliability hearing ensures that such testimony will not undermine the foundation of the case.

Recommendation 8:

Training on reliability issues surrounding jailhouse informant testimony and the discovery requirements for jailhouse informants—as set forth by the Oklahoma Court of Criminal Appeals in *State v. Dodd*—should be provided for defense attorneys, prosecutors, and judges.

As outlined in this chapter, there are several concerns regarding the reliability of jailhouse informant testimony. While many attorneys and judges are undoubtedly aware of these concerns, the stakes are even more significant in a capital case. The *Justice Commission Report* contains several recommendations regarding jailhouse informants that include training for defense, prosecution and trial judges regarding jailhouse informant testimony and discovery requirements.²⁹³ The Commission agrees fully with these recommendations and urges the state to support such training.

²⁸⁷ *Id.* at 12–13.

²⁸⁸ The Oklahoma Justice Commission recommended adding the following underlined language to OUJI-CR-9-43A: “whether the witness has received, been offered, or reasonably expects anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony” *See id.* at 93.

²⁸⁹ *See* OUJI-CR 9-43A (2016 Supp.).

²⁹⁰ 993 P2d 778 (2000). The Oklahoma Justice Commission recommended adding the following language: “If the informant’s testimony is discovered within ten days or during trial, the defendant should be allowed such time to review such information as the court deems necessary and reasonable.” *See* OKLA. JUSTICE COMM’N, *supra* note 10, at 28. The report further recommended that the state be required to provide the defense with a written copy of any agreement with a jailhouse informant. *Id.*

²⁹¹ *See* OKLA. JUSTICE COMM’N, *supra* note 10, at 27–28.

²⁹² *See id.* at 26.

²⁹³ *See id.* at 27–28.

Recommendation 9:

The Legislature should create a system of adequate compensation, separate from The Governmental Tort Claims Act, for those who have been convicted of murder and sentenced to death and who are subsequently exonerated. Compensation for those wrongfully convicted and placed on death row should be indexed to the federal level. The current cap on compensation should be eliminated. The compensation should be available regardless of the plea entered in the case, and the compensation should be exempt from state taxes. The compensation should apply to future exonerations, regardless of the date of conviction. Any compensation for a wrongful conviction should be filed as a public record.

The costs to a person who has been wrongfully convicted are immeasurable and impossible to compensate. Nevertheless, the state should provide financial compensation to offset the terrible injustice that has occurred. The Commission was deeply troubled to learn that only two of the 10 Oklahoma death row exonerees have been financially compensated—likely due to the significant barriers to compensation in existing Oklahoma law. For example, two of the men exonerated from Oklahoma’s death row—Robert Miller, Jr., and Ronald Keith Williamson—gave false confessions.²⁹⁴ The Commission believes, therefore, that compensation should be available regardless of a confession or guilty plea entered in the case. The Commission also strongly believes the existing cap for compensation should be eliminated and, instead, set at the federal level, which also accounts for time spent on death row.

Recommendation 10:

Legislation should be enacted to require the immediate update of an exonerated defendant’s government records, including immediate expungement of any conviction that has been vacated, set aside, or overturned, notwithstanding existing statutes.

Exonerees often struggle to find gainful employment after their release because of the social stigma of having been incarcerated.²⁹⁵ The Commission urges the Oklahoma Legislature to ameliorate the social costs of death row exonerees by implementing this recommendation.

²⁹⁴ *Browse Cases*, NAT’L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> (last visited Dec. 1, 2016) (filter column titled “State” by “Oklahoma” and column titled “Contributing Factors Display” by “False Confession”). Of the 31 Oklahomans exonerated since 1989, false confessions were involved in five of the cases (including the two death penalty cases mentioned above).

²⁹⁵ Leslie Scott, *“It Never, Ever Ends”: The Psychological Impact of Wrongful Conviction*, 5 AM. UNIV. CRIM. L. BRIEF 10 (2010).

Role of the Prosecution

I. Introduction

In *Gregg v. Georgia*, which ended the national moratorium on the death penalty, the United States Supreme Court rejected “the defendant’s challenge to what he called the ‘unfettered authority’ afforded prosecutors by the Georgia death penalty statute.”¹ This reluctance on the part of the Court to diminish the considerable nature of prosecutorial discretion is generally attributed to separation of powers doctrine.² Prosecutors have an ethical responsibility not merely to convict, but to ensure that justice prevails.³

The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.⁴

As “administrators of justice,”⁵ prosecutors possess a considerable advantage within the adversarial system, in part because of their authority to make charging decisions and to direct law enforcement to gather evidence. Prosecutors have unique control over material that may be favorable to the defendant or that may demonstrate that a defendant did not commit the crime for which he or she was accused.⁶ Prosecutors, therefore, have a unique duty to disclose such evidence that may exonerate a defendant or suggest that the appropriateness of a punishment is less than death.⁷

The limited checks on prosecutorial power and the ethical responsibilities of prosecutors are discussed in this chapter, which includes research and interviews with criminal justice stakeholders and district attorneys in Oklahoma.

¹ *Gregg v. Georgia*, 428 U.S. 153, 199 (1976); see also *Campbell v. Kincheloe*, 829 F.2d 1453, 1463 (9th Cir. 1987) (citations omitted) (noting that the argument that a death penalty statute is unconstitutional due to unbridled prosecutorial discretion “has been explicitly rejected by the Supreme Court.”), cert. denied, 488 U.S. 948 (1988).

² John Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 Fordham L. Rev. 2571, 2593-94 (1997), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3377&context=flr>.

³ *ABA-AALS Joint Conference Report on Professional*, 44 A.B.A.J. 1159, 1218 (1958).

⁴ *Berger v. United States*, 295 U.S. 78, 88 (1955).

⁵ A.B.A., *A.B.A. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION* 3 (3d ed. 1995), http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf.

⁶ Lisa Kurcias, *Prosecutor’s Duty to Disclose Exculpatory Evidence*, 69 Fordham L. Rev. 1205, 1209 (2000), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3689&context=flr>.

⁷ MODEL RULES OF PROF’L CONDUCT 3.8(d), (g), (h) (A.B.A. 2016).

II. Duty to Disclose Evidence in Capital Cases

A. Law Governing Disclosure of Evidence in Capital Cases

In *Brady v. Maryland*⁸ and *Giglio v. United States*,⁹ the U.S. Supreme Court held that the government has a constitutional obligation to produce exculpatory and impeachment evidence to the defense. Specifically, under *Brady*, the state violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment.¹⁰

The prosecution has a duty, irrespective of good or bad faith, to obtain *Brady* material from law enforcement.¹¹ In *Allen v. District Court of Washington County*, the Oklahoma Criminal Court of Appeals (OCCA) held that prosecutors must disclose "any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons."¹² In addition to the prosecutor's obligation under *Brady* and its progeny, discovery at the pretrial and trial stages in Oklahoma criminal cases is governed by the Oklahoma Criminal Discovery Code (OCDL).¹³ The provisions of the code have remained substantially unchanged since its enactment by the legislature in the early 1990s.¹⁴ Upon the request of the defense, per Oklahoma law, the prosecution is required to disclose:

- a. the names and addresses of witnesses which the state intends to call at trial, together with their relevant, written or recorded statement, if any, or if none, significant summaries of any oral statement;
- b. law enforcement reports made in connection with the particular case;
- c. any written or recorded statements and the substance of any oral statements made by the accused or made by a codefendant;
- d. any reports or statements made by experts in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons;
- e. any books, papers, documents, photographs, tangible objects, buildings or places which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused;
- f. any record of prior criminal convictions of the defendant, or of any codefendant; and
- g. Oklahoma State Bureau of Investigation (OSBI) rap sheet/records check on any witness listed by the state or the defense as a witness who will testify at trial, as well as any convictions of any witness revealed through additional record checks if the defense has furnished social security numbers or date of birth for their witnesses, except OSBI rap sheet/record checks shall not provide date of birth, social security number, home phone number or address.¹⁵

⁸ *Brady v. Maryland*, 375 U.S. 83 (1963).

⁹ *Giglio v. United States*, 405 U.S. 410 (1972).

¹⁰ *Browning v. Trammell*, 717 F.3d 1092, 1094 (10th Cir. 2013).

¹¹ See *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995).

¹² *Allen v. Dist. Court*, 803 P.2d 1164 (Okla. Crim. App. 1990).

¹³ OKLA. STAT. tit. 22, § 2001; see also *Dodd v. State*, 995 P.2d 778 (2000) (imposing specific discovery requirements on the governments when using jailhouse informant testimony).

¹⁴ Compare OKLA. STAT. tit. 22, §§ 2001-02 (2016) with 1994 version of same statute.

¹⁵ OKLA. STAT. tit. 22, § 2002(A)(1).

The OCDC also codifies the state's burden of disclosure under *Brady*: “The state shall provide the defendant any evidence favorable to the defendant if such evidence is material to either guilt or punishment.”¹⁶ The statute imposes this burden on the prosecutor not only with respect to materials “in the possession or control of members of the prosecutor’s staff” but also to materials in the possession of “law enforcement agencies that regularly report to the prosecutor” and “law enforcement agencies who have reported to the prosecutor with reference to the particular case.”¹⁷ In other words, evidence must be disclosed, irrespective of whether the prosecutor has actually collected the information from law enforcement agencies and/or investigators.

In addition, the Oklahoma Rules of Professional Conduct require prosecutors to:

Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.¹⁸

As discussed in the *Role of the Judiciary* chapter, Oklahoma law does not recognize a right to discovery during subsequent post-conviction stages of litigation, including in capital cases. Instead, the OCCA has stated that, absent a threshold showing of particularized need, an appellant or habeas petitioner’s motion for discovery should be denied.¹⁹ A prosecutor’s *Brady* obligations, however, do not cease at trial.²⁰ There remains a continuing obligation to disclose any exculpatory information to the defense.²¹ Yet, in the absence of a particularized need or a prosecutor’s disclosure, a defendant has limited avenues to discover whether a *Brady* violation—which could have impacted the outcome of the case—has occurred.

B. Discovery Practices in Oklahoma Capital Cases

Open or full discovery permits defense counsel access to all unprivileged material that is in the possession of or known to the prosecution about a defendant’s case.²² In the absence of statutory guidance regarding open-file discovery during the trial and post-conviction phases, Oklahoma district attorneys have varying policies for open-file discovery practices in capital cases. Several prosecutors reported that their offices have formal open-file discovery policies.²³ One prosecutor reported that it is his policy to informally permit trial, appellate, and post-conviction counsel access to their files on a continuing basis.²⁴ Several district attorneys also reported that

¹⁶ OKLA. STAT. tit. 22, § 2002(A)(2).

¹⁷ OKLA. STAT. tit. 22, § 2002(A)(5). Concerning the latter two provisions, a prosecutor’s obligations turn on whether “the prosecutor should reasonably know” that such favorable evidence is in the possession of these other agencies. *Id.* The importance of *Brady*—and Oklahoma prosecutors’ adherence to it—are discussed in the next section of this chapter.

¹⁸ OKLA. RULES PROF’L CONDUCT 3.8(d) (2014).

¹⁹ *Brown v. State*, 935 P.2d 316, 326 (Okla. Crim. App. 1997). *See also* *Fields v. State*, 946 P.2d 266, 272–73 (Okla. Crim. App. 1997) (requiring litigants to demonstrate in their requests for post-conviction discovery that the requested materials are “necessary to present any specific issue on post-conviction” or “contain information relevant to any material, previously unresolved factual issue”). The court further presumes compliance with all previous discovery orders. *Id.*

²⁰ MODEL RULES OF PROF’L CONDUCT 3.8(d), (g), (h) (A.B.A. 2016).

²¹ *Id.*

²² THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES 2 (2007), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf.

²³ Interview with Mike Fields, Dist. Att’y for Dist. 4 (Blaine, Canadian, Garfield, Grant, and Kingfisher Counties) (Sept. 26, 2016) (reporting that he has always had an open file policy. This formal open file discovery policy was adopted in 2013. Prior to that, his district operated under an informal open file policy.) (on file with author) [hereinafter Fields Interview]; Interview with Jason Hicks, Dist. Att’y for Dist. 6 (Caddo, Grady, Jefferson, and Stephens Counties) (reporting that the formal open-file policy was established January 3, 2011, the day he was sworn in. Reporting that his staff knows there is an open-file policy; and notification of the policy is often put on charging documents.) (Sept. 28, 2016) (on file with author) [hereinafter Hicks Interview].

²⁴ Interview with Craig Ladd, Dist. Att’y for Dist. 20 (Carter, Johnston, Love, Marshall, and Murray Counties) (Sept. 27, 2016) (on file with author) [hereinafter Ladd Interview].

defense counsel will receive all discoverable material but are not permitted such open-file discovery.²⁵ Defense attorneys in Oklahoma relayed that access to prosecutors' files could prove difficult and open-file policies varied by jurisdictions and district attorneys.²⁶

In addition to the question of *how much* information is turned over by the prosecution to the defense, there is an issue regarding *when* that information is turned over. Although the statute²⁷ calls for motions for discovery to be "made at the time of the district court arraignment or thereafter," several district attorneys who were interviewed reported that it is their policy, at least in capital cases, to turn over discoverable materials either prior to or at the preliminary hearing—that is, before a defendant has been formally arraigned and typically before a bill of particulars has been filed announcing the state's intent to seek the death penalty.²⁸

The OCDC also requires payment of "[r]easonable cost[s]" by the requesting party to the party providing discovery. Several district attorneys reported that it is not their practice to seek payment from the defense; in these districts, discovery is provided electronically, which minimizes reproduction costs.²⁹ In addition—though not an issue of cost—one district attorney reported that discovery is handed over in person and defense counsel must physically sign the back of every page of discovery they receive from the prosecution.³⁰

Of the district attorneys interviewed, none require their staff to prepare privilege logs listing materials withheld from capital defense counsel.³¹ However, one district attorney reported he notifies defense counsel that certain material has not been tendered so that counsel may, if they choose, litigate the issue pretrial.³²

District attorneys of 19 counties (17 rural counties and Oklahoma and Tulsa Counties) stated in interviews that the District Attorneys Council (DAC) provides regular and ongoing training to prosecutors concerning their discovery obligations.³³ Some district attorneys further indicated that they provide in-house training to their assistants as to their obligations under the OCDC, *Brady*, and related authorities.³⁴

²⁵ Comm'n Panel Discussion with Steve Kunzweiler, Dist. Att'y for Dist. 14 (Tulsa County) (October 26, 2016) [hereinafter Kunzweiler Panel]. The district attorney jointly serving Cleveland, Garvin, and McClain Counties (District 21) confirms that defense counsel receives all discoverable material but are not permitted open-file discovery. Interview with Greg Mashburn, Dist. Att'y for Dist. 21 (Cleveland, Garvin, and McClain Counties) (Sept. 26, 2016) (on file with author) [hereinafter Mashburn Interview].

²⁶ Comm'n Panel Discussion with Craig Sutter, Deputy Executive Director, Oklahoma Indigent Defense System (OIDS); Patti Palmer Ghezzi, Assistant Federal Defender, Capital Habeas Unit (CHU), W. District of Oklahoma; Robert Ravitz, Chief Public Defender, Oklahoma County (Oct. 27, 2016) [hereinafter Defense Panel] (reporting generally that access to the prosecution and law enforcement files often depend upon the district attorney's office and that there is not a uniform policy statewide).

²⁷ OKLA. STAT. tit. 22, § 2002(D) (2006).

²⁸ Fields Interview, *supra* note 23 (reporting that the bulk of discoverable material is disclosed to the defense at the preliminary hearing); Mashburn Interview, *supra* note 25 (same); Ladd Interview, *supra* note 24 (reporting that discoverable material is disclosed to the defense before the preliminary hearing. Also reporting that there may be supplemental discovery with specific requests through discovery practice or in cases when evidence is discovered at a later date.); Hicks Interview, *supra* note 23 (reporting that usually by the time they file a capital case the discovery packet is ready for defense counsel).

²⁹ Districts 4, 6, and 20; *see* Fields Interview, *supra* note 23; Hicks Interview, *supra* note 23; Ladd Interview, *supra* note 24.

³⁰ District 21; *see* Mashburn Interview, *supra* note 25.

³¹ Fields Interview, *supra* note 23; Hicks Interview, *supra* note 23; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25.

³² District 4; *see* Fields Interview, *supra* note 23 ("The way we handle issue is we turn over everything. If something is not discoverable, we will notify defense that we don't think it is discoverable. Then they can file motion and litigate that. Typically, that scenario plays out with law enforcement personnel files. They will often litigate those files.")

³³ Fields Interview, *supra* note 23; Hicks Interview, *supra* note 23; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Interview with Steve Kunzweiler, Dist. Att'y for Dist. 14 (Tulsa County) (October 28, 2016) [hereinafter Kunzweiler Interview]. The District Attorneys Council exists partly to "provide a professional organization for the education, training, and coordination of technical efforts of all state prosecutors, and to maintain and improve prosecutor efficiency and effectiveness in enforcing the laws of this state." *Inside the Office*, DIST. ATT'YS COUNCIL, https://www.ok.gov/dac/About_the_DAC/Inside_the_Office/index.html (last visited Dec. 14, 2016).

³⁴ *See, e.g.*, Fields Interview, *supra* note 23; Ladd Interview, *supra* note 24.

C. The Import of Discovery in Capital Cases

The second most common reversible error identified on appellate or post-conviction review of capital cases was the “prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty.”³⁵ This section details several Oklahoma cases in which prosecutors either intentionally withheld or failed to turn over evidence favorable to capital defendants.

In Michael Allen Browning’s case, two victims were shot to death in their home in Tulsa County, and their house burned to the ground.³⁶ The victims’ daughter—also shot—survived and later identified her former boyfriend, Mr. Browning, and another man, Shane Pethel, as the perpetrators.³⁷ Several months later, the surviving victim’s attorney inadvertently faxed two psychiatric reports to the prosecutors who were seeking the death penalty against Mr. Browning. The reports indicated that the surviving victim displayed “magical thinking” and a “blurring of reality and fantasy,” and that, in assessing her, “[a]n assaultive, combative or even homicidal potential must be carefully considered.”³⁸

The prosecution notified defense counsel that they had received the reports from the victim’s attorney, but refused to disclose the reports’ contents. A Tulsa County district court judge examined the reports *in camera* and concluded that they “contained no material exculpatory or impeaching information.”³⁹ After conducting its own review of the reports, the OCCA agreed.⁴⁰ A federal court later rejected the trial court’s assessment, stating, “[I]t is difficult to see how the Oklahoma courts could reasonably conclude there was nothing material about a recent diagnosis of a severe mental disorder that made [the sole surviving victim] hostile, assaultive, combative, and even potentially homicidal, or that [she] was known to blur reality and fantasy and project blame onto others.”⁴¹ Browning’s case was reversed on appeal.⁴² The current district attorney struck the Bill of Particulars—abandoning the state’s intent to seek the death penalty—and stated that the prosecution will move forward seeking a sentence of life or life without parole.⁴³

In another case—that of Alfred Brian Mitchell—the prosecution withheld DNA evidence from Mitchell’s defense counsel. Mitchell was convicted and sentenced to death in Oklahoma County for the 1991 murder of Elaine Scott.⁴⁴ At trial, prosecutors presented the testimony of forensic chemist Joyce Gilchrist to establish that sperm had been found on the victim through anal and vaginal swabs when, in fact, pretrial DNA testing established that no sperm was present.⁴⁵ Ms. Gilchrist also testified that sperm found on the victim’s undergarments was consistent with Mr. Mitchell’s profile and that of the victim’s boyfriend.⁴⁶ However, test results provided by the FBI to the state before trial indicated that the DNA evidence was a match only to Ms. Scott’s boyfriend, not to Mr. Mitchell.⁴⁷ In its review of Mr. Mitchell’s federal habeas petition, the federal

³⁵ James S. Liebman et al., *Restructuring Federal Courts: Habeas: Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000) (finding that 46 percent of state post-conviction reversals are attributable to prosecutors’ suppression of favorable evidence).

³⁶ Browning v. Trammell, 717 F.3d 1092, 1095 (10th Cir. 2013).

³⁷ *Id.* at 1095.

³⁸ *Id.* (internal quotations omitted).

³⁹ *Id.* at 1096; Browning v. State, 154 P.3d 816, 857 (Okla. Crim. App. 2006).

⁴⁰ *Id.* (footnotes omitted).

⁴¹ *Trammell*, 717 F.3d at 1106.

⁴² *Id.* at 1094.

⁴³ Stacy Ryburn, *State No Longer Seeking Death Penalty against Man in 2001 Glenpool Double-Murder*, TULSA WORLD (Nov. 14, 2015, 12:01 AM), http://www.tulsaworld.com/news/courts/state-no-longer-seeking-death-penalty-against-man-in-glenpool/article_18774b82-29b7-5453-afc0-60dd6e9f195d.html.

⁴⁴ Mitchell v. Gibson, 262 F.3d 1036, 1044 (10th Cir. 2001).

⁴⁵ *Id.*

⁴⁶ *Id.* at 1063.

⁴⁷ *Id.*

district court observed that the prosecution had “labored extensively at trial to obscure the true DNA test results” and instead, “highlight[ed] Gilchrist’s test results.”⁴⁸ The federal district court ruled that there was sufficient evidence to uphold Mitchell’s conviction and death sentence, despite Gilchrist’s testimony.⁴⁹ The U.S. Court of Appeals for the Tenth Circuit, however, granted Mitchell a new sentencing trial.⁵⁰ That new trial resulted in another death sentence, which the OCCA overturned in 2006 due to errors by the trial judge and prosecutors.⁵¹ In 2008, at a new sentencing trial, an Oklahoma County jury again Mitchell sentenced to death.⁵²

In separate but related cases out of Oklahoma County—those of Yancy Lyndell Douglas and his co-defendant, Paris LaPriest Powell—prosecutors failed to disclose to defense counsel a deal between the state and its key witness in the cases against Mr. Douglas and Mr. Powell. The attorney who prosecuted Mr. Douglas denied offering the witness assistance on pending parole revocation proceedings.⁵³ However, “the day after Mr. Douglas was sentenced to death, [the prosecutor] wrote a letter recommending that [the witness] receive parole.”⁵⁴ The federal district court reviewing Mr. Powell’s case during federal habeas review found that the witness was “the key to the successful prosecution of Mr. Powell” and summarized the facts underlying the *Brady* claim: “[A]t a minimum, [the witness] used his identification testimony in an effort to benefit himself, [the prosecutor] was aware of [the witness’s] requests for assistance, had acted on his request, and that this information was not known by or conveyed to [Mr. Powell’s] trial counsel.”⁵⁵ Both convictions were vacated by the Tenth Circuit Court of Appeals, and the attorney who prosecuted both cases was suspended for 180 days, further discussed *infra*.⁵⁶

More recently, the ongoing case of Donnie Lee Harris Jr. raises concerns about prosecutors’ adherence to the requirements of the ODCD. Mr. Harris was sentenced to death in LeFlore County in December 2013 for allegedly pouring gasoline from a bottle of Crown Royal on his girlfriend, Kristi Ferguson, and then igniting the gasoline with a cigarette lighter. Through the course of the investigation, the state fire marshal collected portions of a liquor bottle and articles of clothing from Mr. Harris’s bedroom, where the crime was alleged to have taken place. That evidence was subsequently lost, prior to trial, although photographs of the evidence were admitted at Mr. Harris’s capital trial.⁵⁷ On post-conviction review, and following an evidentiary hearing, the district court found that “[t]rial counsel never actually viewed these items” and that the fire marshal had “violated the policies of the State Fire Marshall’s [*sic*] Office” by “fail[ing] to obtain a receipt for these items.”⁵⁸ The district court later found, following a second evidentiary hearing, that other physical evidence—a lighter, admitted at trial as the prosecution’s exhibit—also had been lost.⁵⁹ No chain of custody documents concerning the evidence could be located.⁶⁰

⁴⁸ *Id.* at 1064. The court also found that the prosecution had mischaracterized the FBI report in their closing argument to the jury, a mischaracterization which the court described as “entirely unsupported by evidence” and “misleading.” *Id.*

⁴⁹ Mitchell v. Ward, 450 F. Supp. 2d 1194 (Okla. W.D. 1999); see also Ed Godfrey & Diana Baldwin, *DA says no evidence hidden in murder trial*, NEWSOK, Aug. 15, 2011, <http://newsok.com/article/2731601>.

⁵⁰ Ron Jackson, *17 Years After Daughter’s Murder, Family Awaits Peace*, NEWSOK, Jan. 6, 2008, <http://newsok.com/article/3189325>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Douglas v. Workman, 560 F.3d 1136, 1183 (10th Cir. 2009) (per curiam).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1175 (internal quotations omitted).

⁵⁶ Yancy Douglas, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3187> (last visited Dec. 14, 2016). “Former Oklahoma County prosecutor Brad Miller has been suspended from practicing law for 180 days for ‘reprehensible’ misconduct in a 1993 murder case.” See Nolan Clay, *Former Oklahoma County prosecutor suspended from practicing law for 180 days*, THE OKLAHOMAN, June 26, 2013, <http://newsok.com/article/3856251>.

⁵⁷ Notice Ct. Req. Evid’y Hr’g Regard. Missing Evid., Harris v. Oklahoma, No. D-2014-153 (Okla. Crim. App. Nov. 23, 2013).

⁵⁸ Order Remand Ct. Crim. Appeals, Harris v. Oklahoma, No. D-2014-153 (16th Dist. Ct., LeFlore County, Okla. Jan. 8, 2016).

⁵⁹ *Id.*

⁶⁰ *Id.*

Later discovery of exculpatory evidence withheld by prosecutors—whether intentional or not—has led to the wrongful convictions of capital defendants.⁶¹ It is difficult to know just how many wrongful convictions have stemmed from withheld exculpatory evidence. However, it is notable that in the five years after the 1996 passage of a North Carolina law granting capital defendants full access to law enforcement and prosecution files post-conviction, five death row inmates had their convictions overturned.⁶² All five were granted new trials and eventually exonerated.⁶³ In each of the five cases, prosecutors had suppressed evidence including witness statements and deals with jailhouse informants, according to one report.⁶⁴ North Carolina later granted full, open-file access to defendants in felony cases in 2004.⁶⁵ Other states—recognizing that robust criminal discovery policies may prevent wrongful convictions and ultimately save the state costs on appeal—have passed legislation to that effect. For example, Texas (2014)⁶⁶ and Ohio (2010)⁶⁷ have passed open-file legislation for criminal cases. Florida, Colorado, New Jersey, and Arizona have also passed legislation granting criminal discovery to varying degrees.⁶⁸

III. Exercise of Prosecutorial Discretion in Death Penalty Cases

In Oklahoma, 27 district attorneys represent 77 counties. The 27 district attorney's offices are dependent upon funds from each respective county and the state (with state appropriations funding roughly half of expenditures for all counties in 2015).⁶⁹ Legislative appropriations for the DAC—which oversees Oklahoma's 27 elected district attorneys—were roughly \$58 million in 2016, down from appropriation levels 10 years ago (despite cost increases).⁷⁰ The average salary for the 27 district attorneys in 2016 was \$128,752.⁷¹ The average starting salary of a prosecutor in Oklahoma is \$44,543—below the national average—with workloads averaging roughly 297 new cases a year, in addition to pre-existing cases.⁷² The “[h]igh caseloads leave insufficient time for legal review, meetings with victims, and case preparation,” according to a recent presentation.⁷³ Almost half of the 310 assistant district attorneys have 5 or fewer years of experience; with a turnover rate of 70% between 2011 and 2014.⁷⁴

⁶¹ THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES 3 (2007), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf.

⁶² *Id.* at 15.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ G.S. § 15A-905; THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES 2 (2007), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf.

⁶⁶ Tex. Code Crim. Pro. 39.14

⁶⁷ Ohio Crim. R. 16

⁶⁸ THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES 15-16 (2007), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf.

⁶⁹ OKLA. STAT. tit. 19, §§ 215.56, 215.57B, 215.58 (cited in Handbook for County Commissioners of Oklahoma (January 2014), p. 2-14, <http://agecon.okstate.edu/ctp/files/2014%20County%20Commissioner%20Handbook.pdf> (last visited October 10, 2016)) (“The county initially pays for certain expenses for the District Attorney, but the state, through the District Attorneys Council, reimburses the county for certain expenses that the county is not required to provide, such as maintenance, operation, and capital outlay. Counties must provide the District Attorney with office space, including heating, cooling, and maintenance of that space; a law library and necessary legal subscriptions; and funds for investigation, prosecution, or defense of any action where the county is a party.”); *see also* OKLA. STAT. tit. 26, §§2-118, 2-119, 2-121 (“The county initially pays salaries and fringe benefits for each election board secretary, but the state, through funds appropriated by the state legislature, reimburses the county at a rate not to exceed 155% of the specified salaries. The county files claims for this reimbursement with the Secretary of the State Election Board. . . . The county may receive reimbursements for ad valorem exemptions such as additional homestead exemptions; exemptions granted for new or expanded manufacturing or research and development facilities; and state owned agricultural land for which no state agency is making an in-lieu ad valorem payment.”).

⁷⁰ Mike Boring & Suzanne McLaine Atwood, Oklahoma District Attorneys Budget Presentation, PowerPoint Presentation, http://www.oksenate.gov/Committees/Cmte_Meeting_Notices%20%202016/2016%20Budget%20Presentation%20SMA%20Update%2012-11-15.pdf (last visited Dec. 14, 2016).

⁷¹ Computed from data obtained at *District Attorneys Council*, OKLA. WATCH DATA, <http://oklahomawatchdata.org/state-salaries/220> (last visited Dec. 14, 2016).

⁷² Boring, *supra* note 70.

⁷³ *Id.*

⁷⁴ *Id.*

Most district attorneys in Oklahoma represent more than one county.⁷⁵ Constituents from each county elect one district attorney every four years.⁷⁶ Incumbent prosecutors are rarely voted out of office, and win reelection 95 percent of the time, typically running unopposed.⁷⁷ In a 2001 national survey of state prosecutors, 40 percent of chief prosecutors served 12 or more years, and 72 percent served five years or more.⁷⁸

Several district attorneys reported to the Commission that they felt no political or public pressure to seek the death penalty, and that such pressure would not factor in their charging decisions.⁷⁹ However, in a video available online, at least one current Oklahoma district attorney can be heard discussing his support and lobbying for aggressive use of the death penalty.⁸⁰

One scholar argues that as crime became a dominant issue in American politics, the death penalty became “the ultimate vehicle for politicians to demonstrate just how tough they are on crime.”⁸¹

Candidates for governor of Texas in 1990 argued about which of them was responsible for the most executions and who could do the best job in executing more people. One candidate ran television advertisements in which he walked in front of photographs of the men executed during his tenure as governor and boasted that he had ‘made sure they received the ultimate penalty: death.’ Another candidate ran advertisements taking credit for thirty-two executions. In Florida, the incumbent gubernatorial candidate ran television advertisements in 1990 showing the face of serial killer Ted Bundy, who was executed during his tenure as governor. The governor stated that he had signed over ninety death warrants in his four years in office.⁸²

Robert “Bob” Macy, district attorney of Oklahoma County for 21 years (1980-2001) sought more death sentences than any individual district attorney in the U.S.⁸³ The 54 cases he brought ending in a death sentence totaled “more than the current death row populations of Colorado, Indiana, New Mexico, Utah, Virginia, Washington, and Wyoming combined.”⁸⁴ Macy won elections by large margins and campaigned on his use of the death penalty, and even ran unopposed in his last election in 1998.⁸⁵

⁷⁵ OKLA. STAT. tit. 19, § 215.1; District attorneys for District 7 (Oklahoma County); District 14 (Tulsa County); and District 15 (Muskogee County) serve only one county.

⁷⁶ OKLA. STAT. tit. 19, § 215.1.

⁷⁷ Ronald Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 592 (2009), <http://moritzlaw.osu.edu/students/groups/osjcl/files/2012/03/Wright-FinalPDF.pdf>.

⁷⁸ *Id.*

⁷⁹ Interview with David Prater, Dist. Att’y for Dist. 7 (Oklahoma County) (Sept. 16, 2016) [Hereinafter *Prater Interview*] (stating that there is “zero political pressure to pursue or not pursue the death penalty. I don’t make political decisions when it comes to the death penalty.”); Hicks Interview, *supra* note 25 (“He says he doesn’t let public pressure effect his charging decision. He gives an example of such a case, and that although people were asking for ‘a pound of flesh’ he didn’t file a Bill of Particulars, because it was not appropriate based on the facts of the case.”); Ladd Interview, *supra* note 25 (“Went thru two elections and it never came up... I think death penalty is an appropriate punishment. I am obligated to do it, because it’s the law.”); Interview with Steven Kunzweiler, Dist. Att’y for Dist. 14 (January 6, 2016) (reporting that he knows he has lawyers in his office that are against the death penalty. Also reporting that he does not hire prosecutors based on their opinions on the death penalty) [hereinafter *Kunzweiler Phone Interview*].

⁸⁰ *The Devil’s in the Details - The Death Penalty by DA Rex Duncan - 04/09/2014*, YouTube (May 10, 2014), <https://www.youtube.com/watch?v=c-MD4hXPtLI>.

⁸¹ Stephen Bright, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases (with Keenan)*, 75 BU. L. REV. 759, 770-72 (1995), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4501&context=fss_papers.

⁸² *Id.* at 772.

⁸³ Ziva Branstetter, *Was ‘Cowboy’ Bob Macy product of his time or ‘deadliest’ DA?*, THE FRONTIER (July 3, 2016), <https://www.readfrontier.com/spotlight/cowboy-bob-macy-called-2-deadliest-prosecutor/>.

⁸⁴ FAIR PUNISHMENT PROJECT, AMERICA’S TOP FIVE DEADLIEST PROSECUTORS: HOW OVERZEALOUS PERSONALITIES DRIVE THE DEATH PENALTY 8 (Jun. 2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf [hereinafter FAIR PUNISHMENT PROJECT].

⁸⁵ Nolan Clay & Bryan Dean, *Former Oklahoma County District Attorney Bob Macy dies*, NEWSOK (Nov. 19, 2008), <http://newsok.com/article/3624881>.

Macy's exercise of his discretion to frequently seek the death penalty contributed to a significant portion of the death row population of Oklahoma, as well as the nation. One study found Macy to be one of just five prosecutors who account for 15 percent of the death row population nationwide as of January 2016.⁸⁶ This is equivalent to each of the 5 prosecutors being responsible one out of seven prisoners sentenced to death nationwide. Moreover:

[E]ven as death sentences have declined nationally, a small group of individuals continue to drive up the total number of death sentences nationwide, which has contributed to a misperception that the death penalty is a common practice, when in reality, most of America's prosecutors have abandoned it.⁸⁷

Once these prosecutors leave office, jurisdictions like Macy's often experience a dramatic decrease in the use of the death penalty.⁸⁸ During Macy's term, death sentences in his jurisdiction averaged 2.6 every year, whereas during the last six years Oklahoma County has sentenced just three defendants to death.⁸⁹ For murder cases that were filed in the last ten years, only nine counties in Oklahoma have imposed death sentences, a decline from previous periods.⁹⁰

Even though a prosecutor's use of the death penalty is circumscribed by a state's capital sentencing statute—usually through the use of aggravating factors that must be present—district attorneys still possess wide discretion in their charging decisions regarding whether to pursue the death penalty. The U.S. Supreme Court has never required the promulgation of procedures or guidelines to govern how prosecutors reach the decision to pursue death.⁹¹ As one report notes, “In states where the vast majority of capital cases are adjudicated, charging decisions are decentralized, discretionary, and largely un-reviewed by courts.”⁹² An Oklahoma law journal described Macy's tenure as an example of how a judicial system can be “overpowered” by a zealous district attorney.⁹³

The U.S. Department of Justice (DOJ) Attorney's Manual for federal prosecutors requires that all charging decisions that carry a death sentence be submitted to the DOJ for a pre-indictment review—a model that may be replicated in the states.⁹⁴ In Oklahoma, one district attorney reported that his office has a formal death penalty review team comprised of multiple senior attorneys who conduct reviews of all death penalty decisions.⁹⁵ Several district attorneys reported to the Commission that they have informal, unwritten protocols in their offices for reviewing death penalty decisions, which include consultations with their first assistants, senior counsel, and sometimes law enforcement officers.⁹⁶ Such protocols reportedly include both a review of the state's death penalty statute, as well as factual and evidentiary thresholds. If those thresholds are met, then they may

⁸⁶ FAIR PUNISHMENT PROJECT, *supra* note 84.

⁸⁷ *Id.*; see also Branstetter, *supra* note 85 (quoting Oklahoma County District Attorney David Prater, “If you look at the popularity of Macy during that period of time it sure seems to me that his decisions were reflecting community standards that our county was willing to pursue...I think Mr. Macy was a product of the times.”).

⁸⁸ FAIR PUNISHMENT PROJECT, *supra* note 84 (“Under Macy, Oklahoma County had more death sentences than it had seen in the previous 40 years. The number dropped precipitously after he retired: Oklahoma County has only had three death sentences in the past six years.”).

⁸⁹ *Id.*

⁹⁰ Oklahoma County (5); Cleveland (5); Comanche (1); Tulsa (1); Garvin (1); Grady (1); LeFlore (1); McClain (1); and Stephens (1); see also *Overview* chapter and Appendix I.

⁹¹ Jonathan DeMay, *A District Attorney's Decision Whether to Seek the Death Penalty: Toward an Improved Process*, 26 FORDHAM URBAN L. J. 767, 767 (1998), <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1740&context=ulj>.

⁹² THE CONSTITUTION PROJECT, IRREVERSIBLE ERROR 119 (2014).

⁹³ Ryan Patrick Alford, *Catalyzing More Adequate Federal Habeas Review of Summation Misconduct: Persuasion Theory and the Sixth Amendment Right to an Unbiased Jury*, 39 OKLA. L. REV. 479, 491 (Fall 2006), <http://adams.law.ou.edu/olr/articles/vol59/301Alford4articleblupdf>.

⁹⁴ U.S. ATTY'S MANUAL tit. 9, § 10.060, at <https://www.justice.gov/usam/usam-9-10000-capital-crimes#9-10.060> (last visited Dec. 14, 2016).

⁹⁵ Kunzweiler Phone Interview, *supra* note 79.

⁹⁶ Fields Interview, *supra* note 25; Mashburn Interview, *supra* note 25; Hicks Interview, *supra* note 25; Prater Interview, *supra* note 79; Kunzweiler Interview, *supra* note 35.

review other factors including the victim's role in his or her own death;⁹⁷ the suffering of the victim;⁹⁸ the age of the defendant;⁹⁹ what drove the accused to commit the crime;¹⁰⁰ criminal histories of the accused;¹⁰¹ mitigation evidence;¹⁰² and the desires of the victim's family.¹⁰³ Several district attorneys emphasized that the wishes of victims' family members weighed heavily in their consideration.¹⁰⁴

These informal deliberations, however, vary among district attorneys' offices.¹⁰⁵ One district attorney indicated that the death penalty is only used in the most heinous cases;¹⁰⁶ in another county, a death sentence was considered appropriate in cases of pre-meditated murder provided that other statutory aggravators were present.¹⁰⁷

Similarly, the solicitation of mitigation evidence from the defense prior to seeking death was not a formally established protocol by most district attorneys interviewed by the Commission. These district attorneys relayed, however, that public defenders knew that such evidence would be welcome and carefully reviewed and considered.¹⁰⁸ One district attorney reported that his office formally solicits mitigation evidence from defense counsel and invites them to present such evidence prior to filing of a Bill of Particulars seeking death.¹⁰⁹

IV. Handling Prosecutorial Error and Misconduct

One study reports a correlation between reversal rates due to state conduct and the zealous use of the death penalty by counties.¹¹⁰ The study found that "[t]he higher the rate at which a state or county imposes death verdicts, the greater the probability that each death verdict will have to be reversed because of serious error."¹¹¹ It also found that "[c]apital error rates more than triple when the death-sentencing rate increases from a quarter of the national average to the national average, holding other factors constant."¹¹² In instances where "death sentencing increases from a quarter of the national average to the highest rate for a state. . . the predicted increase in reversal rates is six fold—to about 80%."¹¹³ Finally, the "lower the rate at which a state imposes death sentences—and the more it confines those verdicts to the worst of the worst—the less likely it is that serious error will be found."¹¹⁴

A 2016 study found that prosecutorial misconduct occurred in a third of death penalty cases during the 21-year tenure (1980-2001) of Oklahoma County District Attorney Robert Macy. Prosecutorial misconduct in the death penalty cases brought by Macy contributed to the exoneration of three individuals subsequently freed from

⁹⁷ Prater Interview, *supra* note 79; Fields Interview, *supra* note 25.

⁹⁸ Hicks Interview, *supra* note 25.

⁹⁹ Kunzweiler Interview, *supra* note 33.

¹⁰⁰ Prater Interview, *supra* note 79; Ladd Interview, *supra* note 24; Kunzweiler Interview, *supra* note 33.

¹⁰¹ Prater Interview, *supra* note 79; Hicks Interview, *supra* note 25; Kunzweiler Panel, *supra* note 25.

¹⁰² Prater Interview, *supra* note 79; Fields Interview, *supra* note 25; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Kunzweiler Panel, *supra* note 25.

¹⁰³ Fields Interview, *supra* note 25; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Kunzweiler Interview, *supra* note 33.

¹⁰⁴ Mashburn Interview, *supra* note 25.

¹⁰⁵ Prater Interview, *supra* note 79; Fields Interview, *supra* note 25; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Hicks Interview, *supra* note 25.

¹⁰⁶ Panel discussion with David Prater, Dist. Att'y for Dist. 7 (Oklahoma County) (October 26, 2016) [hereinafter *Prater Panel*].

¹⁰⁷ Ladd Interview, *supra* note 24.

¹⁰⁸ Prater Interview, *supra* note 79; Fields Interview, *supra* note 25; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Hicks Interview, *supra* note 25; Kunzweiler Panel, *supra* note 25.

¹⁰⁹ Kunzweiler Phone Interview, *supra* note 79.

¹¹⁰ RICHARD C. DIETER, DEATH PENALTY INFO. CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE THE MOST DEATH CASES AT ENORMOUS COST TO ALL (Oct. 2013), <http://www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

death row.¹¹⁵ Twenty-three of Macy's 54 capital convictions relied on the testimony of disgraced police chemist Joyce Gilchrist.¹¹⁶ According to a recent report, courts reversed almost half of the death sentences imposed in Oklahoma County under Macy's tenure.¹¹⁷

A 2001 report described cases in which Oklahoma prosecutors have invoked inflammatory language to minimize the jurors' sense of responsibility in capital cases, such as invoking God and the Bible in arguing for the death penalty.¹¹⁸ The OCCA called one such statement by prosecutors "rank misconduct" that "has no place in a criminal trial in the State of Oklahoma."¹¹⁹ The OCCA ruled in that case that while such a statement rose to the level of misconduct, it was "harmless" and had not prejudiced the trial.¹²⁰ The court stated, however, that:

Criminal procedure goes to extreme lengths to remove all possibility of a jury verdict or sentence even partially based on bias or prejudice. We call on jurors to perform the difficult task in a capital murder trial of deciding whether another human being lives or dies. For the prosecutor to attempt to make this task somehow easier by implying God is on the side of a death sentence is an intolerable self-serving perversion of Christian faith as well as the criminal law of this State.¹²¹

Several district attorneys reported to the Commission that training and continuing education on *Brady*, discovery obligations, and ethics are provided at the DAC summer and fall conferences.¹²² While one district attorney relayed that prosecutors are required to have 12 hours of continuing education annually to maintain their licenses, another district attorney explained that certification specifically tailored for capital prosecutors was not mandatory in Oklahoma and that requirements for such death penalty training or continuing education was established within each county's office of the district attorney.¹²³

¹¹⁵ FAIR PUNISHMENT PROJECT, *supra* note 84.

¹¹⁶ *History of Misconduct Chronicled in Oklahoma County with 41 Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/node/6292> (last visited Dec. 14, 2016).

¹¹⁷ FAIR PUNISHMENT PROJECT, *supra* note 84, at 9.

¹¹⁸ *Parks v. Brown*, 840 F.2d 1496, 1503-04 (10th Cir. 1987) (noting the prosecutors closing argument, in which he stated, "You're not yourself putting Robyn Parks to death. You just have become a part of the criminal justice system that says when anyone does this, that he must suffer death. So all you are doing is you're just following the law... so it's not on your conscience. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know."); *Long v. State*, 885 P.2d 167, 177 (Okla. Crim. App. 1994) (finding improper—but ultimately harmless and not reversible error—the prosecutor reading to jurors a quote from the Bible during his closing statement).

¹¹⁹ *Long*, 885 P.2d at 177.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See, e.g., Fields Interview, *supra* note 25; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25; Hicks Interview, *supra* note 25; Kunzweiler Interview, *supra* note 33. See also A "Prosecutors Boot Camp" in 2015, according to a flyer available on the DAC website, provided an opportunity for assistant district attorneys to discussed "topics related to legal and ethical standards for prosecuting criminal offenses." *Prosecutor Bootcamp*, OK.GOV, <https://www.ok.gov/dac/documents/2015%20Prosecutor%20Boot%20Camp.pdf> (last visited Dec. 14, 2016); two 2015 "Featured Webinars" entitled "Brady and Discovery" and "Prosecutors Ethics" are listed on a flyer available on the DAC website at <https://www.ok.gov/dac/documents/2015%20Featured%20Webinars.pdf> (last visited Sept. 28, 2016).

¹²³ Prater Panel, *supra* note 106 (reporting that he sent capital prosecutors for training at the National District Attorneys Association); Kunzweiler Interview, *supra* note 33 (reporting that he helped start the DAC boot camp and there is a DAC conference in the Spring, Summer, and Fall; and that all prosecutors need to have 12 hours of continuing education to keep law license).

The American Bar Association outlines the special responsibilities of prosecutors in criminal cases in its “Model Rules of Professional Conduct” for lawyers. Prosecutors are advised to:

- a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;
- d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;
- e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
 - 1) the information sought is not protected from disclosure by any applicable privilege;
 - 2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and
 - 3) there is no other feasible alternative to obtain the information;
- f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.
- g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
 - 1) promptly disclose that evidence to an appropriate court or authority, and
 - 2) if the conviction was obtained in the prosecutor’s jurisdiction,
 - i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
 - ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.¹²⁴

Misconduct is further defined as to include “violat[ing] or attempt[ing] to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”¹²⁵

In its 2013 report, the Oklahoma Justice Commission recommended that “misconduct of a prosecutor that is willful, deliberate and made in bad faith or egregious be reported” for disciplinary proceedings.¹²⁶ Prosecutorial misconduct may include the following actions:¹²⁷

- Charging a suspect with more offenses than is warranted;
- Withholding exculpatory evidence from defense;
- Purposefully mishandling, mistreating or destroying evidence;
- Allowing witnesses, who prosecutors know (or should know) are not truthful to testify;
- Pressuring defense witnesses not to testify;
- Relying on fraudulent forensic experts;
- During plea negotiations, overstating the strength of the evidence;
- Making statements to the media that are designed to arouse public indignation;
- Making improper or misleading statements to the jury;
- Making misleading arguments that overstate the probative value of testimony; and
- Failing to report prosecutor misconduct when it is discovered.

While some legal stakeholders have described the issue of prosecutorial misconduct using terms like “rampant,” “pervasive,” “common,” and “ingrained,”¹²⁸ and one federal appellate judge has described *Brady* violations as “epidemic,”¹²⁹ disciplinary actions rarely follow findings of prosecutorial misconduct.¹³⁰ The issue of whether

¹²⁴ MODEL RULES OF PROF'L CONDUCT 3.8 (A.B.A. 2016).

¹²⁵ MODEL RULES OF PROF'L CONDUCT 8.4 (A.B.A. 2016).

¹²⁶ OKLA. JUSTICE COMM'N, OKLAHOMA JUSTICE COMMISSION REPORT TO THE OKLAHOMA BAR ASSOCIATION (FEB. 2013), AT 31, [HTTP://WWW.OKBAR.ORG/PORTALS/45/PDF/2013/COMMISSION_FINAL_REPORT.PDF](http://www.okbar.org/Portals/45/PDF/2013/COMMISSION_FINAL_REPORT.PDF) [HEREINAFTER OKLA. JUSTICE COMM'N].

¹²⁷ *Government Misconduct*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes/government-misconduct/>; CTR FOR PROSECUTORIAL INTEGRITY, AN EPIDEMIC OF PROSECUTOR MISCONDUCT 2-3 (2013), <http://www.prosecutorintegrity.org/wp-content/uploads/EpidemicofProsecutorMisconduct.pdf>.

¹²⁸ *Id.* at 4.

¹²⁹ *United States v. Olsen*, 737 F.3d 625 (9th Cir. 2015) (“*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend”).

¹³⁰ See AMERICAN BAR ASSOCIATION, CROSSING THE LINE: RESPONDING TO PROSECUTORIAL MISCONDUCT (2008) (citing a report by the California Commission on the Fair Administration of Justice: “Of those 2,430 cases, 443 resulted in findings that prosecutorial misconduct actually occurred. In 33 of the 443 cases, a reversal of conviction was the result—the rest concluding that the misconduct was harmless error. Perhaps the most disturbing statistic is that a follow-up study looking at half of the cases resulting in a reversed conviction concluded that the prosecutor was not referred to the California State Bar for discipline, which is required under California law.”); see also Matt Ferner, *Prosecutors Are Almost Never Disciplined For Misconduct*, HUFFINGTON POST, (Feb. 11, 2016, 4:16 pm ET), http://www.huffingtonpost.com/entry/prosecutor-misconduct-justice_us_56bce00fe4b0c3c55050748a.

prosecutors who commit prosecutorial misconduct should be disciplined by the bar is a contentious one. There is no consensus on exactly what constitutes prosecutorial misconduct sufficient to warrant disciplinary action.

Bar disciplinary bodies tend to be restrained before acting upon any such charges. According to a recent study that examined 3,625 instances of prosecutorial misconduct—pulling from analysis in nine separate studies—that occurred at the state and national levels between 1963 and 2013, public sanctions were imposed in just 63 cases (or less than 2 percent of the time).¹⁵¹

The district attorneys who provided information to the Commission indicated that staff violations of *Brady* obligations would, depending on the severity, lead to termination of the employee,¹⁵² with lesser sanctions (e.g., leave without pay) available for less than egregious breaches.¹⁵³

In April 2012, for example, Oklahoma County District Attorney David Prater fired two assistant district attorneys, Pam Kimbrough and Stephanie Miller, for withholding a witness statement from defense attorneys in a non-capital first-degree murder trial.¹⁵⁴ Kimbrough was an experienced attorney who had been appointed as conflict counsel in a first-degree murder case¹⁵⁵ prior to her employment as a prosecutor in the district attorney's office.¹⁵⁶ Kimbrough represented the state in both capital¹⁵⁷ and non-capital¹⁵⁸ first degree murder cases. According to Prater, the withheld statement in question was “potentially exculpatory.”¹⁵⁹ Prater forwarded information from his office's internal investigation to the attorney general's office and the Oklahoma Bar Association (OBA), which brought separate disciplinary proceedings against both Miller and Kimbrough in 2014.¹⁶⁰ Upon review of those proceedings the following year, the Supreme Court of Oklahoma ruled that both Kimbrough and Miller be publicly censured and ordered to pay for the cost of proceedings.¹⁶¹

In 2013, the Oklahoma Supreme Court declined to disbar a former assistant district attorney in Oklahoma County, Robert Bradley Miller, who was responsible for *Brady* violations in the capital trials of Powell and Douglas, discussed *supra*, and other transgressions, including the use of “fake subpoenas to force two minors to become witnesses” in a separate case.¹⁶² Miller's disbarment had been recommended by the OBA.¹⁶³ The Oklahoma Supreme Court disagreed, stating: “Reprehensible though Miller's conduct might have been, and even if such misconduct is punished more harshly when it occurs now, Miller's actions took place decades ago, and it would be unfair to hold him to a harsher standard than he would have been subjected to when his actions took place.” Miller was suspended from practicing law for 180 days, and ordered to pay court costs.¹⁶⁴

¹⁵¹ CTR. FOR PROSECUTORIAL INTEGRITY, *supra* note 127, at 8.

¹⁵² Fields Interview, *supra* note 23; Hicks Interview, *supra* note 23; Ladd Interview, *supra* note 24; Mashburn Interview, *supra* note 25. See also Tim Willert, *Oklahoma County District Attorney Fires Two Assistants*, NEWSOK (Apr. 11, 2012, 12:00 AM), <http://newsok.com/article/3663479> (reporting on the firing of two Oklahoma County assistant district attorneys who were found to have withheld eyewitness impeachment evidence in a non-death first-degree murder case).

¹⁵³ See Hicks Interview, *supra* note 23.

¹⁵⁴ Willert, *supra* note 132.

¹⁵⁵ *Oklahoma v. Lila Jean Bartlett et al.*, OKLA. ST. CTS. NETWORK, <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-04-1424> (last visited Dec. 14, 2016).

¹⁵⁶ *Elected Officials of Oklahoma County*, OKLA. COUNTY, <https://www.oklahomacounty.org/electedofficialshistory.htm>; Willert, *supra* note 132.

¹⁵⁷ See *Oklahoma v. Levi Craig Griffith*, OKLA. ST. CTS. NETWORK, <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-04-2949>.

¹⁵⁸ See *Oklahoma v. Miller*, OKLA. ST. CTS. NETWORK, [HTTP://WWW.OSCN.NET/DOCKETS/GETCASEINFORMATION.ASPX?DB=OKLAHOMA&NUMBER=CF-2008-3683](http://www.oscn.net/dockets/GetCaseInformation.aspx?db=oklahoma&number=CF-2008-3683).

¹⁵⁹ Willert, *supra* note 132.

¹⁶⁰ *Id.*; see also *State ex rel. Oklahoma Bar Association v. Miller and State ex rel. Oklahoma Bar Association v. Kimbrough*, No. SCBD-6104 (Okla. Oct. 20, 2015) (<http://law.justia.com/cases/oklahoma/supreme-court/2015/scbd-6104.html>).

¹⁶¹ *Id.*

¹⁶² Terry Carter, *Misconduct in two 1990s death-penalty cases gets ex-prosecutor suspended*, ABA JOURNAL (June 28, 2016, 6:56 PM), http://www.abajournal.com/news/article/misconduct_in_two_1990s_death-penalty_cases_gets_ex-prosecutor_suspended/.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

V. Consular Notification

Prosecutorial discretion in capital cases is a local matter that may have international consequences. Article 36 of the Vienna Convention on Consular Relations (VCCR) provides that when a foreign national is “arrested or committed to prison or to custody, pending trial or is detained in any other manner,” appropriate authorities within the receiving State must inform him or her “without delay” of his right to have his or her native country’s local consular office notified of his or her detention.¹⁴⁵

In 2005, the U.S. withdrew from the Optional Protocol to the VCCR (“Optional Protocol”), which granted jurisdiction to the International Court of Justice (ICJ) over such disputes with respect to the VCCR. Withdrawal was in response to the ICJ decision in *Mexico v. United States of America*, where Mexico sought to halt the execution of 54 Mexican nationals in the U.S., who had not been informed of their consular rights. ICJ ruled that the U.S. had to review and reconsider 51 of those convictions.¹⁴⁶

Violations of the VCCR have led to extensive litigation in national and international courts, including courts in the United States.¹⁴⁷ Consular notification in capital cases is particularly important because consulates can provide resources and oversight to ensure fair treatment.¹⁴⁸

In 2008 the U.S. Supreme Court ruled in *Medellin v. Texas* that states were not obligated to comply with the Vienna Convention absent a federal law implementing the Convention’s Optional Protocol.¹⁴⁹ As a result, the ICJ no longer had jurisdiction over claims from foreign countries whose citizens have been convicted in the U.S. in violation of the VCCR. Moreover, the U.S. can no longer use the ICJ to enforce the rights of U.S. citizens convicted abroad without the benefit of consular access.¹⁵⁰

In July 2011, the U.S. Supreme Court denied a stay of execution for a Mexican national, Humberto Leal Garcia, Jr., despite opposition from the Obama administration and the Mexican government.¹⁵¹ Leal was sentenced to death for murdering a 16-year-old girl in Texas in 1994,¹⁵² but he was not informed of his right to contact the Mexican consulate upon his arrest.¹⁵³ The stay would have permitted Congress to deliberate on pending legislation requiring states to comply with the Vienna Convention and inform foreign nationals about their right to consular notification.¹⁵⁴ Leal was executed on July 7, 2011, and Texas has since executed two more Mexican nationals who had also been denied consular assistance.¹⁵⁵

¹⁴⁵ Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 596 U.N.T.S. 261, <http://www.fuech.eu/pdf/viennaconvention.pdf>.

¹⁴⁶ THE CONSTITUTION PROJECT, *supra* note 92, at 122.

¹⁴⁷ *Foreign Nationals*, CORNELL CTR. ON THE DEATH PENALTY, <http://www.deathpenaltyworldwide.org/foreign-nationals.cfm> (last visited Dec. 14, 2016).

¹⁴⁸ John Cary Sims & Linda E. Carter, *Representing Foreign Nationals: Emerging Importance of the Vienna Convention on Consular Relations as a Defense Tool*, THE CHAMPION (Sept./Oct. 1998), <https://www.nacdl.org/champion/articles/98sep01.htm> (last visited October 13, 2016).

¹⁴⁹ *Medellin v. Texas*, 552 U.S. 491 (2008).

¹⁵⁰ THE CONSTITUTION PROJECT, *supra* note 92, at 123.

¹⁵¹ Bill Mears, *Mexican National Executed in Texas*, CNN (July 7, 2011) <http://www.cnn.com/2011/CRIME/07/07/texas.mexican.execution/>.

¹⁵² Eyder Peralta, *Mexican National Is Executed, Despite White House’s Appeal to High Court*, NPR (July 7, 2011, 1:10 PM), <http://www.npr.org/blogs/thetwo-way/2011/07/07/157675450/as-mexican-national-awaits-execution-white-house-pleads-for-delay>.

¹⁵³ Mears, *supra* note 151.

¹⁵⁴ *Id.*

¹⁵⁵ Mark Warren, *Foreign Nationals, Part III: Executive Clemency for Death-sentenced Foreign Nationals*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/foreign-nationals-part-iii#innocence> (last updated Jan. 18, 2017).

In addition to Mexico, several other countries including the United Kingdom, Paraguay, and Germany have all asserted that they might have been able to help their citizens avoid a death sentence in the U.S. had they been informed before trial that their citizens had been arrested and faced the death penalty.¹⁵⁶

Since 1976, 32 foreign nationals have been executed in the U.S. (24 of whom raised VCCR claims during their appellate or clemency proceedings).¹⁵⁷ Oklahoma has executed three foreign nationals,¹⁵⁸ two of whom raised such VCCR claims.¹⁵⁹

Four additional foreign nationals have been sentenced to death in Oklahoma and raised similar VCCR claims, but each of their sentences have been subsequently amended. Gilberto Hernandez Martinez, a Cuban national, was sentenced to death in Oklahoma in 1997, and had not been informed upon arrest of his right to contact his consulate. In Martinez's case, the OCCA rejected his appeal on the grounds that he was denied consular notification, stating that Martinez had "failed to show he made any 'request' to state authorities to inform Cuban authorities of his arrest."¹⁶⁰ After the prosecution stipulated Martinez's intellectual disability in exchange for a waiver of further appeals, a life sentence was negotiated in lieu of death.¹⁶¹

Three other Mexican nationals, Geraldo Valdez Maltos, Osvaldo Torres Aguilera, and Isidro Marquez Burrola, also had their death sentences amended.¹⁶² Maltos had his death sentence vacated on appeal, and he was later resentenced to life.¹⁶³

In 2005, the OCCA stayed the execution of Osvaldo Torres Aguilera and remanded his case for an evidentiary hearing in the district court on the question of whether the state had violated his Vienna Convention rights by "failing to inform Torres, after he was detained, that he had the right to contact the Mexican consulate."¹⁶⁴ In addition, the OCCA found that the VCCR was binding on Oklahoma. Two hours after the ruling was issued, Governor Brad Henry commuted Torres's sentence.¹⁶⁵ In commuting the death sentence to life without parole, the governor cited the failure of the government to notify Mexico that one of its foreign nationals had been arrested as a basis for granting clemency.¹⁶⁶

Burrola also had his death sentence modified to life without parole by the OCCA for ineffective assistance of counsel, "where trial counsel failed to seek court funding for mitigation investigation and refused assistance offered by [the] Mexican government through [the] Mexican Capital Legal Assistance Program."¹⁶⁷

¹⁵⁶ Maurice Chammah, *How Mexico Saves Its Citizens from the Death Penalty in the U.S.*, THE MARSHALL PROJECT (Sept. 22, 2016, 6:00AM), <https://www.themarshall-project.org/2016/09/22/how-mexico-saves-its-citizens-from-the-death-penalty-in-the-u-s#.fXGckjwzi>.

¹⁵⁷ Mark Warren, *Confirmed Foreign Nationals, Part II: Confirmed Foreign Nationals Executed Since 1976*, DEATH PENALTY INFO. CTR. (last updated Apr. 12, 2016).

¹⁵⁸ Tuan Nguyen (1998) and Hung Thanh Le (2004) of Vietnam; and Sahib al-Mosawi (2001) of Iraq. Both Le and al-Mosawi raised VCCR claims. See Mark Warren, *Confirmed Foreign Nationals, Part II: Confirmed Foreign Nationals Executed Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/foreign-nationals-part-ii> (last updated Apr. 12, 2016).

¹⁵⁹ *Id.*

¹⁶⁰ *Martinez v. State*, 984 P.2d 815, 818 (Okla. Ct. Crim. App. 1999).

¹⁶¹ Warren, *supra* note 155.

¹⁶² *Id.*

¹⁶³ *Foreign Nationals, Part III, DPIC*, <http://www.deathpenaltyinfo.org/news/36?page=5> ("Sentence vacated for ineffective assistance; later resentenced to life.").

¹⁶⁴ *Torres v. State*, 120 P. 3d 1184 (Okla. Crim. App. 2005).

¹⁶⁵ *Foreign Nationals, supra* note 147.

¹⁶⁶ *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Dec. 14, 2016).

¹⁶⁷ Warren, *supra* note 155.

VI. Conclusion and Recommendations

Given the wide latitude in decision-making afforded to prosecutors in our criminal justice system, abuses in the exercise of that authority can and do occur. Public trust in the criminal justice system is vital, and prosecutorial misconduct undercuts that trust. The duties of a prosecutor to act in the interest of justice and to ensure due process are even more important when a life hangs in the balance. Indeed, the Oklahoma's Rules of Professional Conduct states, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."¹

In its review and discussions with stakeholders, the Commission was pleased to learn of and applauds the leadership of many district attorneys who have been actively combatting prosecutorial misconduct. It is necessary that the rules governing prosecutors' conduct be enforced to rein in aberrant and inappropriate conduct. The Commission found that aberrations can flourish in the absence of enforcement by responsible entities. When the system—through its supervising bodies—fails to hold accountable those who engage in misconduct, the system itself fails. In light of these concerns, the Commission recommends the following:

Recommendation 1:

Prosecutors and their investigators should be provided regular training concerning the common causes for wrongful convictions. This training should be mandatory.

The Oklahoma Justice Commission studied the causes of wrongful conviction and recommended that prosecutors receive training regarding risks associated with testimony elicited from jailhouse informants, accomplice witnesses, or by means of unreliable interrogation protocols. This Commission agrees fully with that recommendation. Further, this Commission adopts the recommendation that prosecutors also receive training in critical safeguards against wrongful convictions, such as proper police and investigative methods, discovery practices and *Brady* requirements, forensic evidence, mental health evidence, and the retention of evidence.

Recommendation 2:

Prosecutors and law enforcement should be provided regular training concerning their obligations under the Vienna Convention on Consular Relations to notify a non-citizen's government when a non-citizen has been arrested and charged with a capital crime.

Violations of the Vienna Convention on Consular Relations have led to extensive litigation in national and international courts, including courts in the United States. Consular notification in capital cases is particularly important because consulates can provide resources and oversight to ensure fair treatment of their own citizens.

¹ OKLA. RULES PROF'L CONDUCT 5.8, Cmt. 1.

Recommendation 3:

All Oklahoma district attorneys' offices and the Office of the Attorney General should be required to allow open-file discovery at all stages of a capital case, including during the direct appeal, state post-conviction review, federal habeas corpus review, and any clemency proceedings.

In hearing from defense attorneys and prosecutors in Oklahoma, the Commission learned that there is no uniform, statewide policy regarding discovery and that access to important law enforcement files may be hindered due to lack of clear policies in some jurisdictions. Further, even when clear policies are in place for open-file discovery, such policies are limited to the trial stage. As the Commission learned during its review of wrongful convictions, the possibility that exculpatory evidence may be uncovered extends beyond the trial phase. Thus, meaningful discovery cannot be limited to the trial stage and should extend to appellate stages and clemency proceedings.

Prosecutors have a unique duty to disclose evidence that may exonerate a defendant or suggest that death is not an appropriate punishment. Rule 3.8(d) of the Oklahoma Rules of Professional Conduct directs the “timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.”

Recommendation 4:

District attorneys' offices should be required to retain all files, including protected work product, pertaining to a capital defendant's case until 60 days after the inmate is no longer on death row, whether because the inmate has been executed, died in custody, had a death sentence commuted to a sentence less than death, or been exonerated.

Given the gravity and irreversible nature of the death penalty, district attorneys must ensure the condemned are afforded the highest standards of evidence retention.

Role of the Defense

I. Introduction

Among the most significant factors that influence outcomes in capital cases is the quality of a defendant's attorney.¹ The Sixth Amendment to the United States Constitution guarantees capital defendants more than mere representation. Instead, capital defendants are entitled to "reasonably effective assistance,"² which depends upon defense counsel undertaking a thorough pretrial investigation of their client's background.³ Such effective assistance is also contingent upon the skilled use of experts before and during trial. Moreover, capital defense attorneys are expected to employ trial strategies that advance client interests on both the question of culpability and on the appropriateness of the death penalty as punishment for the offense.⁴ "[G]ood defense counsel at trial is the most potent weapon against prosecutorial misconduct,"⁵ and effective defense counsel act as a safeguard against wrongful convictions.⁶ Effective representation requires specialized training and experience in the complex legal framework that governs capital cases. To provide effective assistance in these high-stakes cases, counsel must be adequately compensated and funded.

This chapter examines defense counsel's role in Oklahoma's capital punishment system. It also evaluates whether defense attorneys in Oklahoma are qualified and whether they have been provided the necessary resources and independence to offer adequate representation to persons either facing a death sentence or awaiting execution.

¹ See JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at ii (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf. This statistical study—published in 2000—examined 4,578 capital appeals from 1973 through 1995. The authors found that "the overall rate of prejudicial error in the American capital punishment system was 68%" and that the most common errors traced back to ineffective defense counsel and police and prosecutors who failed to disclose exculpatory evidence.

² *Strickland v. Washington*, 466 U.S. 687 (1984).

³ *Williams v. Taylor*, 529 U.S. 362, 396 (2000); *Wiggins v. Smith*, 539 U.S. 510, 522–23 (2005).

⁴ Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 926 (2005), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2005guidelines.authcheckdam.pdf [hereinafter *ABA Guidelines*] (commentary appended to Guideline 1.1 states that "trial counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase"); *id.* at Guideline 10.10.1 cmt. ("[I]t is critical that, well before trial, counsel formulate an integrated defense theory that will be reinforced by its presentation at both the guilt and mitigation stages."); see also MOLLY TREADWAY JOHNSON & LAURA I. HOOPER, RESOURCE GUIDE FOR MANAGING CAPITAL CASES: VOLUME I: FEDERAL DEATH PENALTY TRIALS 13–14 (2004), [http://www.fjc.gov/public/pdf.nsf/lookup/dpen0000.pdf/\\$file/dpen0000.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dpen0000.pdf/$file/dpen0000.pdf) (noting that a capital case "inevitably includes appointing experts and investigators").

⁵ Fredrick E. Vars, *Prosecutorial Misconduct: The Best Defense Is a Good Defense*, 75 WASH. & LEE L. REV. ONLINE 465, 468 (2016), <http://scholarlycommons.law.wlu.edu/wluonline/vol75/iss1/21>.

⁶ As one academic observes, "innocence protection is not in tension with due process", and "[r]aising the standard for effective assistance of counsel would aid all defendants." Susan A. Bandes, *Protecting the Innocent as the Primary Value of the Criminal Justice System*, 7 OHIO STATE J. OF CRIM. L. 413, 435 (2009).

II. Prevailing Standards for Capital Counsel

In the decades following *Strickland v. Washington*—the landmark U.S. Supreme Court case establishing a criminal defendant’s Sixth Amendment right to effective counsel (and how effectiveness of counsel is to be evaluated)⁷—courts have routinely turned to the American Bar Association’s (ABA) *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines) to assess a defense counsel’s performance in death penalty cases.⁸

The ABA Guidelines establish “a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing or convicted of death penalty offenses.”⁹ As of March 2014, at least ten death penalty jurisdictions had adopted, in substantial measure, the ABA Guidelines.¹⁰ The Oklahoma Court of Criminal Appeals (OCCA) has “recognize[d] the utility of guidelines for effective capital counsel,” including those promulgated by the ABA.¹¹

The ABA Guidelines—formally adopted by the ABA in 2005—are substantively significant and establish practice standards for capital counsel at all stages of the proceedings. The ABA Guidelines speak to the qualifications and training of defense counsel, their workload, their funding and compensation, and the several duties they owe their clients (e.g., the duty to investigate, the duty to assert legal claims, and the duty to facilitate the work of successor counsel).

According to the ABA Guidelines, “the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master.”¹² Indeed, “the abilities that death penalty defense counsel must possess in order to provide high quality legal representation differ

⁷ See *Strickland*, 466 U.S. 687 (1984) (holding that, to establish that counsel’s representation fell below the requirements of the Sixth Amendment, a petitioner must “show both that his counsel provided deficient assistance and that there was prejudice as a result.”); see also *Harrington v. Richter*, 562 U.S. 86, 104 (2011). The Supreme Court has described these two prongs as follows:

To establish deficient performance, a person challenging a conviction must show that counsel’s representation fell below an objective standard of reasonableness. A court considering a claim of ineffective assistance must apply a strong presumption that counsel’s representation was within the wide range of reasonable professional assistance. The challenger’s burden is to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.

With respect to prejudice, a challenger must demonstrate a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. Counsel’s errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. (internal quotations and citations omitted).

⁸ A list of cases citing the ABA Guidelines is available online at the ABA’s website., *Summaries of Cases Citing to the 2005 ABA Guidelines*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2005summary.authcheckdam.pdf (last visited Sept. 20, 2016). For full text of the ABA Guidelines, see *supra* note 4, http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2005guidelines.authcheckdam.pdf; see also *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, AM. BAR ASS’N, 36 HOFSTRA L. REV. 677 (2008) (*ABA Mitigation Guidelines*), http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/2008_July_CCI_Guidelines.authcheckdam.pdf.

⁹ *American Bar Association Guidelines*, FED’L CAPITAL HABEAS PROJECT, https://www.capdefnet.org/2255/pubmenu.aspx?menu_id=55&id=48 (last visited Sept. 20, 2016).

¹⁰ These jurisdictions include Alabama (by resolution of the Alabama Circuit Court Judge’s Association), Arizona (by rule of the Arizona Supreme Court and by administrative regulation of the Arizona Superior Court of Maricopa County), Georgia (as policy of the Georgia Public Defender Standards Council), Kentucky (as policy of the Department for Public Advocacy for the Commonwealth of Kentucky), Louisiana (by administrative regulation of the State of Louisiana), Nevada (by order of the Nevada Supreme Court), Ohio (by rule of the Ohio Supreme Court), Oregon (as policy of the Oregon Office of Public Defense Services), Texas (as practice standards by the Texas State Bar Board of Directors), and Wyoming (as policy of Wyoming’s Office of the Public Defender). See *Implementation of the 2005 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, AM. BAR ASS’N, http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Implementation%20Fact%20Sheet%20March%202014.authcheckdam.pdf (last visited Oct. 10, 2016).

¹¹ *Torres v. State*, 120 P.3d 1184, 1189 (Okla. Crim. App. 2005). The Court has declined, however, to find capital counsel ineffective “simply because counsel’s representation differed from current capital practice customs, even where the differences are significant.” *Id.*; see also *Coddington v. State*, 259 P.3d 833, 839–40 (Okla. Crim. App. 2011) (holding that capital counsel would not be found per se ineffective for failing to adhere to the ABA Guidelines because, inter alia, appellant had not been prejudiced by counsel’s allegedly deficient performance).

¹² ABA Guidelines, *supra* note 4, Guideline 11 cmt.

from those required in any other area of law.”¹⁵ It therefore is imperative that attorneys representing capital clients “be qualified by training and experience to undertake such representation and provide high quality advocacy.”¹⁴

In 2008, the ABA’s 27 guidelines adopted in 2003 were augmented with nine additional guidelines specific to mitigation specialists, in recognition of the fact that, in capital cases, “the mitigation function is of utmost importance.”¹⁵ As discussed in the *Death Eligibility* chapter, capital trials are bifurcated. If a defendant is convicted of a capital offense and the state has chosen to seek the death penalty, the trial proceeds to the penalty phase, wherein defense counsel can present a wide range of mitigating evidence to convince the jury to spare their client’s life.

Because defense counsel can never be certain of acquittal, and because a timely and robust mitigation investigation may persuade district attorneys to forego seeking death in a case,¹⁶ mitigation specialists often play a pivotal role in the defense of capital cases.¹⁷ In fact, the *ABA Guidelines* explicitly require that a mitigation specialist be made part of any capital defense team,¹⁸ particularly since “[m]itigation investigation can be extremely difficult, time-consuming and costly, especially when the defendant, witnesses and documentation come from different and multiple states or countries.”¹⁹

The *ABA Guidelines* and Supreme Court cases²⁰ require counsel to investigate thoroughly both the facts of the crime and any evidence that may be marshaled by the prosecution in support of a death sentence. This obligation to investigate exists even before the state announces its intent to seek a death sentence, since the presentation of mitigation evidence may help to dissuade the prosecution from seeking death in a capital-eligible case.²¹

III. Capital Counsel in Oklahoma

In Oklahoma, the vast majority²² of indigent capital defendants are represented at the trial level by one of three government agencies: the Oklahoma County Public Defender’s Office, the Tulsa County Public Defender’s Office, or—if the case falls outside of Oklahoma County and Tulsa County—by one of the two capital trial divisions of the Oklahoma Indigent Defense System (OIDS).²³ The Oklahoma County Public Defender’s Office and the

¹⁵ *Id.* at 963–64, Guideline 5.1 cmt.

¹⁴ Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1124 (2003).

¹⁵ *ABA Mitigation Guidelines*, *supra* note 8, at 677.

¹⁶ *See generally* *Role of the Prosecution* chapter.

¹⁷ *See* *ABA Guidelines*, *supra* note 4, Guideline 11.4.1(C) (obligating counsel to investigate evidence “to rebut any aggravating evidence that may be introduced by the prosecutor” during the penalty phase); *see also* *Wiggins*, 539 U.S. at 524.

¹⁸ *ABA Guidelines*, *supra* note 4, Guideline 4.1(A)(1).

¹⁹ PETER A. COLLINS, ROBERT C. BORUCHOWITZ, MATTHEW J. HICKMAN & MARK A. LARRANAGA, AN ANALYSIS OF THE ECONOMICS OF SEEKING THE DEATH PENALTY IN WASHINGTON STATE 60 (2015).

²⁰ *See Strickland*, 466 U.S. 687 (1984); *see also* *Rompilla v. Beard*, 545 U.S. 374 (2005).

²¹ *ABA Guidelines*, *supra* note 4, Guideline 10.9.1 cmt (“In either event, the mitigation investigation is crucial to persuading the prosecution not to seek death.”).

²² Conflict counsel may be appointed in those rare instances when the public defenders and OIDS are not able to represent a defendant.

²³ OKLA. STAT. tit. 19, § 158.7 (“[I]f the court determines that a conflict of interest exists between a defendant and the county indigent defender, the case may be re-assigned by the court to another county indigent defender, an attorney who represents indigents pursuant to contract, or a private attorney who has agreed to accept such appointments.”); *see also* Interview with Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Sept. 22, 2016) (on file with author) [hereinafter Ravitz Interview]; Interview with Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Mar. 24, 2016) (on file with author) [hereinafter Nigh Interview]. At one time, Canadian County also operated its own public defender’s office. *See* *Holt v. State*, 538 P.2d 1127, 1975 Okla. Crim. App. LEXIS 402, at *1 (Okla. Crim. App. 1975) (noting that appellant was represented by the public defender of Canadian County). That office is not required by statute and is no longer in operation.

Tulsa County Public Defender's Office were formed pursuant to state law, which provides for the creation of such offices in counties with populations of more than 300,000 persons.²⁴

As of 2016, the Oklahoma County Public Defender's Office's criminal division comprises 34 attorneys, including attorneys whose work mainly involves appeals.²⁵ Just three of these 34 attorneys regularly perform capital defense trial services, and together they form the office's capital trial division.²⁶ The Tulsa County Public Defender's Office does not have a comparable division but has on staff three attorneys—including the office's director—who are qualified to handle capital cases at the trial level. Like the Oklahoma County Public Defender's Office, the Tulsa County Public Defender's Office represents its capital clients on direct appeal.²⁷ In 2015, the Tulsa office comprised 22 felony lawyers who were appointed to 5,647 cases, or an average caseload of 256 per lawyer.²⁸

OIDS handles both trial and appellate level capital litigation in the 75 counties other than Tulsa and Oklahoma counties. OIDS began as an appeals-only indigent defense service but, as of 1991, the system has existed “to provide indigents with legal representation comparable to that obtainable by those who can afford counsel and to do so in the most cost effective manner possible.”²⁹ By the mid-1990s, OIDS began to represent capital defendants at the trial stage through its Norman Capital Trial Division, which represents indigent capital defendants in 46 counties in the western part of the state, and its Sapulpa Capital Trial Division, which represents these defendants in Oklahoma's remaining 29 counties (located in the eastern part of the state).³⁰

Currently, the OIDS office in Norman has three attorneys and three investigators; in the fiscal year ending on June 30, 2016, the office carried over 12 cases, received appointments in five cases, and concluded its representation in four cases (none of which resulted in a death sentence).³¹ The office in Sapulpa has five attorneys and four investigators; in that same fiscal year, the office carried over 20 cases, received appointments in seven cases, and concluded its representation in six cases (similarly, none of them resulted in a death sentence).³²

A. Appointment of Counsel

The Oklahoma County Public Defender's Office and the Tulsa County Public Defender's Office are appointed to homicide cases soon after a suspect is taken into custody—within three days in Oklahoma County and within five days in Tulsa County.³³ However, attorneys with the public defender's offices reach out to individuals arrested in connection with a homicide case as soon as they learn of the arrest—typically, through local news

²⁴ OKLA. STAT. tit. 19, § 1581a. The most recent federal decennial census records Oklahoma County's and Tulsa County's respective populations as 718,633 and 603,403. *State & County QuickFacts: Oklahoma County*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/40109> (last visited Sept. 28, 2016); *see also State & County QuickFacts: Tulsa County*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/40143> (last visited Sept. 28, 2016). The 2010 population of Oklahoma's third largest county, Cleveland County, was 233,733; *see also State & County QuickFacts: Cleveland County*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/40027> (last visited Sept. 28, 2016). Cleveland County recently established a public defender agency but does not undertake capital representation at any stage. Interview with Jamie Pybas, Div. Chief, Homicide Dir. App. Div., Okla. Indigent Def. Sys. (Sept. 30, 2016) (on file with author) [hereinafter Pybas Interview].

²⁵ Ravitz Interview, *supra* note 23.

²⁶ *Id.*

²⁷ Nigh Interview I, *supra* note 23.

²⁸ *See* App. II, p. 25.

²⁹ Home Page, OKLA. INDIGENT DEF. SYS., <https://www.ok.gov/OIDS> (last visited Oct. 1, 2016).

³⁰ Interview with Gretchen Mosley, Sapulpa Capital Tr. Div., Okla. Indigent Def. Sys. (Sept. 30, 2016) (on file with author) [hereinafter Mosley Interview]; OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 8–9 (2016).

³¹ Pybas Interview, *supra* note 24; OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 8 (2016).

³² Mosley Interview, *supra* note 30; OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 9 (2016).

³³ Ravitz Interview, *supra* note 23; Nigh Interview I, *supra* note 23. E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 14, 2016) (on file with author); E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author).

reporting—to apprise the arrestees of their rights (to counsel, to remain silent, etc.).⁵⁴ The offices' formal appointment occurs at a probable cause hearing held within days of a homicide suspect's arrest.⁵⁵

The OIDS capital trial divisions actively monitor the counties that they serve to ensure that, if a homicide is committed and a suspect is arrested, OIDS will be appointed as counsel to that suspect at the earliest opportunity.⁵⁶ Upon appointment, both the Tulsa County Public Defender's Office and OIDS immediately assign two attorneys to homicide cases.⁵⁷ In Tulsa County, a mitigation specialist also is assigned to the case if the facts support a possible death sentence (because one or more aggravating factors are present).⁵⁸ The Oklahoma County Public Defender's Office initially assigns one attorney to every homicide case.⁵⁹ It is that attorney's responsibility to assemble the necessary team—i.e., an additional attorney and an investigator—to investigate and litigate the case.⁴⁰ When the two public defender offices or attorneys employed by OIDS are unable to represent a capital client because of a conflict of interest—as, for example, when a case involves co-defendants—conflict counsel are appointed.⁴¹

B. Appeals Process

At the direct appeal stage, capital litigation outside of Oklahoma County and Tulsa County is undertaken by the OIDS Homicide Direct Appeals Division, which also represents indigent appellants convicted of murder but not sentenced to death. The division is staffed by seven attorneys, who began fiscal year 2016 with five pending capital cases and 42 non-capital (felony) cases and ended that same fiscal year with five pending capital cases and 58 non-capital (felony) cases.⁴² Approximately 40% of the division's caseload involves non-capital conflict cases from Oklahoma County and Tulsa County.⁴³ The division also is responsible, pursuant to Oklahoma law,⁴⁴ for investigating and raising claims of ineffective assistance of trial counsel.⁴⁵

In addition to its trial and appellate work, OIDS represents all death-sentenced inmates in their state post-conviction proceedings through its Capital Post-Conviction Division.⁴⁶ The division comprises four attorneys, two investigators, and a legal secretary.⁴⁷ When the Homicide Direct Appeals Division has a conflict of interest, the Capital Post-Conviction Division undertakes the representation at this stage of the proceedings.⁴⁸ The office began fiscal year 2016 with 29 active cases—seven of which were capital post-conviction cases and one of which was a capital direct appeal—and ended that same fiscal year with 28 active cases, six of which were

⁵⁴ E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 14, 2016) (on file with author); E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author).

⁵⁵ *Id.*

⁵⁶ Mosley Interview, *supra* note 50.

⁵⁷ Nigh Interview I, *supra* note 25; Mosley Interview, *supra* note 50.

⁵⁸ E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author).

⁵⁹ Ravitz Interview, *supra* note 25.

⁴⁰ E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 14, 2016) (on file with author).

⁴¹ Ravitz Interview, *supra* note 25; Nigh Interview I, *supra* note 25; Mosley Interview, *supra* note 50; *see also* OKLA. STAT. tit. 19, § 158.7 (governing conflicts of interest specific to the public defender offices); OKLA. STAT. tit. 22, § 1535.7 (governing conflicts of interest specific to OIDS).

⁴² *See* OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 12 (2016).

⁴³ Pybas Interview, *supra* note 24.

⁴⁴ *See* Okla. Crim. App. R. 3.11(B)(5)(b); *Dewberry v. State*, 954 P.2d 774, 775 (Okla. Crim. App. 1998).

⁴⁵ As is discussed in the *Role of the Judiciary* chapter, this aspect of Oklahoma's system for adjudicating capital cases on direct appeal and in post-conviction proceedings—the fact that ineffective assistance of counsel must be raised for the first time on direct appeal—is unusual among capital jurisdictions.

⁴⁶ Interview with Kristi Christopher, Div. Chief, Capital Post-Conviction Div., Okla. Indigent Def. Sys. (Sept. 28, 2106) (on file with author) [hereinafter Christopher Interview].

⁴⁷ *Id.*

⁴⁸ *Id.*

capital post-conviction cases and one of which was a capital direct appeal.⁴⁹

Representation of death-sentenced inmates at the federal level—which occurs after an inmate has been denied relief on direct appeal and in state post-conviction proceedings—is primarily undertaken by the Capital Habeas Unit (CHU) of the Federal Public Defender for the Western District of Oklahoma, located in Oklahoma City.⁵⁰ If the CHU cannot be assigned to a case due to a conflict of interest, the federal district court will appoint conflict counsel from a panel of qualified lawyers.⁵¹

Currently, capital caseloads appear manageable for the attorneys handling capital cases at the Tulsa County and Oklahoma County public defenders' offices. However, those attorneys are also managing non-capital cases, and the heavy caseloads for noncapital cases *are* an issue for public defenders statewide. When a capital case is assigned to a defense attorney with a heavy caseload, at least one office indicated that it prioritizes the capital case and would attempt to minimize that attorney's non-capital caseload.⁵² However, the defense attorneys who spoke with the Commission indicated that if capital cases increase, the caseloads could become burdensome and difficult to manage.⁵³

IV. Oklahoma's Adherence to Professional Standards in Capital Cases

A. Oklahoma Capital Counsel: Funding and Compensation

1. Funding

The Oklahoma Legislature directly appropriates funds to the indigent defense system. For the fiscal year ending on June 30, 2016, the total budget for OIDS was \$15.4 million.⁵⁴ As detailed in the agency's annual report, OIDS was not adequately funded in fiscal year 2016: its budget was reduced mid-year by \$710,732 and was set at \$1.1 million less than the amount appropriated in the previous fiscal year, even as its caseload has nearly doubled in the past seven years.⁵⁵ Attorney costs for the agency's capital work for the fiscal year ending on June 30, 2015—the most recent year for which data are available—averaged \$36,710 per case.⁵⁶

The majority of funding for the public defender offices of Oklahoma County and Tulsa County comes from the respective “court fund[s]” of those counties.⁵⁷ However, the budget for these offices is set by the Oklahoma Supreme Court in consultation with each office's respective chief.⁵⁸ Each county's court fund is financed through

⁴⁹ See OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 13 (2016).

⁵⁰ Interview with Randy Bauman, Dir., Capital Habeas Unit, Fed'l Pub. Defender, W.D. Okla. (Mar. 18, 2106) (on file with author) [hereinafter Bauman Interview].

⁵¹ *Id.*

⁵² Ravitz Interview, *supra* note 25.

⁵³ Nigh Interview I, *supra* note 25.

⁵⁴ See OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 1–2 (2016), <https://www.ok.gov/OIDS/documents/2016%20Annual%20Report.pdf>. The agency was appropriated \$16,079,722 for the fiscal year but, “due to a statewide revenue failure, OIDS, along with other state agencies, received funding reductions totaling \$1,125,581.” *Id.* at 2. Approximately 37 percent of that amount ultimately was restored. *Id.*

⁵⁵ See *id.*

⁵⁶ See OKLA. OFFICE OF MGMT. & ENTERPRISE SERVS., COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2015, at 199 (2015), <https://www.ok.gov/OSF/documents/cafr15.pdf>. This figure is commensurate with the capital trial level costs in Oklahoma and Tulsa Counties for defense reported in the cost study, which were \$56,467. See *Appendix IB*, PETER A. COLLINS, MATTHEW J. HICKMAN & ROBERT C. BORUCHOWITZ, CAPITAL PUNISHMENT IN OKLAHOMA: AN ANALYSIS OF THE ECONOMIC COSTS (2017).

⁵⁷ See OKLA. STAT. 19, §§ 158.4 (making chief public defender and assistant public defender salaries “payable monthly, from the court fund of such county”), 158.6 (making investigator and secretary salaries “payable monthly, from the court fund of such county”), 158.8 (making expert witness compensation payable “by the court fund pursuant to procedures established by the governing board of the court fund”).

⁵⁸ E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 14, 2016) (on file with author); E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author).

“fees, fines, costs and forfeitures . . . collected by the court clerk,”⁵⁹ but the chief public defenders of both the Oklahoma County Public Defender’s Office and the Tulsa County Public Defender’s Office report that their budgets do not fluctuate based on changes to the county court fund.⁶⁰

For fiscal year 2015, Oklahoma County’s public defender programs totaled \$4,633,853 with an additional \$11,871 spent on public defender travel expenses.⁶¹ For fiscal year 2009, which provides the most recent publicly-available data, Tulsa County’s public defender programs totaled \$3,752,743, with an additional \$10,300 spent on public defender travel expenses.⁶² The chief public defender for Tulsa County reports that his office did receive a budget increase in the past two years, as requested and in spite of the fact that the court fund was lower than in previous years. The chief public defender is, however, unable to replace employees who retire or leave for other reasons without the Supreme Court’s authorization to hire a replacement.⁶³ His office currently is short one investigator and awaiting approval to fill this vacancy.⁶⁴

In addition to the court fund, the general fund of each county also is used to finance these offices—specifically, Oklahoma law requires counties with a public defender’s office to “provide for necessary office supplies and equipment and arrange for sufficient office space in the county building . . . to permit the efficient and effective operation of the office of public defender.”⁶⁵ In Oklahoma County, fiscal year 2017 estimates for these costs totaled \$51,420.⁶⁶ In Tulsa County, fiscal year 2016 estimates for these costs totaled \$54,500.⁶⁷

2. Compensation

Oklahoma law requires chief public defenders and assistant public defenders to “receive a salary commensurate with the range of salaries of assistant district attorneys in their districts.”⁶⁸ The same holds true for the investigators and secretaries employed by these offices.⁶⁹ Furthermore, in *Earl v. Tulsa County District Court*, the Oklahoma Supreme Court held that “commensurate with” in the statute is to be read as “equal to” to avoid, by way of the governing board, “[j]udicial exercise of managerial discretion over public defenders’ salaries,” a proposition the Court recognized as “of doubtful legal efficacy” and “fraught with hazards of constitutional infirmity.”⁷⁰

By contrast, the salaries of OIDS attorneys and support staff are set by OIDS’s executive director, subject to the salary schedules adopted by the OIDS board.⁷¹ Each member of the board is appointed by the governor (with the advice and consent of the Oklahoma Senate) and serves a five-year term; at least three members of the

⁵⁹ OKLA. STAT. tit. 20, § 1301.

⁶⁰ E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 14, 2016) (on file with author); E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author). Although it is encouraging that Oklahoma’s public defender offices have not faced budget shortfalls when their respective county’s court fund has been lower than expected or as needed, other states have encountered difficulties tying the funding for their indigent defense services to fees, fines, costs, and forfeitures. See Dylan Walsh, *On the Defensive*, THE ATLANTIC (June 2, 2016), <http://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/> (“Louisiana, uniquely, funds the majority of indigent defense through court fees. . . . These local revenues constitute almost 70 percent of the public-defense system’s budget, with the bulk of them assessed on traffic tickets. Because the number of tickets written in a given month bears no relationship to the ebb and flow of criminal activity or prosecution, this setup results in a dismal state of uncertainty and repeated budgetary shortfall.”).

⁶¹ OKLA. STATE AUD. & INSP., OKLAHOMA COUNTY COURT CLERK STATUTORY REPORT 3 (2014).

⁶² OKLA. STATE AUD. & INSP., TULSA COUNTY COURT CLERK STATUTORY REPORT 3 (2010).

⁶³ E-mail from Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Oct. 14, 2016) (on file with author).

⁶⁴ *Id.*

⁶⁵ OKLA. STAT. tit. 19, § 158.1a.

⁶⁶ OKLA. COUNTY CLERK, ANNUAL ADOPTED BUDGET: OKLAHOMA COUNTY, OKLAHOMA: FISCAL YEAR 2016–2017, at 10, 23, 93 (2016).

⁶⁷ BUDGET BD. OF TULSA COUNTY, BUDGET AND FINANCIAL PLAN FOR APPROPRIATED FUNDS: FISCAL YEAR 2015–2016, at 79 (2015).

⁶⁸ OKLA. STAT. tit. 19, § 158.4.

⁶⁹ *Id.* at § 158.6.

⁷⁰ 606 P.2d 545, 548 (Okla. S. Ct. 1979); see also Nigh Interview I, *supra* note 25 (confirming that salaries at the Tulsa County Public Defender’s Office are equal to those in the Tulsa County District Attorney’s Office).

⁷¹ OKLA. STAT. tit. 22, §§ 1535.3, 1535.4.

board must be attorneys licensed to practice law in the state of Oklahoma “who have experience through the practice of law in the defense of persons accused of crimes.”⁷² Board members serve without compensation and may be reappointed.⁷³

A review of publicly available data on compensation rates at district attorney’s offices and OIDS reveals noticeable disparities. For example, the division chiefs of the two capital trial divisions of OIDS earn approximately \$90,000 per year—less than the majority of salaries listed for assistant district attorneys and less than the majority of salaries listed for district attorneys and their first assistants.⁷⁴ Other capital counsel at OIDS likewise are paid notably less than their counterparts working on behalf of the state in capital cases.⁷⁵

When conflict attorneys are appointed in a capital case, their compensation is subject to the fee structure established under Oklahoma law. Currently, compensation for lead counsel in a capital case is capped at \$20,000 per case; compensation for co-counsel is capped at \$3,000 per case.⁷⁶ In exceptional cases—specifically, those cases “requir[ing] an extraordinary amount of time to litigate”—these caps may be exceeded “upon a determination” by OIDS’s executive director, with approval by the OIDS Board.⁷⁷

Even if conflict counsel’s compensation were significantly higher than the cap established under Oklahoma statutory law, such compensation would still fall far short of the typical cost to zealously litigate a capital case.⁷⁸ In Florida, for example, experienced capital counsel successfully (and accurately) argued to the Florida Supreme Court that an \$84,000 cap on compensation for post-conviction litigation services failed to account for “complex and unusual capital post-conviction proceedings” and, if applied, would amount to a denial of “meaningful access to counsel.”⁷⁹ Further, a significant number of national, state, and local reports have condemned compensation shortfalls as jeopardizing the constitutional right to effective assistance of counsel.⁸⁰

In all criminal cases, but especially capital ones, expert services are crucial to effective representation, regardless of whether those experts will consult on or testify to issues pertaining to culpability (e.g., DNA analysis,

⁷² OKLA. STAT. tit. 22, § 1555.1. There are no other statutory qualifications to serve on the Board. *Id.*

⁷³ *Id.*

⁷⁴ See *Compare State Pay: District Attorneys Council*, OKLA. WATCH, <http://oklahomawatchdata.org/state-salaries/220> (last visited Sept. 18, 2016); see also *State Pay: Indigent Defense System*, OKLA. WATCH, <http://oklahomawatchdata.org/state-salaries/047> (last visited Sept. 18, 2016).

⁷⁵ *Id.* The salaries of OIDS capital counsel listed on Oklahoma Watch’s website range from \$54,475 to \$75,850. See *State Pay: Indigent Defense System*, OKLA. WATCH, <http://oklahomawatchdata.org/state-salaries/047> (last visited Sept. 18, 2016).

⁷⁶ OKLA. STAT. tit. 22, § 1555.15(A).

⁷⁷ OKLA. STAT. tit. 22, § 1555.15(B). In one recent Oklahoma County capital case, the second chair defense attorney was paid \$13,000. See Collins, *supra* note 56, at 25. In most conflict cases in Tulsa and Oklahoma Counties, second chair defense counsel are paid less than \$7,500. See *id.*

⁷⁸ See, e.g., Collins, *supra* note 49, at 49 tbl.5 (estimating that the average cost to provide trial-level defense services in Washington State capital cases is \$848,948 and that the median cost to provide these services is \$608,496). It also should be noted that caps on compensation are inconsistent with the *ABA Guidelines*. *ABA Guidelines*, *supra* note 4 (Guideline 9.1(B)(1)).

⁷⁹ *Maas v. Olive*, 992 So. 2d 196, 204–05 (Fla. 2008). Because representation during post-conviction review involves the same investigative effort as occurs (or should occur) pretrial, as well as a substantial number of hours engaged in legal research and writing, the costs to provide constitutionally adequate representation pre-conviction and on post-conviction review are, in capital cases, comparable. See *ABA Guidelines*, *supra* note 4 (Guideline 9.1 cmt. (“Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel’s obligation to make an independent examination of all of the available evidence—both that which the jury heard and that which it did not—to determine whether the decision-maker at trial made a fully informed resolution of the issues of both guilt and punishment.”)).

⁸⁰ See, e.g., *ABA Guidelines*, *supra* note 4 (Guideline 9.1 cmt.); AM. BAR ASS’N, THE TEXAS DEATH PENALTY ASSESSMENT REPORT, at xvii to xviii (2013); AM. BAR ASS’N, THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT, at xxi (2013); *Commonwealth v. McGarrell*, No. 77 EM 2004, 2012 Pa. LEXIS 2854, at 2–3 (Pa. Feb. 12, 2012), <http://standdown.typepad.com/PA-SupCt-LernerReport.pdf> (concluding that “the compensation of court appointed capital defense lawyers in Philadelphia is grossly inadequate” and that “[t]he existing compensation system unacceptably increases the risk of ineffective assistance of counsel in individual cases”); AM. BAR ASS’N, THE KENTUCKY DEATH PENALTY ASSESSMENT REPORT, at v (2014); THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 31 (2009); Am. Bar Ass’n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 16 (1990); see also THE CONSTITUTION PROJECT, IRREVERSIBLE ERROR: RECOMMENDED REFORMS FOR PREVENTING AND CORRECTING ERRORS IN THE ADMINISTRATION OF CAPITAL PUNISHMENT, at xxxvi (2014) (noting that cuts in the federal budget in 2013 jeopardized federal public defenders’ ability “to provide constitutionally guaranteed representation”); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1119–20 (2006) (noting that regular shortfalls in OIDS’s funding have “hindered the agency’s ability to effectively represent its clients” (internal quotations omitted)).

ballistics, forensic pathology), to the jury's sentencing-phase decision (e.g., developmental trauma, mental illness, PTSD), or to the defendant's eligibility for a death sentence (e.g., sanity and intellectual disability).⁸¹ In Oklahoma County and Tulsa County, funding for experts comes from the district courts, whether as a lump sum transfer for use during the fiscal year, through the filing of requests for funding in particular cases, or both.⁸² In Oklahoma County, specifically, the public defender's office's most recent budget for all expert services totaled \$85,000, the vast majority of which was used to fund expert services in first-degree murder cases (between 40 and 50 cases per year).⁸³ This amount is appreciably lower than would be required to fund even four or five capital cases: for cases without guilt/innocence defenses, costs for penalty-phase expert services total no less than \$20,000; when guilt/innocence defenses are available and a need arises to hire independent forensic experts to test the state's evidence, the costs for expert services range from \$28,000 to \$55,000 per case.⁸⁴ If the district courts do not have the resources to finance supplemental funding requests by the public defender offices, they may seek those resources directly from the Supreme Court of Oklahoma.⁸⁵

OIDS funds expert services in capital cases—including experts needed in capital appeals—directly from its annual budget, subject to the approval of the executive director.⁸⁶ Although requests for supplemental funding from the district courts are almost universally denied, these funds are greatly needed to provide high-quality representation in capital cases.⁸⁷

As the following sections detail, adequately funding defense services in capital cases is necessary to ensure that counsel can provide high-quality representation by, for example, enlisting the support of much-needed expert services. Moreover, without sufficient resources, Oklahoma's public defender offices and OIDS could not recruit, train, and retain qualified counsel, as required by the *ABA Guidelines*. Accordingly, it is of the utmost importance that these agencies receive consistent and adequate funding so they may provide their capital clients the level of representation required by the Sixth Amendment.

B. Oklahoma Capital Counsel: Qualifications and Training

Oklahoma law does not require capital counsel to satisfy the qualification and training requirements established by the *ABA Guidelines*, nor is this Commission independently assessing the competence of Oklahoma capital defense attorneys overall. However, as indicated in the preceding section, the chief public defenders of the Oklahoma County Public Defender's Office and the Tulsa County Public Defender's Office report that members of their staff are qualified, by training and experience, to represent capital clients. This includes all the capital counsel in these offices: four of the 34 attorneys in the Oklahoma County Public Defender's Office's criminal

⁸¹ See *ABA Guidelines*, *supra* note 4 (Guideline 4.1 cmt.).

⁸² Ravitz Interview, *supra* note 25; Nigh Interview I, *supra* note 25.

⁸³ Ravitz Interview, *supra* note 25; E-mail from Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Oct. 17, 2016) (on file with author).

⁸⁴ *Id.*

⁸⁵ *Id.*; Nigh Interview I, *supra* note 25. (a) Supreme Court Revolving Fund (OKLA. STAT. tit. 20, § 1510.1), (b) the State Judicial Revolving Fund (*id.* at § 1510.2), or (c) the Supreme Court Administrative Revolving Fund (*id.* at § 1510.5).]

⁸⁶ Mosley Interview, *supra* note 50; Christopher Interview, *supra* note 46; OKLA. STAT. tit. 22, § 1555.4(D)(2); see also Pybas Interview, *supra* note 24 (explaining that the process is the same for all OIDS attorneys regardless of whether they work in the trial or appellate divisions: When an attorney believes she needs an expert in her capital case, she will use a standard form called a Professional Services Request Form (PSRF) and will identify the particular type of expert needed and the anticipated cost, along with a detailed explanation of why the facts of the case justify the expert services. This form goes to the Division Chief for discussion and approval. If the Division Chief approves the request, it is then sent to the finance department to confirm whether funds are available in the amount requested. From there, it goes to the Executive Director who approves or denies the request. Each division has a separate expert services budget and must theoretically stay within that budget. If, however, a division exhausts its own budget and still has a need for an expert, the Executive Director has the discretion to move available funds from other budgets within OIDS.)

⁸⁷ Mosley Interview, *supra* note 50. Some capital defense attorneys in the state surmise that, whereas the district courts of Oklahoma County and Tulsa County recognize that it is their role to provide supplementary resources to ensure indigent defendants receive a constitutionally adequate defense, the courts in less populous jurisdictions presume that OIDS can and must pay all defense costs, even though the court fund in each of these counties exists partly for the purpose of financing indigent defense services.

division and three of the 40 attorneys employed by the Tulsa County Public Defender's Office.⁸⁸ Specifically, because of the criteria imposed by the heads of these offices, these seven attorneys' qualifications align with the criteria established in ABA Guideline 5.1 (Qualifications of Defense Counsel):

- License to practice law;⁸⁹
- Demonstration of a commitment to provide zealous advocacy and high quality legal representation in the defense of capital cases;⁹⁰
- Training in (1) relevant state, federal, and international law; (2) pleading and motion practice; (3) pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty; (4) jury selection; (5) trial preparation and presentation, including the use of experts; (6) ethical considerations particular to capital defense representation; (7) preservation of the record and of issues for post-conviction review; (8) counsel's relationship with the client and the client's family; (9) post-conviction litigation in state and federal courts; and (10) the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science;⁹¹
- Substantial knowledge and understanding of the relevant state, federal, and international law, both procedural and substantive, governing capital cases;⁹²
- Skill in the management and conduct of complex negotiations and litigation;⁹³
- Skill in legal research and analysis, and the drafting of litigation documents;⁹⁴
- Skill in oral advocacy;⁹⁵
- Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;⁹⁶
- Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;⁹⁷
- Skill in the investigation, preparation, and presentation of mitigating evidence;⁹⁸ and
- Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.⁹⁹

⁸⁸ Ravitz Interview, *supra* note 25; Nigh Interview I, *supra* note 25; Interview with Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Sept. 28, 2016) (on file with author) [hereinafter Nigh Interview II].

⁸⁹ *ABA Guidelines*, *supra* note 4, Guideline 5.1(B)(1)(a).

⁹⁰ *Id.* at Guideline 5.1(B)(1)(b).

⁹¹ *Id.* at Guidelines 5.1(B)(1)(c), 8.1(B); *see also* Interview with Andrea Miller, Div. Chief, Appeals Div., Okla. County Pub. Defender (May 13, 2016) (on file with author) [hereinafter Miller Interview] (noting that, while there is little to no capital case-specific training in state, attorneys have had the opportunity to travel to out-of-state trainings).

⁹² *Id.* at Guideline 5.1(B)(2)(a).

⁹³ *Id.* at Guideline 5.1(B)(2)(b).

⁹⁴ *Id.* at Guideline 5.1(B)(2)(c).

⁹⁵ *Id.* at Guideline 5.1(B)(2)(d).

⁹⁶ *Id.* at Guideline 5.1(B)(2)(e).

⁹⁷ *Id.* at Guideline 5.1(B)(2)(f).

⁹⁸ *Id.* at Guideline 5.1(B)(2)(g).

⁹⁹ *Id.* at Guideline 5.1(B)(2)(h).

By contrast, although several of the eight attorneys within the two capital trial divisions of OIDS—the Norman Capital Trial Division (three attorneys) and the Sapulpa Capital Trial Division (five attorneys)—satisfy these qualification and training requirements, not all of them do.¹⁰⁰ This partly is a function of inadequate funding: unlike their counterparts in the two public defender’s offices, which by law must “receive a salary commensurate with the range of salaries of assistant district attorneys in their districts,” OIDS attorneys are not guaranteed parity in compensation and, therefore, do not receive salaries commensurate with their counterparts working on behalf of the state.¹⁰¹

Resource constraints also limit the extent to which all Oklahoma-based capital defense attorneys can access training to become qualified—and remain qualified—to represent capital clients, as the *ABA Guidelines* advise.¹⁰² As reported by the chief public defender for Oklahoma County—the state’s most populous county and the jurisdiction responsible for 36.8 percent of the state’s 318 death sentences—training programs that carry a cost for attendance simply are unaffordable.¹⁰³ Likewise, the chief public defender for Tulsa County reports that his office’s resources are inadequate to send his assistants to vital external training programs, and the county itself has acknowledged that its public defender’s office “has no internal or external formal training regimen.”¹⁰⁴ And while both public defender offices facilitate in-house training and regularly seek scholarships from non-governmental sources (e.g., the Oklahoma Coalition to Abolish the Death Penalty), additional funding is necessary to ensure compliance with prevailing national standards.¹⁰⁵

The capital attorneys employed by OIDS face similar limitations on their opportunities for capital representation training. Because OIDS is not adequately funded—as mentioned above, the agency’s funding for fiscal year 2017 is \$4.1 million less than the amount appropriated in the previous fiscal year¹⁰⁶—it is unable to maintain a budget for training its employees.¹⁰⁷

C. Oklahoma Capital Counsel: Independence and Defense Team Composition

Independence from political pressures is a cornerstone of effective representation.¹⁰⁸ Because Oklahoma capital defense counsel largely work within governmental agencies, the oversight of which is limited to budgetary

¹⁰⁰ Mosley Interview, *supra* note 30.

¹⁰¹ See OKLA. STAT. tit. 22, § 1355.4 (empowering the executive director of OIDS to “set the salaries of [personnel necessary to carry out the duties imposed upon the System], subject to the salary schedules adopted by the [Oklahoma Indigent Defense System] Board”), OKLA. STAT. tit. 22, § 1355.5 (empowering the Oklahoma Indigent Defense System Board to “adopt salary schedules for the System” without additional legislative guidance); see also *id.* (noting that starting salaries for attorneys in the Sapulpa Capital Trial Division are substantially less than the salaries of their counterparts in district attorney’s and public defender’s offices across the state).

¹⁰² See *ABA Guidelines*, *supra* note 4, Guideline 8.1(C) (“Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program . . . that focuses on the defense of death penalty cases.”).

¹⁰³ Ravitz Interview, *supra* note 25; see, e.g., *Death Penalty College: Tuition*, Santa Clara Univ. L. Sch., <http://law.scu.edu/dpc/tuition> (last visited Sept. 22, 2016) (attorney tuition ranging from \$915 to \$995).

¹⁰⁴ BUDGET BD. OF TULSA COUNTY, BUDGET AND FINANCIAL PLAN FOR APPROPRIATED FUNDS: FISCAL YEAR 2015–2016, at 227 (2015); see also Nigh Interview II, *supra* note 88. It is well established that capital counsel must regularly attend specialized training programs so as to “keep[] abreast of new developments in a volatile and highly nuanced area of the law,” Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 358 (1995); moreover, and as the *ABA Guidelines* note, “many capital defense counsel have discovered that they must attend training programs more frequently [than is required by their respective Bar] in order to provide effective legal representation.” *ABA Guidelines*, *supra* note 4 (Guideline 8.1 hist.). See also Jud. Conf. of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998) (observing that “[a]ll of the defense counsel interviewed by the Subcommittee stressed the importance of participating in specialized death penalty training programs,” and further observing that “[t]here are, however, very few training programs anywhere in the country specializing in the defense of death penalty cases,” a situation that has improved nationally since 1998 but not with respect to Oklahoma, specifically).

¹⁰⁵ Ravitz Interview, *supra* note 25; Nigh Interview II, *supra* note 88.

¹⁰⁶ OKLA. INDIGENT DEF. SYS., 2016 ANNUAL REPORT 2 (2016).

¹⁰⁷ Mosley Interview, *supra* note 30. See also STATE OF OKLA., FISCAL YEAR EXECUTIVE BUDGET: HISTORICAL DATA: 2017, at 213 (2016), https://www.ok.gov/OSF/documents/bud17hd_tagged.pdf (listing OIDS’s actual expenditures by category for fiscal years 2014 and 2015).

¹⁰⁸ Accord *ABA Guidelines*, *supra* note 4, Guideline 2.1(C) (requiring each capital jurisdiction’s legal representation plan for implementing the *Guidelines* to be “structured to ensure that counsel defending death penalty cases are able to do so free from political influence”).

matters, their work is appropriately independent of the state regarding the quality of representation, insofar as it might be affected by political decisions.

On the other hand, and as was discussed above, funding limits set by politicians can create serious challenges to independence. Limits to state and local governments' efforts to fund the public defender's offices in Oklahoma County and Tulsa County and OIDS present serious difficulties to these organizations' capacity to comport with national standards for capital cases, particularly as those standards pertain to training and qualifications. Moreover, the consensus among practitioners at these organizations is that a return to higher rates of seeking the death penalty by prosecutors would seriously prejudice their clients facing capital charges or seeking relief from a death sentence.¹⁰⁹

Furthermore, whereas the *ABA Guidelines* require each capital defense team to include, at every stage of the proceedings, two qualified attorneys, an investigator, and a mitigation specialist,¹¹⁰ as discussed in great detail in the cost study—attached as *Appendix IB*—OIDS cannot satisfy this requirement at its present funding levels and caseload.¹¹¹ On state post-conviction review, for example, each case typically is assigned to only one attorney in the Capital Post-Conviction Division. Moreover, the division's two investigators must divide between themselves approximately 30 capital and non-capital cases and, on these cases, serve as both fact investigator and mitigation specialist.¹¹²

V. The Importance of Competent Counsel in Capital Cases

Since the reinstatement of the death penalty in the late 1970s, capital representation nationally and in Oklahoma has been markedly uneven. Both state and federal courts in Oklahoma have often found the representation of counsel in capital cases to be 'ineffective,' meaning a condemned prisoner's trial lawyer's performance was constitutionally deficient and that deficiency prejudiced the outcome of the case.

In James Fisher's capital case, for example, a federal appellate court found it "beyond question" that Mr. Fisher's court-appointed attorney—not a lawyer working for one of the state's public defender offices—rendered ineffective assistance throughout the representation.¹¹³ Mr. Fisher was arrested for the 1982 murder of Terry Gene Neal. Mr. Neal had been stabbed in the neck with a broken bottle in his Oklahoma City apartment.¹¹⁴ "The nature of the trial itself," the U.S. Court of Appeals for the Tenth Circuit held, "indicates a singular lack of preparation on [defense counsel's] part. The trial transcript reveals that throughout most of [his] examination of witnesses, including his own client, he had no idea what answers he would receive to his questions and was not pursuing any particular strategy of defense."¹¹⁵ The Court also faulted Mr. Fisher's trial counsel for:

[F]ailing through apparent ineptitude to act as a reasonably diligent and professional advocate; failing through his hostility to his client and his client's interests, and his apparent sympathy and assistance for the state's case, to act as his client's loyal advocate; failing to advance any defense theory, even that of holding the state to its burden of proof; and, under the circumstances, failing to make a closing argument.¹¹⁶

¹⁰⁹ Ravitz Interview, *supra* note 25; Interview with Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Aug. 17, 2016) (on file with author) [hereinafter Nigh Interview III]; Mosley Interview, *supra* note 30; Miller Interview, *supra* note 91; Pybas Interview, *supra* note 24; Christopher Interview, *supra* note 46.

¹¹⁰ *ABA Guidelines*, *supra* note 4, Guideline 4.1(A)(1).

¹¹¹ Mosley Interview, *supra* note 30; Christopher Interview, *supra* note 47; *see also* App. II.

¹¹² Christopher Interview, *supra* note 46.

¹¹³ *Fisher v. Gibson*, 282 F.3d 1283, 1293 (10th Cir. 2002).

¹¹⁴ *Fisher v. State*, 206 P.3d 607, 608 (Okla. Crim. App. 2009).

¹¹⁵ *Fisher*, 282 F.3d at 1294.

¹¹⁶ *Id.* at 1307.

Upon retrial, Mr. Fisher was again convicted and sentenced to death,¹¹⁷ and his new court-appointed trial attorney was again found to have rendered ineffective assistance of counsel.¹¹⁸ Evidence presented at an evidentiary hearing demonstrated that counsel had “failed to properly investigate, prepare and present relevant and readily available evidence at trial.”¹¹⁹ Approximately eighteen boxes of materials related to Mr. Fisher’s case were in counsel’s possession, yet counsel never reviewed them. Instead, the boxes were placed in storage and their contents examined only after Mr. Fisher was sentenced to death and was appointed successor counsel (through OIDS).¹²⁰ Counsel also failed to make use of the services of “an experienced investigator [] assigned [by the district court] to assist him.”¹²¹ At the evidentiary hearing, counsel “admitted that he did not track down any defense witnesses and he did not recall interviewing any of the State’s witnesses before trial.”¹²² Partly on the basis of these deficiencies, the OCCA reversed Mr. Fisher’s conviction.¹²³ He ultimately was released from custody on the stipulation that he leave, and never return to, Oklahoma.¹²⁴

Similarly, in *Cargle v. Mullin*, also out of Oklahoma County, defense counsel—who had been hired by Marcus Cargle’s parents to represent their son at his 1994 capital trial for the shooting death of two individuals during a drug transaction—failed to “properly confer with and advise his client,” “interview and prepare even obvious defense witnesses,” “develop available exculpatory/mitigating evidence,” “investigate sources for impeachment of the crucial prosecution witnesses,” and “expose the State’s relatively weak case to meaningful adversarial testing.”¹²⁵ And as in Mr. Fisher’s case, counsel also “disloyally impeached his own client” by suggesting that Mr. Cargle had lied in a video-recorded police interview “in a case that was all about credibility.”¹²⁶ On retrial, Mr. Cargle was convicted and sentenced to life without possibility of parole.¹²⁷

Both Mr. Fisher’s and Mr. Cargle’s cases illustrate—as do others¹²⁸—the serious consequences of a capital defense counsel’s failure to provide adequate representation. Furthermore, because the standard established in *Strickland* for granting relief based on inadequate representation is a notably difficult one to satisfy,¹²⁹ cases such as Mr. Fisher’s and Mr. Cargle’s necessarily present an incomplete picture as to the quality of capital representation in the state of Oklahoma. Other defendants may present similarly egregious deficiencies but be unable to meet the *Strickland* standard. Such cases, when reversed for ineffectiveness of counsel, also produce substantial costs to retry them. Mr. Fisher’s conviction and death sentence were reversed and litigated twice following his 2005 trial. These costs are worth reflection when considering the adequacy of Oklahoma’s present arrangement for supplying indigent capital defendants and death-sentenced inmates with trial, appellate, and post-conviction counsel.

¹¹⁷ Dan Barry, *In the Rearview Mirror, Oklahoma and Death Row*, N.Y. TIMES, Aug. 11, 2010, at A1.

¹¹⁸ *Fisher*, 206 P.3d at 615.

¹¹⁹ *Id.* at 611.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 615.

¹²⁴ Barry, *supra* note 117.

¹²⁵ 517 F.3d 1196, 1211 (10th Cir. 2005).

¹²⁶ *Id.* at 1211, 1217.

¹²⁷ Nick Trougakos, *Man Spared Death Penalty at Retrial*, NEWSOK, Feb. 3, 2005 (The court cited “prejudicial conduct” and “misrepresentation by prosecutors” and a “grossly deficient defense attorney”).

¹²⁸ See, e.g., *Anderson v. Simons*, 476 F.3d 1151 (10th Cir. 2007) (finding defense counsel ineffective for “wholly fail[ing] to investigate potential mitigation evidence, instead focusing almost exclusively on the guilt phase of the trial”); *Marquez-Burrola v. State*, 157 P.3d 749 (Okla. Crim. App. 2007) (finding defense counsel ineffective for failing to “investigate, develop, and present an acceptable mitigation case”).

¹²⁹ See Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 11–15 (1996) (discussing *Strickland*’s relatively modest demands of capital counsel).

VI. Conclusion and Recommendations

The integrity of our capital punishment system depends upon an accused being afforded competent and effective counsel. Capital defense relies on adequate funding and resources to ensure that trial, appellate, and post-conviction counsel can meet the standards outlined by both professional and legal standards. In capital cases, where the defendant's life is at stake, ineffective or underfunded defense counsel have repeatedly failed to meet those standards. Indeed, Oklahoma's experience with wrongful convictions demonstrates the importance of ensuring justice in the first instance, rather than cutting corners in the early stages of a case. Oklahoma policymakers should ensure that all persons accused of the worst offenses are zealously and effectively represented throughout their criminal proceedings. In light of the critical role defense counsel plays in capital cases, the Commission makes the following recommendations:

Recommendation 1:

To better ensure that individuals facing the death penalty in Oklahoma receive high-quality representation, the Oklahoma Bar Association should promulgate advisory guidelines for the appointment and performance of defense counsel in capital cases.

While the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*) are helpful in assessing counsel's conduct, they were not drafted with any particular jurisdiction in mind. Both practitioners and judges may be too quick to disregard these commonsense standards, to the detriment of capital defendants and death-sentenced inmates seeking relief on appeal or in post-conviction proceedings.

Due to these limitations to the *ABA Guidelines*, the Commission recommends that the Oklahoma Bar Association (OBA) promulgate its own set of advisory guidelines for the performance of Oklahoma capital counsel—guidelines that would consider those characteristics that make Oklahoma capital representation different from other jurisdictions. In Texas, for example, the state bar association used the *ABA Guidelines* as a template to create standards for Texas capital counsel. The Commission is confident that adoption of capital case guidelines specific to Oklahoma will help to elevate the quality of representation of indigent capital defendants.

Recommendation 2:

The Oklahoma Bar Association should facilitate or provide regular training for capital defense trial counsel and appellate counsel specific to the unique demands of capital case representation.

Counsel must be trained if they are to undertake the serious and complex work of representing individuals accused of a capital crime or sentenced to death. As noted in the *ABA Guidelines*:

[P]roviding high quality legal representation in capital cases requires unique skills. Accordingly, the standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case. Such training is not to be confined to instruction in the substantive law and procedure applicable to legal representation of capital defendants, but must extend to related substantive areas of mitigation and forensic science. In addition, comprehensive training programs must include practical instruction in advocacy skills, as well as presentations by experienced practitioners.¹⁵⁰

¹⁵⁰ *ABA Guidelines*, Guideline 8.1 cmt.

The offices in this state that provide capital defense services should continue to finance their staff members' attendance at capital training seminars and programs outside of Oklahoma. However, as the expenses for out-of-state travel may be considerable and may prevent many attorneys and investigators from attending, the OBA could provide a valuable service to the capital defense bar by facilitating in-state training for attorneys and their teams.

Recommendation 3:

Attorneys, investigators, and support staff employed by the Oklahoma Indigent Defense System should receive compensation commensurate with that of attorneys, investigators, and support staff employed by district attorneys' offices in their corresponding counties.

The Commission was encouraged to learn that, in contrast to other jurisdictions, public defenders, investigators, and support staff in Oklahoma and Tulsa counties who represent or work on behalf of capital clients are compensated at levels commensurate with their prosecutorial counterparts. This framework helps to ensure that attorneys who are interested in a career in criminal law will not favor working for the state purely for financial reasons. It also has the benefit of being fair and, therefore, the right thing to do.

By contrast, attorneys, investigators, and support staff employed by the Oklahoma Indigent Defense System (OIDS) are paid less than their prosecutorial counterparts. This situation is unfair to the dedicated attorneys, investigators, and support staff who choose to support our criminal justice system through defense-oriented work. Accordingly, the Commission calls upon Oklahoma's policymakers to correct this disparity so that OIDS's capital case staff receives salaries commensurate with their state counterparts.

Recommendation 4:

Adequate compensation should be provided to conflict counsel in capital cases, and the existing compensation cap should be lifted.

Conflict counsel are sometimes necessary to ensure a capital defendant's constitutional right to competent, conflict-free counsel. As this chapter explains, conflict counsel in Oklahoma are assigned when public defender agencies and OIDS are unable to take the case without entering into a conflict of interest. Currently, compensation for lead conflict counsel in a capital case is capped at \$20,000 per case, whereas compensation for co-counsel is capped at \$5,000 per case. These funding limits are not reflective of compensation levels afforded to qualified capital attorneys. Compensation caps discourage competent attorneys from accepting work, even though their services are sorely needed—or worse, from accepting a case but failing to take the time needed to effectively represent a capital defendant.

Recommendation 5:

Conflict counsel outside of Oklahoma and Tulsa counties (which follow a different process) should not be required to seek funding beyond any statutory cap directly from the Oklahoma Indigent Defense System. Such funds should come from the court funds of the county in which the representation takes place.

If conflict counsel find it necessary to seek funding over and above the statutory caps, the responsibility for approving and providing this funding should not fall on OIDS. Such a fee arrangement places OIDS in the position of allocating portions of its limited funding to conflict counsel. Rather than competing with OIDS for funding, conflict counsel should receive compensation from another source, such as from the court fund of the county where the representation takes place.

Jury Issues

I. Introduction

The jury is a cornerstone of the American criminal justice system and plays a particularly important role in death penalty cases. The capital jury not only determines a defendant's guilt or innocence, but also whether a defendant should be sentenced to death. The jury embodies intersecting rights: a criminal defendant's right to an impartial jury under the Sixth Amendment to the United States Constitution and Sections II-19 and 20 of the Oklahoma Constitution, and a prospective juror's right to equal protection under the Fourteenth Amendment. As the U.S. Supreme Court has stated, the jury has a tremendous amount of power—especially in capital cases—and is meant to provide a check on government overreach:

The framers of the [federal and state] constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.¹

Before discussing the historical context, it is important to note the basics of jury selection. Although the process varies by jurisdiction, jury selection generally encompasses three steps.² First, before a trial, a “pool” of prospective jurors is summoned to the courthouse for jury selection.³ Next, the jury pool is winnowed through a process of exemptions for hardship and general qualifications, such as a juror's inability to read or write English. Then it becomes a smaller group of prospective jurors called the “venire” or “panel.”⁴ The venire is the group of individuals from whom the final “petit jury” is selected.⁵ The petit jury is the group of individuals—always twelve in capital cases—who hear the trial.⁶ Capital cases also involve unique concepts for jurors, like aggravating and mitigating factors (see *Death Eligibility* chapter). Jurors' comprehension of capital jury instructions—particularly related to aggravating and mitigating factors and life without parole—is explored in Section IV.

¹ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

² Jefferson Edward Howeth, *Holland v. Illinois: The Supreme Court Narrows The Scope Of Protection Against Discriminatory Jury Selection Procedures*, 48. WASH. & LEE L. REV. 579, 580–81 (1991).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ OKLA. STAT. tit. 22, § 601.

There are two ways that a prospective juror can be excused from service: 1) a for-cause challenge and 2) a peremptory challenge.⁷ First, the trial court may grant an unlimited number of challenges to prospective jurors “for cause.”⁸ The grounds for a challenge for cause are typically set out by statute and include specific reasons for disqualification, such as relation to a party, prior jury service on a related case, or a general lack of impartiality.⁹ In a capital case, a prospective juror may also be struck from the jury venire because of his or her view on the death penalty.¹⁰ This is due to the fact that in capital cases, including in Oklahoma, jurors must be “death-qualified,” meaning that each juror must agree that he or she could impose a sentence of death if the case were to proceed to the penalty phase. Anyone whose opposition to capital punishment would “substantially impair” their ability to follow the law is also excluded from jury service. Parties may also exclude “for cause” a juror who would automatically vote for a death sentence.¹¹

Second, a prospective juror can be removed through a peremptory challenge, which allows either party to excuse a prospective juror without assigning any cause. The peremptory challenge is a statutory—rather than a constitutional right—and each state and federal jurisdiction has its own laws regarding peremptory challenges. In Oklahoma, each party in a first-degree murder case receives nine peremptory challenges.¹² Early litigation surrounding jury issues focused on discrimination in the selection of the jury pool and the venire, while more recent litigation has focused on the discriminatory use of peremptory challenges.¹³

A. History of the Jury

Historical context is relevant to a full discussion of death qualification and peremptory challenges. For much of the last two centuries, minorities and women were systematically excluded from jury service. From the 1930s to the 1970s, U.S. Supreme Court decisions began to examine purposeful exclusion from jury service on the basis of race and sex.

1. Racial Discrimination

Ostensibly, black men gained the right to jury service after the end of slavery. The passage of the 1875 Civil Rights Act banned the exclusion of a prospective juror on the basis of race.¹⁴ Four years later, in *Strauder v. West Virginia*, the U.S. Supreme Court reaffirmed that the exclusion of a juror from the grand or petit jury based solely on race violated the Equal Protection Clause.¹⁵

⁷ These topics will be discussed at greater length in the sections below.

⁸ See Amy B. Gendleman, *The Equal Protection Clause, The Free Exercise Clause and Religion-Based Peremptory Challenges*, 63 U. CHI. L. REV. 1639, 1641 (1996).

⁹ See *id.*

¹⁰ See *Wainwright v. Witt*, 469 U.S. 412 (1985) (holding that a prospective juror whose views towards capital punishment would “substantially impair” her ability to follow the law and consider aggravating and mitigating factors in support of or against imposition of the death penalty can be excused for cause).

¹¹ See *Morgan v. Illinois*, 504 U.S. 719 (1992).

¹² OKLA. STAT. tit. 22, § 655.

¹³ Howeth, *supra* note 2, at 581.

¹⁴ See Civil Rights Act of 1875, ch. 114, § 4, 18 Stat. 336 (codified as amended at 18 U.S.C. § 243).

¹⁵ *Strauder v. West Virginia*, 100 U.S. 303 (1879) (holding West Virginia’s statute unconstitutional and a violation of equal protection as it excluded citizens from grand and petit jury service solely on the basis of race); see also *Neal v. Delaware*, 105 U.S. 370 (1881); *Gibson v. Mississippi*, 162 U.S. 565 (1896).

In *Strauder*, the Court stated the following:

If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim that it would not be a denial to white men of the equal protection of the laws. Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the amendment. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.¹⁶

In 1910, the Oklahoma Court of Criminal Appeals (OCCA) likewise recognized that such race-based exclusion violates the Fourteenth Amendment.¹⁷ However, in practice, many jurisdictions across the nation routinely excluded—and often continue to exclude—blacks from jury service.¹⁸

For example, in 1923, John Welch challenged the jury panel in his case “on the ground that no negroes were drawn on the panel.”¹⁹ Welch presented Oklahoma demographic and historical data showing that:

Nearly one-third of the inhabitants of Muskogee county are negroes; that many of them have large real estate holdings, and are owners of valuable personal property, and are listed on the tax rolls from which the jury list is drawn; and that for more than ten years [] past no negro has been permitted to sit on a jury in a court of record in Muskogee county.²⁰

The OCCA rejected Welch’s claim and affirmed the trial court’s denial, stating that “the defendant cannot predicate error upon discriminations against his race in other cases, extending over a period of previous years.”²¹ The court identified the relevant question as whether there was discrimination in this particular case and relied on testimony of the three jury commissioners²² in holding that “no one was rejected for jury service on account of race” despite the trial judge’s suspicions “from the general showing made and from his own observations as a trial judge that there has been discrimination against negroes for jury service in Muskogee County.”²³

¹⁶ *Strauder*, 100 U.S. at 308.

¹⁷ *Smith v. State*, 111 P. 960 (Okla. Crim. App. 1910) (remanding to trial court for a hearing on defendant’s motion that “persons of color or African descent known as negroes were excluded from serving on said panel of jury by the commissioners of Muskogee County on account of their race and color, and for no other reason.”); see also *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (reversing and remanding capital defendant’s conviction on basis of state’s intentional discrimination in using peremptory strikes to remove black prospective jurors from petit jury).

¹⁸ See EQUAL JUST. INITIATIVE, *ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY* at 4, 5 (2010).

¹⁹ *Welch v. State*, 236 P. 68 (Okla. Crim. App. 1923).

²⁰ *Id.* at 71.

²¹ *Id.* Ten years later, the U.S. Supreme Court reversed another Oklahoma case, finding that the defendant *had* shown historical exclusion from jury service on the basis of race. See *Hollins v. Oklahoma*, 293 U.S. 394 (1933). Thirty years later, in *Swain v. Alabama*, the Supreme Court required a showing of historical discrimination for a defendant to prove that the state had used a peremptory challenge to exclude a prospective juror on the basis of race. 380 U.S. 202 (1963).

²² The jury commissioners testified that men were identified for jury service “as provided by statute, from the tax rolls, from men with whom one or another of the commissioners was acquainted; that the selections were made from those they considered best qualified, without any race discrimination; that the number of negroes on the tax rolls was not nearly so great, proportionately, as the number of white persons.” *Welch*, 236 P. at 71–72.

²³ *Id.*

The U.S. Supreme Court again addressed the exclusion of blacks from jury service in 1935, holding that the total exclusion of blacks, by law or by practice, violated equal protection.²⁴ The Court reversed the defendant's conviction for rape after it was revealed that the local jury commission had exercised its discretion to remove all blacks in the county from the jury pool, and stated the principle that:

[W]henever by any action of a State, whether through its legislature, through its courts, or through its executive or administrative officers, all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him, contrary to the Fourteenth Amendment of the Constitution of the United States". . . . The principle is equally applicable to a similar exclusion of negroes from service on petit juries. And although the state statute defining the qualifications of jurors may be fair on its face, the constitutional provision affords protection against action of the State through its administrative officers in effecting the prohibited discrimination.²⁵

That same year, the U.S. Supreme Court reversed an Oklahoma case on the same grounds. It took the somewhat unusual step of rejecting the Oklahoma courts' factual findings on the issue of purposeful racial exclusion from jury service.²⁶

In 1940, a unanimous U.S. Supreme Court stated that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."²⁷ The Court implied that a jury composed of a fair cross-section of the community is necessary to fulfill the Sixth Amendment. In 1942, the Court reaffirmed that the jury must be "truly representative of the community" and "not the organ of any special group or class."²⁸ In later years, the Court held that the fair cross-section requirement only applied to the jury venire (or panel, from which the final jury is selected), and not the petit jury (which hears the case at trial).²⁹

In 1945, indicating that only *total* exclusion offended the U.S. Constitution, the Supreme Court held that a Texas practice of seating exactly one black person on each grand jury did not violate the Constitution.³⁰ In doing so, the Court clarified that "[f]airness in selection has never been held to require proportional representation of races upon a jury."³¹

2. Sex Discrimination

While the U.S. Supreme Court held that exclusion from jury service on the basis of *race* violated equal protection under the Fourteenth Amendment, the Court held that exclusion of women violated the fair cross-section requirement of the Sixth Amendment.³² As with race, although the Court found such systematic exclusion to be unconstitutional, the Court was careful to emphasize that "in holding that petit juries must be

²⁴ See *Norris v. Alabama*, 294 U.S. 587 (1935) (holding that exclusion from the petit jury on the basis of race violates equal protection); see also *Hollins*, 295 U.S. 394 (same).

²⁵ See *Norris*, 294 U.S. at 589 (quoting *Garter v. Texas*, 177 U.S. 442, 447 (1900)) (internal citations omitted).

²⁶ *Hollins v. Oklahoma*, 295 U.S. 394 (1935).

²⁷ See *Smith v. Texas*, 311 U.S. 128, 150 (1940); see also *Glasser v. United States*, 315 U.S. 60 (1942).

²⁸ *Glasser*, 315 U.S. at 85–86.

²⁹ See, e.g., *Holland v. Illinois*, 495 U.S. 474 (1990).

³⁰ *Akins v. Texas*, 325 U.S. 598 (1945).

³¹ *Id.* at 405.

³² See *Taylor v. Louisiana*, 419 U.S. 522, 555 (1975).

drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.”³³

Women were virtually excluded from jury service under the English common law doctrine of *propter defectum sexus*—a “defect of sex.”³⁴ This doctrine was codified by Parliament in 1870 and abandoned 49 years later, in 1919.³⁵ In the United States, women were not permitted to sit on a jury until, in 1898, Utah became the first state to find women qualified for jury service.³⁶ Unlike suffrage, women gained the right to jury service on a state by state basis. In Oklahoma, women were permitted to serve on a jury beginning in 1931 with the passage of legislation and the Oklahoma Supreme Court’s upholding of the acts in *In Re House Bill No. 145*.³⁷

The U.S. Supreme Court addressed the systematic exclusion of women from the panel of grand and petit juries in the context of the federal jury system in 1946.³⁸ The Court found that Congress had contemplated that a cross-section of the community included women, and dismissed the defendant’s indictment due to the improper exclusion of women.³⁹ The Court again addressed the systematic exclusion of women from jury service in 1975, this time at the state level, holding that the exclusion of women—unless they volunteered—from jury service violated the fair cross-section requirement of the Sixth Amendment.⁴⁰

In tandem with the issue of systemic exclusion from jury service, the Court was also considering the discriminatory use of peremptory challenges and the concept of death qualification for capital juries. In 1965, the Court decided *Swain v. Alabama*, which held that the discriminatory use of a peremptory challenge on the basis of race violated the Equal Protection Clause.⁴¹ Three years later, the Court reversed a defendant’s death sentence where the state was permitted to remove for cause all prospective jurors who had “conscientious scruples” against the death penalty.⁴²

As previously discussed, the death penalty temporarily came to a national halt in 1972, as a result of the Court’s decision in *Furman v. Georgia*.⁴³ After use of the death penalty resumed in 1976 with the Court’s decision in *Gregg v. Georgia*,⁴⁴ the Court further refined its earlier decisions regarding peremptory challenges and death qualification.⁴⁵ These developments are discussed in detail in sections II and III below.

³³ *Id.* at 558 (“Defendants are not entitled to a jury of any particular composition, but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.”) (internal citations omitted).

³⁴ 3 BLACKSTONE COMMENTARIES 362.

³⁵ *Taylor*, 419 U.S. at 532 n.13.

³⁶ UTAH REV. STAT., tit. 35, § 1297 (1898).

³⁷ See Robert Darcy & Jennifer F. Paustenbaugh, *Woman Suffrage in Oklahoma*, in OKLAHOMA WOMEN’S ALMANAC 3, 27 (2006) (discussing the passage of House Joint Resolution 2 and House Bill 145, along with *In Re House Bill No. 145*).

³⁸ *Ballard v. United States*, 329 U.S. 187 (1946). At the time that *Ballard* was decided, women were considered eligible to sit on a federal jury if permitted to do so by the highest state court in the state where the federal trial took place. See *id.* at 204 n. 1 (Burton, J., dissenting).

³⁹ *Id.*

⁴⁰ *Taylor v. Louisiana*, 419 U.S. 522 (1975).

⁴¹ 380 U.S. 202 (1965).

⁴² *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

⁴³ *Furman v. Georgia*, 408 U.S. 258 (1972).

⁴⁴ *Gregg v. Georgia*, 428 U.S. 453 (1976).

⁴⁵ See, e.g., *Wainwright v. Witt*, 469 U.S. 412 (1985) (holding it permissible in a capital case to exclude a prospective juror for cause whose views would “prevent or substantially impair” their ability to decide the sentence); *Batson v. Kentucky*, 476 U.S. 79 (1986) (putting in place a three step test for determining whether a peremptory challenge was impermissibly exercised to purposefully exclude a prospective juror on the basis of race).

II. Death Qualification

A. The U.S. Supreme Court and Death Qualification

Many segments of the population do not support the death penalty under any circumstances. Thus, death qualification effectively ensures that a capital jury only represents that portion of the population that can consider imposing a death sentence in a capital case. During “voir dire” (the process by which the jury is selected) in a capital case, jurors are questioned by both sides about their views on the death penalty to create a jury that is death-qualified.

In 1968, the U.S. Supreme Court held in *Witherspoon v. Illinois* that individuals cannot be disqualified from jury service simply for voicing general objections to the death penalty, but a state may exclude jurors who would automatically vote against the death penalty or whose views would affect their decision on the defendant’s guilt or innocence.⁴⁶ In 1985, the Court replaced the *Witherspoon* standards in *Wainwright v. Witt* and subsequent cases, giving more discretion to the trial judge regarding death qualification.⁴⁷ The trial judge must decide whether a juror’s attitude about the death penalty would “prevent or substantially impair” his or her ability to decide on the sentence fairly and follow the court’s instructions.⁴⁸ The Supreme Court’s decision in *Witt* and subsequent cases broadened the range of prospective jurors who can be excluded by death qualification.

In *Lockhart v. McCree*, decided the year after *Witt*, the U.S. Supreme Court also rejected a defendant’s argument that death qualification violated his Sixth Amendment right to an impartial jury at the guilt phase of his trial.⁴⁹ The Court held that the right required the jury to be composed of a “fair cross-section of the community,” but it did not prohibit exclusion of jurors who would refuse to impose the death penalty.⁵⁰ The Court emphasized that death-qualified jurors may include those who “firmly believe that the death penalty is unjust,” so long as those jurors can “state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.”⁵¹ In doing so, the Court criticized a number of social science reports relied upon by the defendant to illustrate that death qualification produces more conviction-prone juries; the data at issue in *McCree* and more recent studies are discussed in more detail in *Section II (C)*.

In addition to excluding jurors who will not impose the death penalty, parties may also exclude for cause any juror who would automatically impose the death penalty upon someone convicted of capital murder.⁵² In *Morgan v. Illinois*, the Court noted that “[a]ny juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instructions to consider the mitigating evidence and to decide if it is sufficient to preclude the imposition of the death penalty.”⁵³ Thus, prospective jurors who would automatically impose the death penalty, as well as

⁴⁶ See *Witherspoon*, 391 U.S. at 519-25.

⁴⁷ *Wainwright v. Witt*, 469 U.S. 412 (1985).

⁴⁸ *Greene v. Georgia*, 519 U.S. 145 (1996) (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

⁴⁹ 476 U.S. 162 (1986).

⁵⁰ See *id.* at 173-74 (emphasizing that “[g]roups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the ‘*Witherspoon*-excludables’ [i.e., death-qualified jurors] at issue here, are not ‘distinctive groups’ for fair-cross-section purposes”).

⁵¹ See *id.* at 173-74 (“Because the group of ‘*Witherspoon*-excludables’ includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, ‘death qualification’ hardly can be said to create an ‘appearance of unfairness.’”).

⁵² *Morgan v. Illinois*, 504 U.S. 719 (1992). Empirical studies have shown that, regardless of the Court’s decision in *Morgan v. Illinois*, many automatic death jurors still serve on capital juries. See, e.g., William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 61 (2001); John H. Blume et al., *Probing “Life Qualification” Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1212 (2001).

⁵³ *Morgan*, 504 U.S. at 738. The Supreme Court first noted, in dictum in *Ross v. Oklahoma*, that a capital defendant would have the right to remove for cause a prospective juror who would automatically impose the death penalty. 487 U.S. 81, 85 (1988).

those whose opposition to the death penalty would “substantially impair” their ability to follow the law, can be excluded from service for cause through the death qualification process.

A great deal of discretion is left to the trial court to determine whether a prospective juror’s views render them substantially impaired under *Witt*.⁵⁴ Such deference to a trial court’s decision was affirmed by the Supreme Court.⁵⁵ Some argue that the discretion afforded trial judges has resulted in undefined parameters for death qualification and inconsistency regarding how much opposition to the death penalty renders exclusion from service on a capital case necessary.⁵⁶

B. Capital Jury Selection in Oklahoma

In Oklahoma, as in all states, a capital trial must be tried by a 12-person jury, unless a defendant has waived the right to a jury trial.⁵⁷ Before voir dire begins, a panel of jurors is summoned to appear for jury selection.⁵⁸ Both parties, the state and the defendant, can challenge prospective jurors for cause or by exercising a peremptory challenge.⁵⁹ Two kinds of “for cause” challenges are permitted: general⁶⁰ (meaning that the prospective juror is disqualified from serving in *any* case) or particular⁶¹ (meaning that the prospective juror is disqualified from serving in the specific case due to actual or implied bias).⁶² Unique to capital cases, the Oklahoma statute specifies that a prospective juror can be challenged for cause due to the implied bias of “entertaining of such conscientious opinions as would preclude his finding the defendant guilty of [a capital offense], in which case he shall neither be permitted nor compelled to serve as a juror.”⁶³

The OCCA has recognized that the U.S. Supreme Court’s decision in *Wainwright v. Witt*, discussed above, “superseded the *Witherspoon* standard into a single test of ‘whether the juror’s view would prevent or substantially impair the performance of his duties as a juror.’”⁶⁴ In the OCCA’s view, *Witt* has “not only eliminated the requirement that a juror would vote automatically against the death penalty before he or she may be excused, but also removed the requirement that such a view must be proved with ‘unmistakable clarity.’”⁶⁵

⁵⁴ *Uttecht v. Brown*, 551 U.S. 1, 7–10 (2007).

⁵⁵ *Id.*

⁵⁶ G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87, 89 (2008) (“[A]s judges and justices attempt to determine how much opposition to the death penalty warrants a challenge for cause during voir dire, the discretion left to individual judges results in wildly different determinations.”).

⁵⁷ OKLA. STAT. tit. 22, § 601.

⁵⁸ *Id.* at § 631.

⁵⁹ *See id.* at § 632 (2016). Peremptory challenges will be discussed at length in Section III.

⁶⁰ *Id.* at § 638. The statute reads as follows:

General causes of challenges are:

1. A conviction for felony.
2. A want of any of the qualifications prescribed by law, to render a person a competent juror, including a want of knowledge of the English language as used in the courts.
3. Unsoundness of mind, or such defect in the faculties of the mind or organs of the body as renders him incapable of performing the duties of a juror.

See id.

⁶¹ *See* OKLA. STAT. tit. 22, § 639. The statute defines the two types of particular cause challenges as follows:

1. For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this chapter as implied bias.
2. For the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, and which is known in this chapter as actual bias.

See id.

⁶² *Id.* at § 637.

⁶³ *Id.* at § 660(8).

⁶⁴ *Romano v. State*, 847 P.2d 368, 377 (Okla. Crim. App. 1993).

⁶⁵ *Id.* at 377.

Thus, in picking a capital, death-qualified jury, it is permissible to exclude jurors who, while not absolutely opposed to the death penalty, waver on their ability to impose it.

C. Social Science and Death Qualification

In deciding *Witherspoon* in 1968, the U.S. Supreme Court considered for the first time research indicating that death-qualified juries were more prone to convict the accused. In its ruling the Court noted that, while constitutionally relevant, the research was “too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt.”⁶⁶ The Court left the question open, observing that “[w]hatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.”⁶⁷

Eighteen years later, building on the research discussed in *Witherspoon*, the defendant in *Lockhart v. McCree*⁶⁸ submitted over a dozen studies indicating that death-qualified juries were more conviction-prone.⁶⁹ The Court, however, found several flaws with the research presented by the defendant, including that only one of the studies “attempted to identify and account for the presence” of those opposed to the death penalty on the guilt-phase determination.⁷⁰ Finding that, just as in *Witherspoon*, the data remained “insufficient”⁷¹ and did not establish that death qualification violates a defendant’s Sixth Amendment right to an impartial jury, the Court stated: “We will assume . . . that the studies . . . are adequate to establish that death qualification in fact produces juries somewhat more conviction-prone than non-death-qualified juries. We hold, nonetheless, that the Constitution does not prohibit the States from death qualifying juries in capital cases.”⁷² The Court overturned the lower court’s grant of relief and reframed the constitutional inquiry from “whether death-qualified juries *as a class* might result in higher conviction rates” per *Witherspoon*, to “whether *a particular jury* consists of ‘jurors who will conscientiously apply the law and find the facts.’”⁷³

The dissent in *McCree* noted that, despite methodological differences, “[t]he chief strength of respondent’s evidence lies in the essential unanimity of the results obtained by researchers” showing that death-qualified juries are substantially more likely to convict or to convict on more serious charges.⁷⁴ The dissent concluded that, “when a State seeks to convict a defendant of the most serious and severely punished offenses in its criminal code, any procedure that ‘[diminishes] the reliability of the guilt determination’ must be struck down.”⁷⁵

⁶⁶ *Witherspoon v. Illinois*, 391 U.S. 510, 517–18 (1968).

⁶⁷ *Id.* at 525.

⁶⁸ *Lockhart v. McCree*, 476 U.S. 162 (1986).

⁶⁹ *Id.* at 167–75; see also Kyle Wackenheim, *State v. Fry: Reconsidering Death-Qualification In New Mexico Capital Trials*, 58 N.M. L. REV. 627, 635–38 (2008) (examining the Supreme Court’s previous rejection of sociological studies on death-qualified juries and detailing the findings of subsequent studies).

⁷⁰ See *McCree*, 476 U.S. at 167–75; Wackenheim, *supra* note 69, at 635–38. A 1984 study did account for “nullifiers”—persons who would be unable to decide guilt or innocence due to their deep opposition to the death penalty. See Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors’ Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984). The study asked whether death-qualified jurors are more likely to convict than non-death-qualified jurors. *Id.* Two hundred eighty-eight subjects who were considered either death-qualified or excludable under the *Witherspoon* standard were shown a video of a simulated murder trial. The subjects gave an initial verdict after watching the video and a second verdict after deliberating for an hour in 12-person juries. *Id.* Of the death-qualified jurors, 78 percent found the defendant guilty of some type of homicide compared to 53 percent of excludable jurors. *Id.* at 68–69. After an hour of deliberation, 86 percent of death-qualified jurors found the defendant guilty of homicide compared to 66 percent of excludable jurors. *Id.*

⁷¹ See *Lockhart*, 476 U.S. at 173.

⁷² *Id.* at 171–73.

⁷³ David L. Faigman, Symposium, *Science Challenges for Law and Policy Where Law and Science (and Religion?) Meet*, 95 TEX. L. REV. 1639, 1665 (2015) (emphasis added) (quoting *McCree*, 476 U.S. at 178 (1986)).

⁷⁴ *Lockhart v. McCree*, 476 U.S. at 184, 189 (Marshall, J., dissenting). The dissent further noted that as the Court of Appeals observed, “there are no studies which contradict the studies submitted [by respondent]; in other words, all of the documented studies support the district court’s findings.” *Id.* (quoting *Grigsby v. Mabry*, 758 F.2d 226, 238 (8th Cir. 1985)).

⁷⁵ *Id.* at 206 (Marshall, J., dissenting) (quoting *Beck v. Alabama*, 447 U.S. 625, 638 (1980)).

Notably, several important legal and political developments since *McCree* raise questions governing the present status of capital jury selection. First, the impact of the *Witt* decision—which replaced *Witherspoon*’s requirement that a prospective juror automatically vote against the death penalty before being excused with the “substantial impairment” test—coupled with the U.S. Supreme Court’s 2007 decision in *Uttecht v. Brown* affirming the high level of discretion afforded to a trial court’s *Witt* determinations⁷⁶ has resulted in exclusion of an even larger group of prospective capital jurors.⁷⁷ Second, although the Supreme Court held that jurors who would automatically impose death should also be excluded from a capital jury, empirical studies show that many “automatic death” jurors serve on juries.⁷⁸ Third, support for the death penalty has steadily declined since an all-time high in the 1990s⁷⁹ to the present record lows across the country. One recent poll reported that a majority of Americans prefer life without parole over the death penalty.⁸⁰ In September 2016, the Pew Research Center found that the “share of Americans who support the death penalty for people convicted of murder is now at its lowest point in more than four decades.”⁸¹ The cumulative effect of these developments is a smaller pool of individuals—particularly those who represent the community at large—who are eligible to serve on a capital jury.

Social science research into death qualification and its effect on capital jurors has continued since *McCree* was decided in 1986. This research has largely reaffirmed that death-qualified juries are conviction-prone. Note, however, that at least three studies have found no significant relationship between jurors’ attitude towards the death penalty and the guilt/innocence determination.⁸²

⁷⁶ *Uttecht v. Brown*, 551 U.S. 1 (2007).

⁷⁷ Craig Haney et al., “Modern” Death Qualification: New Data on Its Biasing Effects, 18 LAW & HUM. BEHAV. 619, 621 (1994); see also Aliza Plener Cover, *The Eighth Amendment’s Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 115, 8–9 (2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2789902.

⁷⁸ *Morgan v. Illinois*, 504 U.S. 719 (1992); see also *supra* note 52–53 and accompanying text. Empirical studies have shown that, regardless of the Court’s decision in *Morgan v. Illinois*, many automatic death jurors still serve on capital juries. See, e.g., Bowers et al., *supra* note 52, at 61; John H. Blume et al., *supra* note 52, at 1212.

⁷⁹ Haney et al., *supra* note 77, at 620–21.

⁸⁰ See generally Death Penalty Information Center, Public Opinion, <http://www.deathpenaltyinfo.org/category/categories/resources/public-opinion>; see also Death Penalty Information Center, American Values Center: Majority of Americans Prefer Life Without Parole Over Death Penalty, <http://www.deathpenaltyinfo.org/node/6509>.

⁸¹ Baxter Oliphant, *Support for death penalty lowest in more than four decades*, PEW RESEARCH CTR.: FACT TANK (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/> (Only about half of Americans (49%) now favor the death penalty for people convicted of murder, while 42% oppose it. Support has dropped 7 percentage points since March 2015, from 56%. Public support for capital punishment peaked in the mid-1990s, when eight-in-ten Americans (80% in 1994) favored the death penalty and fewer than two-in-ten were opposed (16%).).

⁸² See Rogers Elliot & Robert J. Robinson, *Death Penalty Attitudes and the Tendency To Convict or Acquit*, 15 LAW & HUM. BEHAV. 389 (1991) (discussing the three studies).

A number of new studies indicate that death-qualified jurors are:

- “[M]ore likely to sentence a person to death upon conviction, less conscious of a person’s due process rights, and unrepresentative of the population, especially African American people and women”⁸⁵;
- More likely to find prosecution witnesses “believable, credible, and helpful[,] consider inadmissible evidence even if a judge has instructed them to ignore it[,] and infer guilt from a defendant’s failure to take the witness stand”⁸⁴;
- More likely to give weight to aggravating circumstances over mitigating circumstances;⁸⁵ and
- “[M]ore likely to be male, Caucasian, financially secure, politically conservative, and Christian.”⁸⁶

Regarding a juror’s tendency to convict, the *McCree* Court did not consider a 1986 study demonstrating that death-qualified jurors were more likely to find a defendant guilty and returned the most severe verdicts.⁸⁷

Additionally, another study, which considered 14 articles and 20 studies involving different methodologies, concluded that death-qualified jurors are more conviction-prone than non-death-qualified jurors.⁸⁸ That study further concluded that minorities and women are more likely to be excluded from capital jury service.⁸⁹

Another post-*Lockhart* article discusses two studies that consider the relationship between attitudes towards the death penalty and mitigating and aggravating circumstances.⁹⁰ Questionnaires were voluntarily filled out by jurors serving jury duty. The studies found that: 1) jurors opposed to the death penalty are more receptive to mitigating circumstances,⁹¹ and 2) that jurors excludable from capital jury service under the *Witherspoon* standard are not as receptive to aggravating circumstances.⁹²

Research based on the findings of the Capital Jury Project—a consortium of academics from 14 different states supported by the National Science Foundation⁹³—has likewise confirmed that death-qualified juries are more prone to convict⁹⁴ and has also found that death-qualified juries “tilt towards death”⁹⁵ and often engage in

⁸⁵ John Paul Truskett, *The Death Penalty, International Law, and Human Rights*, 41 TULSA J. COMP. & INT’L L. 557, 595 (2004); see also Brooke Butler, *The Role of Death Qualification in Jurors’ Susceptibility to Pretrial Publicity*, 37 J. APPLIED SOC. PSYCHOL. 415, 416 (2007); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 51 (1984) (showing that women and blacks may be struck from capital juries at higher rates than men and whites).

⁸⁴ Brooke Butler, *The Role of Death Qualification in Jurors’ Susceptibility to Pretrial Publicity*, 37 J. APPLIED SOC. PSYCHOL. 415, 416 (2007).

⁸⁵ Brook M. Butler & Cary Moran, *The Role of Death Qualification in Venirepersons’ Evaluation of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 182–83 (2002) (finding that death-qualified jurors give more significance to aggravating circumstances while non-death-qualified jurors place more emphasis on mitigating evidence).

⁸⁶ Butler, *supra* note 84, at 416. A series of studies found Caucasian male death-qualified jurors 1.5 times more likely to sentence a capital defendant to death than Hispanic or African-American jurors. Truskett, *supra* note 85, at 595 (citing ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 14 (5d ed. 2002)).

⁸⁷ Irwin A. Horowitz & David G. Seguin, *Effects of Bifurcation and Death Qualification on Assignment of Penalty in Capital Crimes*, 16 J. OF APP. SOC. PSYCH. 163–185 (1986). The Horowitz study was published in March of 1986, after oral arguments in *Lockhart* but before the Supreme Court decided the case.

⁸⁸ Joseph W. Filkins et al., *An Evaluation of the Biasing Effects of Death Qualification: A Meta-Analytic/Computer Simulation Approach*, in *THEORY AND RESEARCH ON SMALL GROUPS* 153–175 (Plenum Press 1998).

⁸⁹ *Id.*

⁹⁰ James Luginbuh & Kathi Middendorf, *Death Penalty Beliefs and Jurors’ Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263–268 (1988).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *What Is the Capital Jury Project?*, SCH. OF CRIM. JUST., UNIV. AT ALBANY, STATE UNIV. OF NY., <http://www.albany.edu/scj/15189.php> (last visited Nov. 17, 2016).

⁹⁴ Marla Sandys et al., *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* (James R. Acker et al. eds., 2d ed. 2003).

⁹⁵ See William J. Bowers, *The Capital Jury: Is It Tilted Towards Death?*, 79 JUDICATURE 220 (1995–1996).

premature decisions regarding punishment.⁹⁶ The research further reveals that “black jurors are substantially more likely than white jurors to vote for life” on the first vote (but not the final vote).⁹⁷

Given the historical exclusion of minorities from jury service, the disparate impact of death qualification on such jurors invites particular consideration.⁹⁸ Almost 30 percent of minority respondents were excluded under *Witt* in one survey-study conducted in the mid-1990s.⁹⁹ In a more recent study of *Witt* strike rates in seven capital cases in Louisiana, more than one-third (35 percent) of black prospective jurors were excluded due to their opposition to the death penalty, compared to 17 percent of white jurors.¹⁰⁰ “[B]lack jurors were 1.8 times more likely to be struck under *Witherspoon* than white jurors.”¹⁰¹

Some argue for the abandonment of death qualification on the grounds that it is antithetical to the intent of the framers’ of the Constitution and the Sixth Amendment right to a trial by jury.¹⁰² The U.S. Supreme Court also looks to national trends in support of or in opposition to a particular sentencing practice as part of its “evolving standards of decency” analysis under the Eighth Amendment.¹⁰³ Thus, trends in juror exclusion due to death qualification may necessarily affect the continued constitutionality of this practice.¹⁰⁴

III. Peremptory Challenges

A. History of the Peremptory Challenge

The peremptory challenge is a statutory right that allows a party to a case to remove a limited number of prospective jurors without providing a reason. Each state and the federal government have their own statutes governing peremptory challenges. It is a practice rooted in the history and tradition of common law.¹⁰⁵

The peremptory challenge first appeared in thirteenth century English common law. The Crown had an unlimited number of peremptory challenges in capital cases, while capital defendants were provided with a limited number of such challenges.¹⁰⁶ In 1305, Parliament—in an attempt to mitigate the Crown’s power to choose all prospective jurors—disallowed the use of the peremptory challenge by the Crown but allowed a capital defendant to retain 35 peremptory challenges.¹⁰⁷ While the King’s courts sought to circumvent this prohibition,¹⁰⁸ Parliament continued to

⁹⁶ See *id.* at 221; see also William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-trial Experience, and Premature Decisionmaking*, 85 CORNELL L. REV. 1476, 1486 (1998).

⁹⁷ See Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 279 (2001).

⁹⁸ See, e.g., J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1134–47 (2014) (explaining how differing attitudes on the death penalty among races may intersect with death qualification to exclude minority jurors from capital juries).

⁹⁹ Haney et al., *supra* note 77, at 630.

¹⁰⁰ Cover, *supra* note 77, at 29.

¹⁰¹ *Id.*

¹⁰² See Cohen & Smith, *supra* note 56.

¹⁰³ See Overview chapter.

¹⁰⁴ See generally Cover, *supra* note 77.

¹⁰⁵ In 1809, Blackstone stated that “in criminal cases, or at least capital ones, there is . . . allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all; which is called a peremptory challenge.” 4 BLACKSTONE COMMENTARIES 353 (15th ed. 1809). Although the English history of the peremptory challenge is not entirely clear, it seems that the early peremptory challenge may have actually been an unstated for cause challenge. Some historians have suggested that in rural English villages, where the community members were acquainted with one another, the peremptory was a means of quickly excusing a prospective juror whom all parties knew was in fact disqualified for cause. See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 820 (1997).

¹⁰⁶ John P. Marks, *Bader v. State: The Arkansas Supreme Court Restricts the Role Religion May Play in Jury Selection*, 33 ARK. L. REV. 613, 622–23 (2002) (citing Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 823 (1997)). By 1300, the common law gave capital defendants 35 peremptory challenges while the Crown received an unlimited number. See *id.*

¹⁰⁷ Marks, *supra* note 106, at 622–23 (citing Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge’s Perspective*, 64 U. CHI. L. REV. 809, 823 (1997)). It was said that to allow the Crown unlimited challenges led to “infinite delays [sic] and danger.” COKE ON LITTLETON 156 (14th ed. 1791).

¹⁰⁸ Hoffman, *supra* note 107, at 821; see also Swain v. Alabama, 380 U.S. 202, 213 (1965) (providing an overview of English common law treatment of the peremptory challenge).

limit the availability of the peremptory challenge over several centuries and ultimately abolished it in 1989.¹⁰⁹ The American colonial courts followed English common law in allowing peremptory challenges but diverged in application. Colonial courts disagreed as to whether only the defense, or the defense and the prosecution should be allowed to exercise peremptory challenges.¹¹⁰ In the Crimes Act of 1790, passed three years after the ratification of the Constitution, the U.S. Congress guaranteed federal defendants charged with treason 35 peremptory challenges; other federal capital defendants received 20 such challenges.¹¹¹

Current federal statutes continue to provide litigants a limited number of peremptory challenges.¹¹² Every state allows the exercise of peremptory challenges.¹¹³ The exact number of peremptory strikes permitted differs by state.¹¹⁴ Today a peremptory challenge is defined as “[o]ne of a party’s limited number of challenges that do not need to be supported by a reason unless the opposing party makes a prima facie showing that the challenge was used to discriminate on the basis of race, ethnicity, or sex.”¹¹⁵

The peremptory challenge “was introduced [in Oklahoma] seventeen years prior to statehood by the first Territorial Legislature for the Oklahoma Territory.”¹¹⁶ In Oklahoma, each party in a first-degree murder case can exercise up to nine peremptory challenges.¹¹⁷ In the 1990s, a Panel of the Emergency Appellate Division¹¹⁸ “comprised of trial judges who face this issue regularly in their courtrooms”¹¹⁹ held that Oklahoma’s peremptory challenge statute was unconstitutional and violated the state constitution.¹²⁰ The panel found that the only way to remove unconstitutional discrimination from jury selection was to abolish the peremptory challenge.¹²¹ The OCCA disagreed, reversing the panel’s decision and finding the peremptory challenge statute to be constitutional.¹²²

B. The Supreme Court and Peremptory Challenges

The peremptory challenge is not constitutionally mandated¹²³ and is not mentioned in the text.¹²⁴ The U.S. Supreme Court, however, has recognized that its historical role in guaranteeing a fair and impartial trial by

¹⁰⁹ Marks, *supra* note 106, at 623. In 1530, a defendant’s peremptory challenges were decreased to twenty from thirty-five; in 1948 they went down to seven and in 1977 to three. The practice of standing aside remained available until 1989, but both it and the peremptory challenge were used with less and less frequency up to the time they were abolished in 1989. See Hoffman, *supra* note 107, at 822.

¹¹⁰ JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 148 (Ballinger 1977).

¹¹¹ *Swain*, 380 U.S. at 214.

¹¹² *Id.*

¹¹³ *Holland v. Illinois*, 493 U.S. 474, 481 (1990).

¹¹⁴ *Swain*, 380 U.S. at 217. In some states, the number of peremptory challenges allowed also depends on the type of action. For instance, in Oklahoma, each side in a first-degree murder case receives nine peremptory challenges, while each party in a non-first-degree murder felony case receives five, and each party in a non-felony case receives three peremptory challenges. OKLA. STAT. tit. 22, § 635 (2016). In North Carolina, as another example, the state and non-capital criminal defendants receive six peremptory challenges while capital defendants receive fourteen. N.C.G.S. § 15A-1217 (2008).

¹¹⁵ See BLACK’S LAW DICTIONARY (8th ed. 2004).

¹¹⁶ See *Moore v. State*, 900 P2d 996, 1000 (noting that the peremptory challenge was adopted in Oklahoma before statehood by 1890 Okla. Sess. Laws §§ 5611, 5615-5615).

¹¹⁷ OKLA. STAT. tit. 22, § 635.

¹¹⁸ The Emergency Appellate Division is assigned criminal cases on appeal by the Oklahoma Court of Criminal Appeals and decides cases in a panel of three judges. See Rule 12.1 *et. seq.*, *Rules of the Court of Criminal Appeals*, OKLA. STAT. tit. 22, Supp. 1993, Ch. 18, App.

¹¹⁹ *Moore*, 900 P2d at 999.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 998.

¹²³ See *Swain*, 380 U.S. at 219 (stating that “[a]lthough ‘[t]here is nothing in the Constitution of the United States which requires the Congress [or the States] to grant peremptory challenges,’ nonetheless the challenge is ‘one of the most important of the rights secured to the accused.’” (quoting *Stilson v. United States*, 250 U.S. 585, 586 (1919) and *Pointer v. United States*, 451 U.S. 396, 408 (1981))).

¹²⁴ Initial drafts of the Sixth Amendment included a provision providing criminal defendants with a right to challenges for cause, but it does not appear that the Framers discussed a right to the peremptory challenge. See Marks, *supra* note 106, at 624 n. 82. The first draft of the Sixth Amendment stated that the right to an impartial jury included “the right of challenge and other accustomed requisites.” Hoffman, *supra* note 107, at 824 n.77 (citing VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 37 (1986)).

allowing litigants to excuse jurors whose bias does not rise to the level of a for cause challenge.¹²⁵ Peremptory strikes, however, have been used as a pretext to remove venire persons for reasons that would otherwise violate the Constitution.¹²⁶ Over the past five decades, the Supreme Court has reviewed the use of peremptory strikes and has held that intentional race or sex-based discrimination during jury selection violates the constitutional rights of both the criminal defendant and the excluded prospective juror, while also damaging the community and public perception of the judicial system's fairness.¹²⁷

1. Historical Challenges to Juror Discrimination

In 1965, the U.S. Supreme Court observed in *Swain v. Alabama* that “a State’s purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.”¹²⁸ *Swain* indicated that use of a peremptory strike could be challenged,¹²⁹ but placed a heavy burden on the defendant, requiring a showing of “the prosecutor’s systematic use of peremptory challenges against Negroes over a period of time.”¹³⁰ To establish a prima facie case of the racially discriminatory use of a peremptory challenge, a defendant had to show a pattern of discrimination on the part of the district attorney’s office.¹³¹ This standard placed a high burden of proof on a defendant seeking to show racial discrimination during jury selection in his or her case.

2. Present Framework to Challenge Juror Discrimination - *Batson v. Kentucky* and Its Progeny

In *Batson v. Kentucky*, decided 21 years after *Swain*, the Supreme Court recognized the difficult evidentiary burden that *Swain* placed on a defendant.¹³² The *Batson* Court abandoned *Swain*’s systemic-pattern-of-exclusion requirement and announced a three-part test for analyzing the alleged discriminatory use of a peremptory challenge.¹³³

The first step of the *Batson* test requires the defendant to make an initial showing, or prima facie case, of

¹²⁵ See *Ross v. Oklahoma*, 487 U.S. 81, 88 (1988). See also *Swain*, 380 U.S. at 219 (stating that “[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury.” (citing *Lewis v. United States*, 146 U.S. 370, 376 (1892))).

¹²⁶ See, e.g., *Foster v. Chatman*, 136 S. Ct. 1737 (2016) (finding that the government unconstitutionally used peremptory strikes to strike prospective black jurors from the petit jury).

¹²⁷ *Batson v. Kentucky*, 476 U.S. 79 (1986); *Georgia v. McCollum*, 505 U.S. 42, 44 (1992) (“For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the state in jury selection offends the Equal Protection Clause.”); see also *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

¹²⁸ *Swain*, 380 U.S. at 203–04. The Supreme Court held that a peremptory challenge could not be used to strike a prospective juror “for reasons wholly unrelated to the outcome of the particular case on trial.” See *id.* at 224.

¹²⁹ However, the *Swain* Court decided that the petitioner had not shown sufficient evidence of deliberate discriminatory exclusion on the part of the prosecution and affirmed the petitioner’s conviction. *Id.* at 258.

¹³⁰ *Id.* at 227.

¹³¹ *Id.*

¹³² *Batson*, 476 U.S. at 92–93 (stating that “[s]ince . . . interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors’ peremptory challenges are now largely immune from constitutional scrutiny.”). The petitioner in *Batson* was charged with second-degree burglary and receipt of stolen goods. During jury selection, the prosecutor used his peremptory challenges to strike all four black prospective jurors, which resulted in an all-white jury. Petitioner was subsequently convicted of both charges. *Batson*, 476 U.S. at 83.

¹³³ *Id.* However, as Justice Rehnquist’s dissent noted, the Court’s holding implicated much more than the reversal of *Swain*’s systematic exclusion requirement. In *Swain*, the Court rejected the petitioner’s claim that the state’s exercise of race-based peremptory challenges to exclude prospective jurors of the same race as petitioner from that particular petit jury violated the defendant’s equal protection rights. See *Batson*, 476 U.S. at 135 (Rehnquist, J., dissenting) (noting that “the [*Swain*] held that the State’s use of peremptory challenges to exclude blacks from a particular jury based on the assumption or belief that they would be more likely to favor a black defendant does not violate equal protection.”). See also *Swain*, 380 U.S. at 221–22 (stating that “we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination . . .”). Nevertheless, the *Batson* Court held that such use of a peremptory would offend the Equal Protection Clause. See *Batson*, 476 U.S. at 90 (“[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State’s case against a black defendant.”).

a discriminatory exercise of a peremptory challenge.¹⁵⁴ A defendant could establish a prima facie case of purposeful discrimination using evidence from his individual case.¹⁵⁵ The Supreme Court has stated that the burden of production at the first step is not an onerous one, and a defendant does not need to show that it was “more likely than not” that intentional discrimination occurred.¹⁵⁶ Instead, any evidence “sufficient to permit the trial judge to draw an inference that discrimination has occurred” suffices, and the inference can be supported by a “wide variety” of evidence.¹⁵⁷ A prosecutor’s use of a single peremptory challenge to remove the only individual of a particular race or sex, for example, may support an inference of discriminatory purpose. As the U.S. Supreme Court reiterated in 2008, “the Constitution forbids striking even a single prospective juror for a discriminatory purpose.”¹⁵⁸

Once a defendant makes a prima facie case, the prosecution is required to provide a race-neutral explanation for the peremptory challenge.¹⁵⁹ In the third and final step, the court must determine whether, considering “all relevant circumstances,” the defendant has made a showing of purposeful discrimination.¹⁴⁰ The burden of persuasion remains on the defendant.¹⁴¹

In reversing *Swain*’s systematic exclusion requirement, the *Batson* Court rested its decision solely on equal protection grounds.¹⁴² The Court noted that “[e]xclusion of black citizens from service as jurors constitutes a primary example of the evil the Fourteenth Amendment was designed to cure.”¹⁴³ Eradicating racial discrimination in the jury selection process was at the heart of the *Batson* decision. The Court asserted that “peremptory challenges constitute a jury selection practice that permits ‘those to discriminate who are of a mind to discriminate.’”¹⁴⁴ The Court elaborated that “[t]he core guarantee of equal protection, ensuring citizens that their state will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors’ race.”¹⁴⁵

Batson was initially limited to racial discrimination. In order to establish a prima facie case of intentional discrimination, the petitioner had to first show that the prosecutor used peremptory challenges to remove a member of a “cognizable racial group.”¹⁴⁶ In 1994, the Court expanded *Batson*’s scope beyond racial discrimination to discrimination on the basis of sex. The Court in *J.E.B. v. Alabama ex rel. T.B.*, held that sex-based peremptory challenges violate the Equal Protection Clause.¹⁴⁷ Initially, *Batson*’s ban on race-based peremptory strikes was limited to state actors (i.e., prosecutors). In subsequent decisions, the Court expanded the

¹⁵⁴ *Id.* at 95.

¹⁵⁵ *Id.*

¹⁵⁶ *Johnson v. California*, 545 U.S. 162 (2005) (finding a prima facie case of racial discrimination where the prosecutor used a peremptory to strike the second of three prospective African-American jurors, although the prosecutor “had no apparent reason to challenge this prospective juror ‘other than her racial identity’” and then used a peremptory to strike the final African-American member of the panel).

¹⁵⁷ *Id.* at 169.

¹⁵⁸ *Snyder v. Louisiana*, 552 U.S. 472 (2008) (citations and internal quotations omitted).

¹⁵⁹ *Batson*, 476 U.S. at 97.

¹⁴⁰ *Id.* at 98.

¹⁴¹ *Id.* at 94 n.18.

¹⁴² The Court’s decision to base *Batson* on the Equal Protection Clause is somewhat curious, as petitioner’s only claims addressed his Sixth and Fourteenth Amendment rights to an impartial jury and a jury selected from a fair cross section of the community. *Batson*, 476 U.S. at 84 n.4. However, petitioner’s decision to forego an equal protection claim makes sense, because *Swain* had apparently foreclosed an equal protection analysis.

¹⁴³ *Id.* at 85. At the time that *Batson* was decided, two federal courts of appeals and several state courts had held that race-based peremptory challenges violated the Sixth Amendment. See *Batson*, 476 U.S. at 83 n.1.

¹⁴⁴ *Id.* at 98 (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953)).

¹⁴⁵ *Batson*, 476 U.S. at 97.

¹⁴⁶ *Id.* at 96.

¹⁴⁷ 511 U.S. 127, 129 (1994). The Court also rejected the notion that social science studies could be used to justify discriminatory behavior in the selection of a jury. *Id.* at 141 n.11 (“We have made abundantly clear . . . that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.”).

applicability of *Batson* to peremptory challenges exercised by private, civil litigants¹⁴⁸ and criminal defendants.¹⁴⁹ The expanding scope of *Batson* indicates a shift in the Court's focus from a defendant's right to due process, equal protection of the laws, and an impartial trial to a prospective juror's equal protection rights.¹⁵⁰

5. Proving Pretextual Peremptory Challenges - *Miller-El v. Dretke*

In *Miller-El v. Dretke*, decided in 2005, the Court explained the types of evidence that can be used to make a prima facie case of racial discrimination under *Batson*.¹⁵¹ Noting the *Batson* Court's assertion that "facts and any other relevant circumstances [can] raise an inference"¹⁵² that the prosecution used peremptory strikes in a racially discriminatory manner, the *Miller-El* Court relied on several categories of case-specific evidence to demonstrate that not only had a prima facie case of racial discrimination been made, but that in light of the strength of the prima facie case, the state's race-neutral reasons for discrimination were not credible.¹⁵³

The first class of evidence recognized by the *Miller-El* Court was a statistical analysis of the prosecution's use of peremptory challenges against various racial groups to demonstrate that it was statistically improbable that the exclusion of blacks from the petitioner's jury was not the result of intentional racial discrimination.¹⁵⁴ The second class of evidence was a comparison between the peremptorily struck jurors with similarly situated white jurors to consider if the district attorney's reasons for the strikes were consistent (i.e. "comparative juror analysis").¹⁵⁵ Third, the Court considered the prosecution's probing questions posed to prospective black jurors compared to the less searching inquiry made of prospective white jurors.¹⁵⁶ Finally, the Court relied on historical evidence of racial discrimination by the district attorney's office in the form of a prosecutor training manual that encouraged exclusion of minority jurors through ostensible "race-neutral" explanations, which helped prove "broader patterns of practice during jury selection" to exclude blacks from juries.¹⁵⁷

Reviewing all of the evidence, the Court concluded:

It is true, of course, that at some point the significance of *Miller-El*'s evidence is open to judgment calls, but when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination. . . . The strikes correlate with no fact as well as they correlate with race.¹⁵⁸

Last year, in *Foster v. Chatman*, the Supreme Court found the prosecution had impermissibly struck black prospective jurors on the basis of race.¹⁵⁹ Timothy Foster was convicted and sentenced to death by an all-white

¹⁴⁸ *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 615 (1990).

¹⁴⁹ *Georgia v. McCollum*, 505 U.S. 40 (1992).

¹⁵⁰ Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 726 (1992). As Justice Thomas noted in *Georgia v. McCollum*, "[W]e have exalted the rights of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." 505 U.S. at 60 (Thomas, J., concurring in the judgment). For a counter perspective, see Underwood, *supra* note 36, at 726–27 (arguing that "the fundamental injury inflicted by race discrimination in jury selection is its effect on the excluded jurors, and that the primary reason for its prohibition is to bring all citizens into full and equal participation in the institutions of American self-government."). In 1990, the Court rejected the Sixth Amendment fair cross-section requirement as a ground for challenging the discriminatory use of a peremptory challenge. See *Holland v. Illinois*, 493 U.S. 474 (1990).

¹⁵¹ 545 U.S. 231 (2005).

¹⁵² *Batson*, 476 U.S. at 96.

¹⁵³ *Miller-El*, 545 U.S. at 265.

¹⁵⁴ *Id.* at 240–41.

¹⁵⁵ *Id.* at 241–52.

¹⁵⁶ *Id.* at 253–64.

¹⁵⁷ *Id.* at 253 (For example, the manual stated, "Minority races almost always empathize with the defendant.") (citations omitted).

¹⁵⁸ *Miller-El*, 545 U.S. at 266.

¹⁵⁹ 136 S. Ct. 1737 (2016).

jury in Georgia in 1980.¹⁶⁰ Through an Open Records Act request, counsel was able to obtain the previously unavailable jury selection file belonging to the prosecution, which included notes about prospective jurors' race and with each black prospective jurors' name highlighted in bright green.¹⁶¹ Other similar evidence uncovered in the file showed the prosecution's categorization and ranking of all black prospective jurors.¹⁶² The Court, in granting relief, concluded that "the focus on race in the prosecution's file plainly demonstrates a concerted effort to keep black prospective jurors off the jury."¹⁶³

C. Oklahoma and Peremptory Challenges

An early study of state and federal reported Batson decisions showed a 15 percent success rate among criminal defendants who raised a Batson challenge to the state's use of peremptory challenges.¹⁶⁴ A review of Oklahoma cases raising Batson issues shows a similar trend.¹⁶⁵ Based on current research, one Oklahoma criminal case has been remanded for a new trial based on the trial court's failure to require the state to proffer a race-neutral reason for its peremptory strike of a prospective juror.¹⁶⁶ This is not unique to Oklahoma: a recent law review article reviewing Batson decisions in North Carolina noted that the North Carolina Supreme Court has found zero Batson violations in seventy-four cases.¹⁶⁷ It is worth exploring the possible reasons for why there are so few grants of relief under Batson.

One reason for the low rate of relief may be the extraordinary deference accorded to a trial court's determination that there was no purposeful discrimination. As the Supreme Court stated in 2008, deference is due to a trial court's finding of no racial discrimination "in the absence of exceptional circumstances."¹⁶⁸

Another explanation may be that defendants do not have access to the evidence needed to meet the high threshold set by Batson to prove that the state's proffered race-neutral reason was, in fact, pretextual. In the few cases in which the U.S. Supreme Court has granted Batson relief, the defendant has often been able to obtain evidence outside the record pointing to invidious discrimination. In *Miller-El*, a district attorney manual

¹⁶⁰ *Id.* One recent study showed that race of a jury has a substantial effect on trial outcomes in criminal cases. Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, Q. J. ECON. 1–29 (2012) (studying criminal trials and racial makeup of juries over a ten-year period in two Florida counties).

¹⁶¹ *Foster* 156 S. Ct. 1737. Additional evidence of discrimination was also adduced from the prosecution's disparate questioning of black versus white prospective jurors, as well as comparative juror analysis. *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Kenneth J. Melilli, *Batson in Practice: What We Have Learned about Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447 (1996) (reviewing reported Batson decisions from April 30, 1986 through December 31, 1995).

¹⁶⁵ See e.g., *Black v. Workman*, 682 F.3d 880 (10th Cir. 2012) (affirming the OCCA's denial of a Batson claim); *Johnson v. Gibson*, 169 F.3d 1239 (10th Cir. 1999) (affirming denial of Batson claim where all three black prospective jurors were struck by the state, which resulted in an all-white jury); *Smith v. Tramell*, No. CIV-09-293-D, 2014 U.S. Dist. LEXIS 129045 (W.D. Okla. Sept. 16, 2014) (affirming denial of Batson claim where prosecution used a peremptory challenge to remove a black prospective juror from panel of alternate jurors); *Grant v. State*, 205 P.3d 1 (Okla. Crim. App. 2009) (finding no Batson violation where African-American panelists removed gave responses similar to non-minority panelists); *Smith v. State*, 157 P.3d 1155 (Okla. Crim. App. 2007) (denying Batson claim where prosecution gave facially race-neutral explanation); *Coddington v. State*, 142 P.3d 437 (Okla. Crim. App. 2006) (finding no Batson violation where prosecution provided facially race-neutral explanation for challenging four African-American jurors); *Harris v. State*, 84 P.3d 731 (Okla. Crim. App. 2004) (finding no Batson violation where prosecution gave facially race-neutral explanation for challenging four African-American jurors); *Bland v. State*, 4 P.3d 702 (Okla. Crim. App. 2000) (finding no Batson violation where peremptory challenges used on some, but not all Hispanic jurors); *Short v. State*, 980 P.2d 1081 (Okla. Crim. App. 1999) (finding no Batson violation where prosecution gave facially race-neutral explanation for challenging African-American juror); *Van White v. State*, 990 P.2d 233 (Okla. Crim. App. 1999) (denying Batson claim where prosecution gave facially race-neutral explanations for three challenged Native American jurors); *Brown v. State*, 989 P.2d 915 (Okla. Crim. App. 1998) (finding no Batson violation where prosecution supplied race-neutral reasons for challenging two minority jurors); *Turrentine v. State*, 963 P.2d 935 (Okla. Crim. App. 1998) (finding no Batson violation where prosecutors gave facially race-neutral explanation for challenging two minority jurors).

¹⁶⁶ *Greene v. State*, 862 P.2d 1271 (Okla. Crim. App. 1993). However, in another more recent case, the OCCA held that the defense failed to prove a prima facie case of discrimination where the trial court denied three Batson objections by the defense without requiring the State to provide race-neutral reasons. See *Maixner v. Rudek*, 2012 U.S. Dist. LEXIS 18837 *8-*9 (W.D. Okla. 2012).

¹⁶⁷ Daniel R. Pollitt & Brittany P. Warren, *Thirty Years of Disappointment: North Carolina's Remarkable Appellate Batson Record*, 94 N.C. L. REV. 1957, 1984 (2016).

¹⁶⁸ *Snyder*, 552 U.S. at 477 (internal citations omitted).

instructing that minority jurors be peremptorily struck was among the evidence considered by the Court.¹⁶⁹ In *Foster*, the defense was able to obtain the prosecution's jury selection file decades after the trial ended.¹⁷⁰ One commentator suggested that the distinguishing feature of *Foster*'s case was not that the prosecution had engaged in such invidious discrimination, but that the prosecution still possessed the incriminating file so many years after trial.¹⁷¹ In *Snyder v. Louisiana*, the Court relied on comparative juror analysis to reverse the Louisiana Supreme Court's finding of no purposeful discrimination.¹⁷² State courts often deny relief even upon remand from the Supreme Court. For example, the Court remanded both *Miller-El* and *Snyder* twice before the lower courts granted *Batson* relief.¹⁷³

The importance of evidence obtained outside the record cannot be overstated. In *Foster*, the Supreme Court commented:

We have 'made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted.' As we have said in a related context, '[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available.'¹⁷⁴

Even where extra-record evidence exists, it may not be enough to meet *Batson*'s high bar for a showing of purposeful discrimination. For instance, in the Oklahoma case *Black v. Workman*, Black made a *Batson* objection to the state's peremptory strike of one of only two black prospective jurors in the 400 to 500 member venire.¹⁷⁵ The state provided the race-neutral reason for the strike that the prospective juror had an undisclosed charge for first-degree burglary.¹⁷⁶ The trial court denied the objection finding that the state's explanation was reasonable.¹⁷⁷ On appeal, Black provided additional evidence that the state's given reason for removing the black prospective juror was pretextual, in the form of evidence that the state failed to remove a white prospective juror who had an undisclosed misdemeanor conviction.¹⁷⁸ The OCCA denied relief, finding that, in addition to the black prospective juror, the state had also removed a white juror who had not initially disclosed a misdemeanor conviction.¹⁷⁹

The Tenth Circuit affirmed the state courts' denial of the *Batson* claim, quoting from the OCCA's opinion that "*Batson* is not violated whenever prospective jurors of different races provide similar responses and one is excused while the other is not. *Batson* requires a race neutral explanation, which was provided in this case. The prosecutor excused both a black and white juror with criminal records."¹⁸⁰ The Tenth Circuit concluded that

¹⁶⁹ *Miller-El*, 545 U.S. at 264 ("A manual entitled 'Jury Selection in a Criminal Case' . . . was distributed to prosecutors. It contained an article authored by a former prosecutor (and later a judge) under the direction of his superiors in the District Attorney's Office, outlining the reasoning for excluding minorities from jury service." (internal citations omitted)).

¹⁷⁰ *Foster v. Chatman*, 136 S. Ct. 1737 (2016).

¹⁷¹ Dahlia Lithwick, *Peremptory Prejudice*, SLATE, May 23, 2016, http://www.slate.com/articles/news_and_politics/jurisprudence/2016/05/john_roberts_s_court_sees_racism_in_foster_v_chatman.html (noting that "[m]ost prosecutors don't use green highlighters and the letter *B* to perform publicly the extent of their racial intentions. This is a strange outlier case, made stranger by a state's open records laws and the completely implausible arguments proffered to explain the prosecution's conduct.").

¹⁷² *Snyder*, 552 U.S. at 483–85.

¹⁷³ See *Miller-El*, 545 U.S. at 237 (granting certiorari a second time and reversing the lower court's judgment after the Fifth Circuit denied petitioner's *Batson* claim on remand from the Supreme Court); see also *Snyder*, 552 U.S. at 476 (granting certiorari a second time and reversing the state court decision after the Louisiana Supreme Court twice rejected defendant's *Batson* claim).

¹⁷⁴ *Foster*, 136 S. Ct. 1737 (alteration in original) (internal citations omitted).

¹⁷⁵ 682 F.3d 880, 894 (10th Cir. 2012).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 895 (citation and internal quotation marks omitted).

Black's "limited evidence of the prosecution's racial motivation here is far less than what is required to overturn a state trial court's *Batson* ruling" and further emphasized the length of time that had passed since the original trial, noting that "[f]urther development of the evidence might demonstrate racial bias in this case, but too much time has passed since the jury selection in Defendant's trial for that to be a reliable exercise."¹⁸¹

In another death penalty case out of Oklahoma, *Johnson v. Gibson*, the Tenth Circuit affirmed denial of a *Batson* claim where the state used peremptory strikes to remove all three prospective black jurors, resulting in an all-white jury.¹⁸² The trial court found, and the OCCA affirmed, that the state's reasons for the strikes were not motivated by purposeful discrimination.¹⁸³ However, later on appeal, Johnson provided additional "troubling evidence of the pretextual character of the prosecutor's ostensibly neutral reasons," showing that the state struck a prospective black juror but kept a white juror who shared similar characteristics.¹⁸⁴ The Tenth Circuit nonetheless denied relief, because Johnson did not raise this evidence of pretext earlier.¹⁸⁵

The decisions summarized in this section demonstrate the high bar for proving a *Batson* violation, as well as the difficulty in determining whether the decision to strike a juror was motivated by discrimination.

D. Safeguards

Some contend that the only way to safeguard against discrimination in jury selection is by doing away with peremptory challenges altogether. Concurring with the majority opinion in *Batson v. Kentucky*, Justice Thurgood Marshall wrote that while he joined the Court's opinion, "the decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely."¹⁸⁶ Justice Marshall cited studies¹⁸⁷ demonstrating the "common and flagrant" misuse of the peremptory challenge and predicted the difficulties in meeting the *Batson* test, noting that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."¹⁸⁸ He added, "If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory."¹⁸⁹

Others maintain that peremptory challenges are a necessary tool for attorneys to remove biased jurors who cannot be excluded through a cause challenge.¹⁹⁰ Regardless, the U.S. Supreme Court has unequivocally

¹⁸¹ *Id.* at 897–98.

¹⁸² 469 F.3d 1259, 1247 (10th Cir. 1999).

¹⁸³ *Id.* at 1247–1248. The race-neutral reasons offered by the prosecutor were that "one venireman had a son the approximate age of appellant and may have over identified with him; one had two individuals in her immediate family who had been convicted of felonies; and, one was in a profession and of a faith both generally considered to disfavor the death penalty." See *Johnson v. State*, 751 P.2d 993, 999, n.3 (Okla. Crim. App. 1987).

¹⁸⁴ *Johnson v. Gibson*, 469 F.3d at 1248.

¹⁸⁵ *Id.*

¹⁸⁶ *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring). Stephen Bright, Timothy Foster's attorney from *Foster v. Chatman*, echoed Justice Marshall in believing that discrimination in jury selection will only end when peremptory challenges are abolished. Eric Davis, *Is Justice Blind But Not Color-Blind?*, REASONABLE DOUBT (May 21, 2016), <http://hclatv.com/justice-blind-not-color-blind/>; see also Debra Cassens Weiss, *SCOTUS Rules for Black Man Who Claimed Prosecutors Eliminated Blacks from Jury on Basis of Race*, ABA JOURNAL, May 25, 2016, http://www.abajournal.com/mobile/article/scotus_rules_for_black_man_who_claimed_prosecutors_eliminated_black_jurors.

¹⁸⁷ Justice Marshall cited, among other evidence, the following cases: *United States v. Carter*, 528 F.2d 844, 848 (8th Cir. 1975) (discussing that, in 15 criminal cases in 1974 in the Western District of Missouri involving black defendants, prosecutors peremptorily challenged 81 percent of black jurors), cert. denied, 425 U.S. 961 (1976); *United States v. McDaniels*, 379 F.Supp. 1243 (E.D. La. 1974) (finding that, in 53 criminal cases in the Eastern District of Louisiana from 1972 through 1974 involving black defendants, federal prosecutors used 68.9 percent of their peremptory challenges against black jurors, who made up less than one-quarter of the venire); *McKinney v. Walker*, 394 F.Supp. 1015, 1017–18 (S.C. 1974) (noting that, in 15 criminal trials with black defendants from 1970 through 1971 in Spartanburg County, South Carolina, prosecutors peremptorily challenged 82 percent of black jurors).

¹⁸⁸ *Batson*, 476 U.S. at 103–06.

¹⁸⁹ *Id.* at 106.

¹⁹⁰ Tejas Bhatt, *Foster v. Chatman and the Necessity of Peremptories*, CT CRIM. LAW (May 25, 2016), <https://criminalopinions.wordpress.com/2016/05/25/foster-v-chatman-and-the-necessity-of-peremptories/>.

recognized that while race and sex biases exist, they have no place in jury selection. Nevertheless the bar for proving “purposeful discrimination” occurred remains exceedingly high.¹⁹¹

IV. Juror Comprehension of Capital Jury Instructions

Due to the gravity of a death penalty sentence, instructions that a capital jury receives are qualitatively different than those provided to other jurors in our legal system. A capital jury must be able to accurately understand and apply the jury instructions, particularly as they relate to the determination of whether the defendant will be sentenced to death.

This section identifies Oklahoma Uniform Jury Instructions (OUJI) relevant to the capital jury, explores some of the Oklahoma case law concerning comprehension of capital jury instructions, and reviews social science research that examines the way in which jury instructions have informed the behavior and decision-making process of capital juries.

A. The Oklahoma Uniform Jury Instructions

The OUJI sections relating to capital jury sentencing include instructions on applicable aggravating circumstances, definitions of some of the aggravating circumstances (including “heinous, atrocious, or cruel”¹⁹² and “continuing threat”¹⁹³), instructions on weighing aggravating factors against mitigating factors, instructions on the requirement that any applicable aggravating circumstance be found unanimously, as well as several other issues.¹⁹⁴ In Oklahoma, jurors may bring materials, including the jury instructions, into the jury room during deliberations.¹⁹⁵

In Oklahoma, a defendant convicted of first-degree murder can be sentenced to death, life without parole, or life imprisonment.¹⁹⁶ During the penalty phase deliberations, the jury may only consider the enumerated statutory aggravating circumstances, which “shall be given . . . in writing to the jury for its deliberation.”¹⁹⁷ To sentence a defendant to death, the jury must unanimously find at least one statutory aggravating circumstance beyond a reasonable doubt.¹⁹⁸ If at least one aggravating circumstance is not found, or “if it is found that any such aggravating circumstance is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed.”¹⁹⁹ The jury instructions regarding the determination of aggravating circumstances state:

If you do not unanimously find beyond a reasonable doubt that one or more of the aggravating circumstances existed, you are prohibited from considering the penalty of death. In that event, the sentence must be imprisonment for life without the possibility of parole or imprisonment for life with the possibility of parole.²⁰⁰

¹⁹¹ Anna Roberts, *Foster v. Chatman: An Egregious Batson Violation (and a SCOTUS Reversal)*, CASETEXT (May 26, 2016), <https://casetext.com/posts/foster-v-chatman-an-egregious-batson-violation-and-a-scotus-reversal> (stating that “Mr. Foster’s counsel briefed this as an ‘extraordinary’ case, but it may be extraordinary less because of the purposeful discrimination than because it could be proved.”).

¹⁹² OUJI-CR 4-73 (2d, Supp. 2005).

¹⁹³ OUJI-CR 4-74.

¹⁹⁴ OUJI-CR 4-66–4-87A.

¹⁹⁵ OKLA. STAT. tit. 22, § 895 (providing that jurors may take written instructions, the verdict forms, and documentary evidence in to the jury room); *see also* *Gohee v. State*, 942 P.2d 211 (Okla. Crim. App. 1997) (holding that jurors may take their notes into the jury room during deliberations).

¹⁹⁶ *See* OKLA. STAT. tit. 21, § 701.10(A) (2016); *see also* OUJI-CR 4-68.

¹⁹⁷ OUJI-CR 4-72; *see also* OKLA. STAT. tit. 21, § 701.11.

¹⁹⁸ OKLA. STAT. tit. 21, § 701.11.

¹⁹⁹ *Id.*

²⁰⁰ OUJI-CR 4-76.

Mitigating circumstances need not be found unanimously³⁰¹ or beyond a reasonable doubt, and jurors are not limited to consideration of specific mitigating circumstances. Jurors are instructed that “[t]he determination of what circumstances are mitigating is for you [the juror] to resolve under the facts and circumstances of this case.”³⁰²

The OCCA has held that, in large part, the instructions require no further explanation and that they are clear for the purposes of jury deliberation.³⁰³ Committee Comments to jury instructions concerning alternative options to the death penalty suggest that jurors could potentially misunderstand instructions concerning life without the possibility of parole (LWOP).³⁰⁴ The Committee Comments cite the OCCA’s approval of a modification of the instruction that may be given by the trial court³⁰⁵ and quotes the OCCA’s guidance for how to reply to juror questions about LWOP:

Therefore, in future cases where the jury during deliberations asks, in some form or fashion, whether an offender who is sentenced to life imprisonment without the possibility of parole is parole eligible, the trial court should either refer the jury back to the instructions, tell the jury that the punishment options are self explanatory, or advise the jury that the punishment options are to be understood in their plain and literal sense and that the defendant will not be eligible for parole if sentenced to life imprisonment without the possibility of parole. *While arguably the latter response is nothing more than another way of referring the jury back to the instructions, it does force the jury to accept the plain meaning of the sentencing options and impose the sentence it deems appropriate under the law and facts of the case.* We recognize trial courts are in the best position to decide which answer is best suited to the situation as the questions posed by juries come in a myriad of forms on this issue. *However, we believe the latter explanation may alleviate some obvious concerns of jurors more effectively than simply telling the jury it has all the law and evidence necessary to reach a decision.*³⁰⁶

B. Oklahoma Case Studies

Two themes that emerge from Oklahoma case law on jury comprehension of capital sentencing instructions are 1) the jury’s potential misunderstanding of instructions on the burden of proof for mitigating versus aggravating circumstances, and 2) the jury’s potential misunderstanding of the meaning of LWOP.³⁰⁷

³⁰¹ In *McGregor v. State*, 885 P.2d 1566, 1584 and *Bryson v. State*, 876 P.2d 240, 262, the OCCA held that a trial court’s failure to instruct the jury that its finding of mitigating circumstances does not have to be unanimous is not error. However, the Committee on Oklahoma’s Uniform Jury Instructions concluded “that such an instruction would assist the jury in its deliberations.” OUJI-CR 4-78, Notes on Use (2d, Supp. 2008).

³⁰² OUJI-CR 4-78.

³⁰³ See *Smallwood v. State*, 907 P.2d 217, 251 (Okla. Crim. App. 1995) (finding that where instruction on aggravating circumstance properly given, need not be repeated on verdict form); *Freeman v. State*, 876 P.2d 283, 290 (Okla. Crim. App. 1994) (finding that the definition of “continuing threat” in jury instructions is clear); *Al-Mosawi v. State*, 929 P.2d 270, 286 (Okla. Crim. App. 1996) (finding no error in jury instruction on considering mitigating evidence); *Ledbetter v. State*, 955 P.2d 880, 898-99 (Okla. Crim. App. 1997) (finding appellant not entitled to instruction that jury could consider any mitigating evidence); *Long v. State*, 885 P.2d 167, 175-76 (Okla. Crim. App. 1994) (finding the jury instructions on aggravating and mitigating circumstances were not “improperly confusing”); *Carter v. State*, 879 P.2d 1254, 1252 (Okla. Crim. App. 1994) (finding not error to fail to give instruction that regardless of finding of aggravating circumstance jury can give life).

³⁰⁴ See Instruction No. 4-68 cmt., OUJI-CR(2d) (Supp.) (2005).

³⁰⁵ *Id.* (citing *Johnson v. State*, 928 P.2d 309, 320 (Okla. Crim. App. 1996)).

³⁰⁶ *Id.* (emphasis added) (quoting *Littlejohn v. State*, 85 P.2d 287, 293-94 (Okla. Crim. App. 1996)).

³⁰⁷ See *Mollett v. Mullin*, 548 F.3d 902, 909-10, 914, 916 (10th Cir. 2005) (examining how factors outlined in *Simmons v. South Carolina*, 512 U.S. 154 (1994)), apply to potential jury confusion over life-without-parole jury instruction where future dangerousness is at issue); *Warner v. State*, 144 P.3d 838, 885-86 (Okla. Crim. App. 2006) (assessing *Littlejohn* holding regarding proper answer to jury question regarding the life-without-parole jury instruction); *Littlejohn v. State*, 85 P.3d 287, 291-94 (Okla. Crim. App. 2004) (critiquing lower court response to jury question on life-without-parole jury instruction and noting continued confusion over the sentence of life without parole); *Harris v. State*, 2004 OK CR 1, ¶¶ 62-73, 84 P.3d 731, at 733-34, 735-37 (discussing appellant’s contention that jury was confused on mitigating circumstances instruction and location of life-without-parole sentence).

In 2004, in *Harris v. State*, the OCCA analyzed an appellant's claim that the sentencing instructions were confusing to the capital jury that had sentenced him to death at trial.²⁰⁸ Harris argued that the jury was potentially confused because during jury selection the trial court judge commented, "There are things called mitigating circumstances, which is evidence to show that the crime is not as bad, for whatever reason, okay."²⁰⁹ Although the OCCA found that this was a legally erroneous statement, it held that the appellant was not unfairly prejudiced because the jury was properly instructed regarding the meaning of mitigating circumstances at the close of the punishment phase of the trial.²¹⁰ The court implied that even if the jury had been confused by the earlier misstatement, the confusion was alleviated by the subsequent instruction.²¹¹

Harris also argued that the trial court misled jurors by stating that appellant could be held in any of the Department of Corrections' facilities, when jurors asked, "If sentenced to life in the State Penitentiary without the possibility of parole is it possible to be put in a correctional facility . . . instead of a penitentiary at some time[?]"²¹² The trial court later learned from the Department of Corrections that an LWOP sentence would require the individual be housed in no less than a medium security prison, but failed to inform the jury of this.²¹³ The OCCA vacated the appellant's death sentence on this issue and sent the case back to the trial court for resentencing, finding that it was possible that the misinformation impacted the jury's deliberations. The OCCA stated that "no Judge can predict, over time, where the Department of Corrections will assign a prisoner to serve a sentence. Any instruction attempted by the judicial branch, about . . . these areas, is doomed to inaccuracy. . . . [W]e cannot say this error did not contribute to the jury's sentencing decision."²¹⁴

In 2003, in *Mollett v. Mullin*, the Tenth Circuit upheld the federal district court's decision to grant an Oklahoma capital defendant a new sentencing hearing due to a trial instruction error concerning the nature of an LWOP sentence.²¹⁵ During jury deliberation, the state trial court responded to a jury question regarding the possibility of parole in conjunction with an LWOP sentence by stating that "[m]atters of parole are beyond the purview [sic] of the jury or the court to consider."²¹⁶

The OCCA had denied relief on Mollet's claim, but the Tenth Circuit relied on a U.S. Supreme Court case, *Simmons v. South Carolina*, to underscore the need for a new trial.²¹⁷ In *Simmons*, the jury inquired whether a life sentenced carried the possibility of parole. In response, the trial court instructed the jury "not to consider parole That is not a proper issue for your consideration."²¹⁸ The Supreme Court in *Simmons* found that trial court had erred and that the jury might take the instruction to mean that parole was possible when it was not, thus creating a "false dilemma" between the prosecution's assertion that future dangerousness was at issue and allowing the jury to believe Simmons might be eligible for parole. When, in actuality, life *without* the possibility of parole was the only alternative to a sentence of death due to Simmons' previous felony convictions for violent crimes.²¹⁹

²⁰⁸ *Harris*, 84 P.3d at 753-54.

²⁰⁹ *Id.* at 753.

²¹⁰ *Id.* at 753-54.

²¹¹ *Id.*

²¹² *Id.* at 755-57.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Mollett v. Mullen*, 348 F.3d 902, 904, 923 (10th Cir. 2003).

²¹⁶ *Id.* at 907-08 (citing the trial transcript, volume VII, at 80-81).

²¹⁷ *Id.* at 922.

²¹⁸ *Simmons v. South Carolina*, 512 U.S. 154, 160-61, 171 (1994).

²¹⁹ *Id.* at 170-71.

Similarly, in *Mollett*, the Tenth Circuit found that the state trial court “created serious potential for jury confusion” given that Mollett’s future dangerousness was at issue and the jury could be confused that there is a possibility of parole with an LWOP sentence when there is not.²²⁰

In *Littlejohn v. State*, a 2004 case, the OCCA discussed at length the issue of potential jury misinterpretation of LWOP sentencing instructions and encouraged courts to use “clear and plain language” to answer jury questions about the possibility of parole under a LWOP sentence.²²¹ In *Littlejohn*, the trial court judge advised jurors prior to deliberation that the phrase “you have all the law and evidence necessary to reach a verdict” was code for “the answer to your question is in the instructions, it was in the evidence, or you’re asking me something that’s inappropriate for me to answer.”²²² The OCCA found that when the trial court answered the jury’s question regarding LWOP with you “have all the law and evidence necessary to reach a verdict,” the response was not “insufficient, misleading or erroneous,” implying that the jury would likely not be confused by such an answer in a way that would prejudice the sentencing decision.²²³ However, the OCCA stated that “advis[ing] the jury that the punishment options are to be understood in their plain and literal sense and that the defendant will not be eligible for parole if sentenced to life imprisonment without the possibility of parole” “may alleviate some obvious concerns of the jurors more effectively than simply telling the jury it has all the law and evidence necessary to reach a decision.”²²⁴ The Committee Comments to the jury instructions, referenced in the previous section, quote the discussion in *Littlejohn* to explain the potential for juror misunderstanding of LWOP.²²⁵

C. Social Science Research on Capital Juror Comprehension

Social science research helps make sense of capital jury behavior and decision-making. One notable resource on jury behavior is compiled by the Capital Jury Project, mentioned previously, which studied 14 states—although Oklahoma is not one of them—by collecting data from past capital jurors and analyzing the capital sentencing decision-making process.²²⁶ The project collected data from capital jurors by posing questions about the jurors’ comprehension of various instructions at different points during the capital trial.²²⁷

The project data is based on hours-long, in-person interviews with capital jurors conducted using a “core juror interview instrument” that was collaboratively developed by researchers.²²⁸ The core juror interviews are supplemented by additional interviews with judges, prosecutors, and defense attorneys, as well as data from trial transcripts.²²⁹

²²⁰ The Tenth Circuit found that the importance of preventing a “false choice”, between the death penalty and some shorter amount of prison time, in the minds of the jury is at the heart of *Simmons*. The Court held that in *Mollett*, where the prosecutor sought the death penalty, the future dangerousness of the individual was at issue, and the jury requested clarification on life without parole, the type of answer provided by the trial court had the potential to cause exactly the type of “false choice” *Simmons* sought to guard against. *Mollett v. Mullin*, 348 F.3d at 909–10, 914, 916.

²²¹ *Littlejohn v. State*, 83 P.3d 287, 293–94 (Okla. Crim. App. 2004).

²²² *Id.* at 291–92.

²²³ *Id.* at 293–94; *see also* Warner v. State, 144 P.3d 858, 885–86 (Okla. Crim. App. 2006) (finding where jury asked about whether appellant would be released from prison, response that jury had all law and evidence was proper under *Littlejohn*).

²²⁴ *Littlejohn*, 83 P.3d at 293–94.

²²⁵ OUI-CR 4-68 cmt. (2d, Supp. 2005).

²²⁶ The Capital Jury Project conducted interviews with jurors in Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. *See What Is the Capital Jury Project?*, SCH. OF CRIM. JUST., UNIV. AT ALBANY, STATE UNIV. OF NY., <http://www.albany.edu/scj/43189.php> (last visited Nov. 17, 2016).

²²⁷ *See* William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction in AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* 425–24 (James R. Acker et al. eds., 2d ed. 2003).

²²⁸ William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1077 (1995). Confidentiality is guaranteed to the capital jurors who are interviewed, and they are offered 20 dollars as incentive for participation. *Id.*

²²⁹ *Id.* at 1077, 1083.

The project studied 14 states with different geographic regions, as well as “states representing the principal variations in guided discretion capital statutes.”²⁵⁰ The project then selected an equal number of capital trials since 1988 that resulted in life and death sentences were selected. Four randomly selected jurors were then interviewed from each of those cases.²⁵¹

On the subject of jurors’ understanding of sentencing phase instructions, approximately half of the capital jurors interviewed erroneously believed that mitigating circumstances had to be proved beyond a reasonable doubt, and approximately 55 percent wrongly believed that in order to consider a mitigating circumstance, the jury must come to a unanimous decision.²⁵² In fact, mitigating circumstances only needed to be proved by either a preponderance of the evidence (a “more-likely-than-not” test), or to the juror’s satisfaction based on the jurisdiction and did not need to be found unanimously.²⁵³

Additionally, almost half of the jurors mistakenly believed they were required to impose the death penalty where the evidence proved that the crime was particularly “heinous, vile, or depraved,” and a similar percentage of jurors believed they had to impose the death penalty if “future dangerousness” was proved.²⁵⁴ However, as previously discussed, the U.S. Supreme Court has held that automatic imposition of the death penalty is not permissible.

Further, in every state where researchers conducted the study, the median estimate by jurors of actual prison time served by a capital-eligible defendant was consistently *below* the mandatory minimum sentence available.²⁵⁵ In other words, jurors mistakenly believed that if they did not impose the death penalty, the defendant would “be back on the streets even before completing the legally mandated minimum sentence for parole consideration in their state.”²⁵⁶

Researchers collecting data for the project in North Carolina found that approximately half of the capital jurors interviewed “mistakenly believed that the judicial instructions had authorized them to rely on any aggravating circumstance, whether or not it was enumerated in the statute, but to rely upon a mitigating circumstance only when there was unanimous agreement that it had been proven beyond a reasonable doubt.”²⁵⁷ The researchers also found that a similar percentage of capital jurors interviewed failed to appreciate situations which mandated a life sentence, such as situations where the jury finds no aggravating circumstances or the mitigating circumstances outweigh the aggravating circumstances.²⁵⁸

Similar results were found by project researchers in California, where “many key provisions of the capital sentencing instruction were very poorly understood, but . . . ‘comprehension appears to be worse when

²⁵⁰ *Id.* at 1078-79. (“[T]he fourteen states currently participating in the CJP [Capital Jury Project] include states with threshold, balancing, and directed statutes; advisory and binding sentencing variations of the balancing model; and narrow as well as traditional statutory definitions of capital murder.”).

²⁵¹ See Bowers, *supra* note 228, at 1079-81.

²⁵² Bowers et al., *supra* note 227, at 458.

²⁵³ *Id.*

²⁵⁴ *Id.* at 440; see also Bowers, *supra* note 228, at 1090-91 (noting that of the seven states studied, contrary to the jurors’ understanding, none required that the death penalty be imposed upon a finding of aggravating circumstances).

²⁵⁵ Bowers et al., *supra* note 227, at 442-43.

²⁵⁶ *Id.* at 443.

²⁵⁷ See Craig Haney, *Taking Capital Jurors Seriously*, 70 IND. L.J. 1225, 1229 (1995) (discussing Capital Jury Project interviews conducted in North Carolina). The North Carolina Capital Jury Project interviews were conducted with 83 jurors (52 females and 31 males) who served in a total of 26 capital murder trials between 1990 and 1994. See James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1161-62 (1995). Of the 83 jurors who were interviewed, 79 served in “eleven matched pairs of capital trials in the same or adjoining counties, with one trial ending in a life sentence verdict and the other in a death penalty verdict.” *Id.* Of those 22 capital trials, three jurors from nine of the trials and four jurors from 13 of the trials were interviewed. *Id.* The interviews were an average of three and one-half hours and were conducted using an standardized interview form that is approximately 50 pages. *Id.*

²⁵⁸ Haney, *supra* note 256, at 1229; see also James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1172-73 (1995).

mitigating factors are considered.”²³⁹ These findings suggest that capital jurors seem to be confused about capital sentencing instructions regarding the burden of proof for mitigating and aggravating circumstances and the possibility of parole for LWOP.²⁴⁰

One suggested tool that has been proposed to alleviate juror confusion regarding sentencing instructions is the decision tree. Called a “Route to Verdict” or flow-chart in other countries, the document lays out “yes” or “no” questions intended to simplify the complex jury instructions by providing a framework for the elements and legal issues the jury is to determine.²⁴¹ Results have been mixed in the U.S., Canada, England, and Australia as to the helpfulness of the decision tree in jury deliberations, but control variables for other factors, such as actual use of the document and use of other aides, have not always been taken into account.²⁴² There has been resistance to utilize the decision tree in American criminal trials given a strong, historical desire to protect the liberty of the jury. Researchers encourage further studies introducing various controls to determine if the decision tree could be a possible aid in increasing juror comprehension of sentencing instructions.²⁴³

The American Bar Association (ABA) recommends that states should evaluate juror understanding of capital jury instructions and implement and update instructions designed to alleviate juror misunderstanding.²⁴⁴ The ABA also suggests that jurors receive a copy of all instructions to consult during deliberation (which is permitted in Oklahoma); that the trial court answer juror clarification questions regarding the applicable legal definition of terms that have different meanings in everyday usage; that trial courts provide clear answers on the meaning of various punishments and allow knowledgeable testimony by parole officers and others; that any juror should be allowed to fully consider any evidence that be mitigating; that the court make clear that jurors may sentence to life even where an aggravating factor has been found beyond a reasonable doubt and no mitigating factors are present; and that, where applicable, courts should make clear to jurors that the weighing of aggravating and mitigating circumstances is not based on whether there are more of one than the other.²⁴⁵

V. Conclusion and Recommendations

The role of the jury in capital cases cannot be overstated. A capital jury determines not only a defendant’s guilt or innocence, but also whether a defendant should be sentenced to death. A jury also acts as the guardian against governmental overreach. The Commission recognizes that many of the issues surrounding capital juries—such as violations of *Batson* and juror comprehension of instructions—do not offer clear solutions, and the Commission struggled with what potential recommendations could be both feasible and safeguard against these serious concerns. In the end, the Commission agreed that the following recommendation could address many of the topics outlined in this chapter:

²³⁹ See Haney, *supra* note 256, at 1229.

²⁴⁰ See Bowers, *supra* note 227, at 441.

²⁴¹ See Marie Comiskey, *Tempest in a Teapot – The Role of the Decision Tree in Enhancing Juror Comprehension and Whether It Interferes with the Jury’s Right to Deliberate Freely?*, 6 Oñati Socio-Legal Series 255, 258–59 (2016).

²⁴² *Id.* at 267–74.

²⁴³ *Id.* at 262, 267, 270 (discussing 2004 study by Weiner et al. which found that group of jury-eligible individuals utilizing decision tree performed better on comprehension test for Missouri Approved Instructions on the death penalty, but results were not statistically significant).

²⁴⁴ AM. BAR ASS’N, DEATH PENALTY MORATORIUM IMPLEMENTATION PROJECT: JURISDICTIONAL ASSESSMENTS 13 (2010), http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/protocols2010.authcheckdam.pdf.

²⁴⁵ *Id.*

Recommendation 1:

In a capital case, the state and the defendant should be guaranteed the right to individual voir dire upon request.

Individual voir dire would be a significant step toward addressing some of the more intractable problems of capital jury selection (e.g., death qualification process, peremptory challenges motivated by racial discrimination, etc.). Individual voir dire would enable counsel to better test a prospective juror's qualifications to serve in a capital case and prevent potential jurors from intentionally or unintentionally training their responses by listening to the prosecution and defense counsel examine fellow potential jurors during the jury selection process.

Role of the Judiciary

I. Introduction

The criminal justice system's reliability depends largely on the framework of appellate review, which allows courts to correct serious trial error, as well as the judges who oversee that system. At the trial level, judges are responsible for making countless decisions—decisions that may influence the outcome of a case, including those in which a death sentence may be imposed. Whether the decision concerns issues such as a request for funding, the admission of evidence, or whether a potential juror may be excused for cause, trial judges are expected to know what the law requires and to rule accordingly. The same holds true for appellate court judges, whose duty it is to rule on the several—and, in capital cases, often complex—legal issues presented to them.

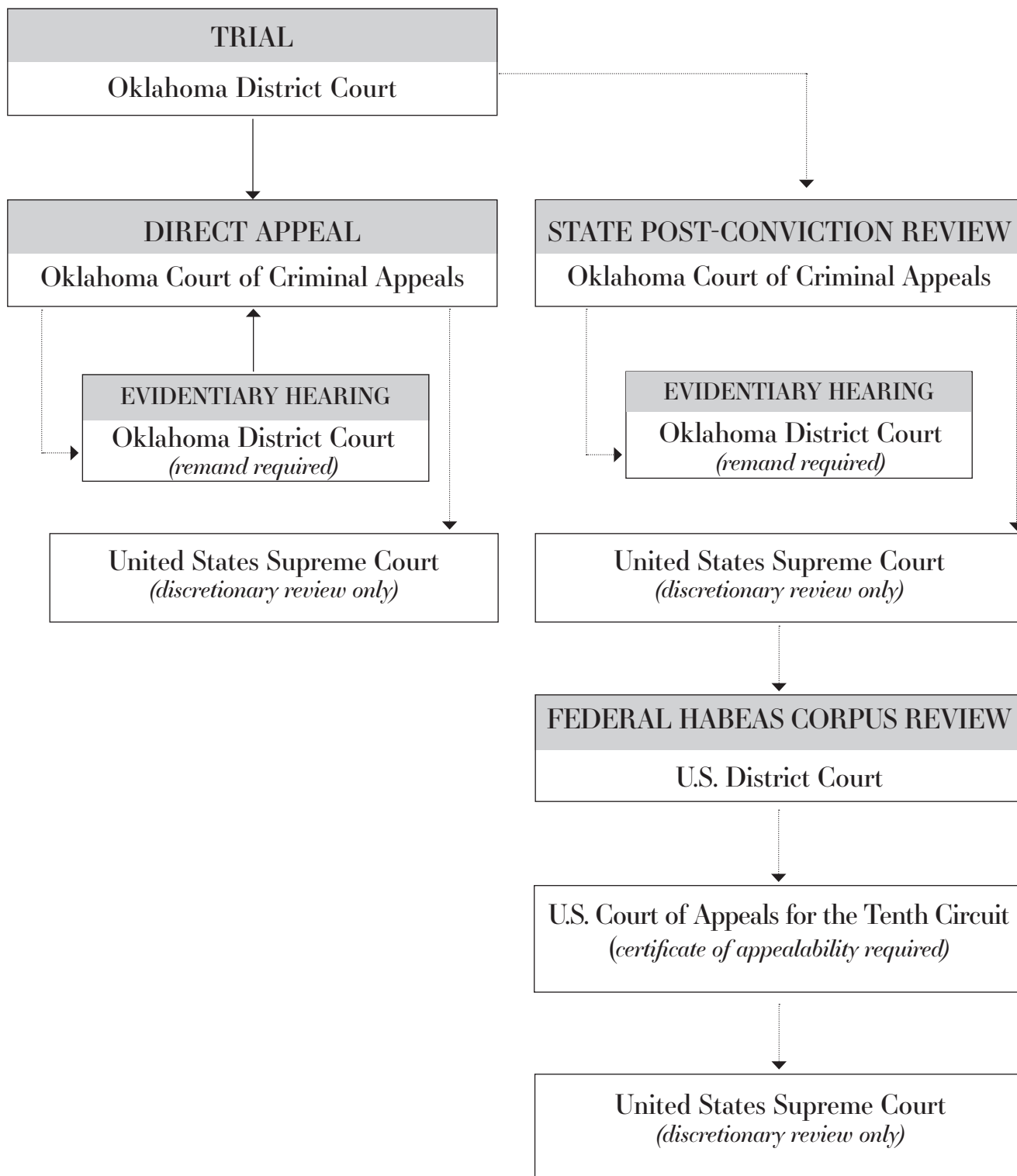
In view of the critical role the judiciary plays in ensuring just and lawful outcomes in capital cases, this chapter examines the procedures available to death-sentenced inmates who seek review of their convictions and sentences in state court.

II. Appellate Review in Capital Cases

State court appellate review of a death sentence—and the conviction underlying that sentence—occurs in two separate proceedings: 1) the direct appeal and 2) post-conviction review. In most capital jurisdictions, these proceedings run consecutively. Thus, all issues raised on direct appeal are resolved before post-conviction counsel begins investigation into whether constitutional error at trial or on direct appeal merits relief. In Oklahoma, by contrast, these two proceedings occur concurrently, with direct appeal and post-conviction counsel both appointed immediately after the trial court has formally sentenced the inmate to death.

The progression of a capital case is depicted in the following chart:

Capital Case Progression



A. Direct Appeal

As reflected in the chart, Oklahoma law provides that “[w]henver the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence *shall* be reviewed on the record by the Oklahoma Court of Criminal Appeals (OCCA).”¹ At this stage, as discussed in the *Role of the Defense* chapter, death-sentenced inmates are represented on direct appeal by the Oklahoma County Public Defender’s Office, the Tulsa County Public Defender’s Office, or—if the case falls outside of Oklahoma and Tulsa counties—by the Homicide Direct Appeals Division of the Oklahoma Indigent Defense System (OIDS).²

The OCCA’s review at this stage encompasses “any errors enumerated by way of appeal” and a mandatory review of the death sentence to ensure, first, that it was not “imposed under the influence of passion, prejudice, or any other arbitrary factor,” and, second, that “the jury’s or judge’s finding of a statutory aggravating circumstance” was sufficiently supported by the evidence admitted at trial.³ Of the 318 death sentences imposed since Oklahoma reformed its capital punishment system in 1977, approximately one percent of those sentences have been reversed or modified to a life sentence based on the OCCA’s mandatory review.⁴

A capital defendant’s time to file an appeal from conviction and death sentence at this stage of the proceedings—a stage known as the “direct appeal”—is, absent extension, approximately 300 days from the time of sentencing. This deadline is the combined total of 1) the time taken by the court reporter to “prepare all transcripts necessary for appeal,” for which he or she has six months; 2) the time taken by the clerk of the trial court to transmit the transcript and record to the OCCA, for which he or she has ten days; and 3) the time taken by the defendant or defense counsel to prepare and file the direct appeal brief, for which they have 120 days (as measured from the date when the OCCA receives the record).⁵ The state’s response brief is due 60 days later.⁶

Extensions of time to file are permitted but disfavored.⁷ The OCCA’s rules permit the presiding judge or vice-presiding judge of the OCCA to grant, at most, two extension requests of 30 days or fewer; requests beyond this threshold may be approved only after agreement of the judges at conference.⁸ Extension requests 60 days beyond final are rare, but may be granted for good cause shown.⁹

¹ OKLA. STAT. tit. 21, § 701.51(A) (emphasis added).

² OKLA. STAT. tit. 19, § 158.7 (“[I]f the court determines that a conflict of interest exists between a defendant and the county indigent defender, the case may be reassigned by the court to another county indigent defender, an attorney who represents indigents pursuant to contract, or a private attorney who has agreed to accept such appointments.”). See also Interview with Robert A. Ravitz, Chief Pub. Defender, Okla. County Pub. Defender (Sept. 22, 2016) (on file with author) [hereinafter Ravitz Interview], Interview with Robert Nigh, Chief Pub. Defender, Tulsa County Pub. Defender (Mar. 24, 2016) (on file with author) [hereinafter Nigh Interview I].

³ OKLA. STAT. tit. 21, § 701.51(B), (C). The mandatory review previously included an assessment as to whether the sentence was proportionate relative to other capital cases; in 1985, however, the Legislature amended Oklahoma law to no longer require proportionality review in death-sentence cases. See *Proportionality Review Chapter, infra*.

⁴ See, e.g., *Allen v. State*, 925 P.2d 615, 621 (Okla. Crim. App. 1996) (finding insufficient evidence to support the jury’s determination as to the “knowingly created a great risk of death to more than one person” aggravator), *vacated on other grounds*, *Allen v. Oklahoma*, 520 U.S. 1195 (1997); *Salazar v. State*, 919 P.2d 1120, 1125–27 (1996); see also *Munn v. State*, 658 P.2d 482, 487–88, 489 (Okla. Crim. App. 1983) (death sentence modified to life imprisonment by a two-to-one majority, with one member of the Court finding the sentence to be disproportionate and another finding that improper argument by the prosecution had “improperly influenced” the jury).

⁵ OKLA. STAT. tit. 21, § 701.15(A), (D). In addition to the transcript and record, the clerk of the trial court also is responsible for transmitting to the OCCA a notice setting forth “the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed,” as well as a report prepared by the trial judge that is “in the form of a standard questionnaire prepared and supplied by the [OCCA].” OKLA. STAT. tit. 21, § 701.15(D). See Okla. Ct. Crim. App. Form 15.12. The defendant or his appellate counsel also are required to file a petition in error with the OCCA pursuant to the Court’s Rule 3.1. See *id.* at R. 9.2(B) (“The petition in error must be filed with the Clerk of this Court within six [] months from the date the Judgment and Sentence is imposed.”).

⁶ OKLA. STAT. tit. 21, § 701.15(D).

⁷ See Okla. Ct. Crim. App. R. 3.4(D). See also E-mail from Kristi Christopher, Div. Chief, Capital Post-Conviction Div., Okla. Indigent Def. Sys. (Oct. 17, 2016) (on file with author).

⁸ Okla. Ct. Crim. App. R. 3.4(D)(2)(a).

⁹ E-mail from Kristi Christopher, Div. Chief, Capital Post-Conviction Div., Okla. Indigent Def. Sys. (Oct. 17, 2016) (on file with author).

If either the defendant or the state fails to timely file their respective appellate briefs, counsel must:

Transmit a written statement of explanation to the Presiding Judge of the Court of Criminal Appeals who shall have the authority to grant an extension of the time to submit briefs, based upon a showing of just cause. Failure to submit briefs in the required time may be punishable as indirect contempt of court.¹⁰

Per the rules of the OCCA, the defendant may file a reply to the state's response within 20 days.¹¹ However, "[p]ropositions of error advanced for the first time in any reply or supplemental brief will be deemed forfeited for consideration."¹² In capital cases, oral argument is by right.¹³ The OCCA has one year from the date it receives the defendant's reply brief to hear arguments and render its decision.¹⁴

Rule 3.11 of the OCCA provides for limited supplementation of the record at the direct appeal stage.¹⁵ For example, supplementation may complete the trial court record, as when "an item admitted during proceedings in the trial court . . . has been excluded" by the clerk of the trial court.¹⁶

Of particular importance to capital cases are the rules on supplementation regarding allegations of ineffective assistance of trial counsel. Ineffective assistance claims are mainstays of capital litigation. These claims almost always require fact-finding external to the trial record to resolve because the record typically is silent as to why a trial lawyer took or failed to take some action (and the defense attorney on direct appeal is not necessarily the same as the trial lawyer¹⁷). Moreover, the underlying strategic rationale, if any, behind these decisions is often critical to a claim that counsel's act or failure to act constituted deficient performance. Rule 3.11 provides that defendants *can* claim ineffective assistance of trial counsel during the direct appeal "upon an allegation of failure of trial counsel to properly utilize available evidence or adequately investigate to identify evidence which could have been made available during the course of the trial."¹⁸ The OCCA has held that these claims *must* be raised on direct appeal and not during other stages of the proceedings (*i.e.*, during state post-conviction review).¹⁹ A defendant who fails to raise these claims at his or her earliest opportunity risks having the claim found to be procedurally defaulted and therefore never reviewed on the merits.²⁰ Accordingly, the OCCA regularly rules on the merits of ineffective assistance of trial counsel claims on direct appeal.²¹

¹⁰ *Id.* An attorney who fails to file a timely brief on behalf of a capital client may be subject to sanction by the Oklahoma Bar Association. *See* Okla. Ct. Crim. App. R. 3.6(C). The court reporter also is subject to sanction if she fails to complete the transcript within the six-month period: "Failure to complete the transcripts in the required time may be punishable as indirect contempt of court and except for just cause shown may result in revocation of the license of the court reporter." *Id.* at § 701.13(G).

¹¹ OKLA. STAT. tit. 21, § 701.13(D); Okla. Ct. Crim. App. R. 9.3(C).

¹² Okla. Ct. Crim. App. R. 9.3(E) (citing *Brown v. State*, 871 P2d 56 (Okla. Crim. App. 1994); *Castro v. State*, 745 P2d 394 (Okla. Crim. App. 1987)).

¹³ Okla. Ct. Crim. App. R. 9.3(F). This right does not extend to post-conviction applications. *Id.* at R. 9.7(F)(8). On the benefits to argument oral argument generally, see Joseph T. Thai & Andrew M. Coats, *The Case for Oral Argument in the Supreme Court of Oklahoma*, 61 OKLA. L. REV. 695, 714 (2008).

¹⁴ OKLA. STAT. tit. 21, § 701.13(D).

¹⁵ *See* Okla. Ct. Crim. App. R. 3.11.

¹⁶ *Id.* at Rule 3.11(B)(1).

¹⁷ Note that on direct appeal, defense counsel may be with the Tulsa County or Oklahoma County Public Defenders or from the Oklahoma Indigent Defense System (OIDS) Homicide Direct Appeals Division. The OIDS Capital Post-Conviction Division represents *all* death-sentenced inmates in their state post-conviction proceedings. *See e.g.*, *Role of the Defense* chapter.

¹⁸ Okla. Ct. Crim. App. R. 3.11(B)(1).

¹⁹ *See* *Murphy v. State*, 54 P3d 556, 560–61 (Okla. Crim. App. 2002).

²⁰ *See* OKLA. STAT. tit. 22, § 1089(C) (requiring, *inter alia*, that "[t]he only issues that may be raised in an application for post-conviction relief are those that [w]ere not and could not have been raised in a direct appeal").

²¹ *See, e.g.*, *Washington v. State*, 989 P2d 960 (Okla. Crim. App. 1999); *Young v. State*, 992 P2d 352 (Okla. Crim. App. 1998); *Wilson v. State*, 985 P2d 448 (Okla. Crim. App. 1998); *Patton v. State*, 975 P2d 270 (Okla. Crim. App. 1998); *Taylor v. State*, 972 P2d 864 (Okla. Crim. App. 1998); *Douglas v. State*, 951 P2d 631 (Okla. Crim. App. 1997); *Bryan v. State*, 935 P2d 558 (Okla. Crim. App. 1997); *Fields v. State*, 925 P2d 624 (Okla. Crim. App. 1996); *Allen v. State*, 925 P2d 615 (Okla. Crim. App. 1996), *vacated on other grounds*, *Allen v. Oklahoma*, 520 U.S. 1195 (1997); *Cargle v. State*, 909 P2d 806 (Okla. Crim. App. 1995), *superseded by statute on other grounds, as stated in* *Coddington v. State*, 142 P3d 457 (Okla. Crim. App. 2006); *Mayes v. State*, 887 P2d 1288 (Okla. Crim. App. 1994); *Malone v. State*, 876 P2d 707 (Okla. Crim. App. 1994).

There is no statute or OCCA rule that allows an appellant to seek to discovery on direct appeal.²²

Without discovery, it may be impossible for petitioners to acquire the proper foundation necessary to seek supplementation of the record. This, in turn, increases the risk that constitutional concerns—such as violations of *Brady v. Maryland*, which requires disclosure of exculpatory evidence by the prosecution to defense counsel²³—will go uncorrected.

In some cases, the failure to correct such discovery violations may lead to wrongful convictions. For example, in *State v. Munson*, a case in which “a significant amount of evidence, including police reports and photographs, was not turned over to Munson either before or during trial.”²⁴ By limiting death-sentenced inmates a right of access to law enforcement’s files, as well as those of the prosecution, Oklahoma law denies these inmates the opportunity to fully litigate the constitutionality of their convictions and sentences.

If the OCCA finds reversible error on direct appeal, it may vacate the conviction, reverse the death sentence, or affirm the sentence if the error is determined harmless.²⁵ When a sentence is reversed on the basis of error, the OCCA must “remand the case for resentencing by the trial court.”²⁶ On remand, the prosecutor may “move the trial court to impose any sentence authorized by law at the time of the commission of the crime.”²⁷ The trial court must impose this sentence if the parties waive resentencing by a newly impaneled jury.²⁸ In the alternative, the prosecutor may “move the trial court to impanel a new sentencing jury who shall determine the sentence of the defendant.”²⁹

Finally, Oklahoma law also permits the OCCA to independently reweigh evidence of aggravation and mitigation to determine the validity of a death sentence in the event that it finds “sentencing errors in the second stage of a capital case,”³⁰—for example, when the court determines that a particular aggravating circumstance is unsupported by the state’s evidence.³¹

B. State Post-Conviction Review

Capital defendants may also challenge their convictions and sentences through post-conviction, or collateral, proceedings. OIDS represents all death-sentenced inmates in their state post-conviction proceedings through its Capital Post-Conviction Division.³² Like direct appeal counsel, OIDS’s Capital Post-Conviction Division is appointed by the district court immediately after a death sentence is imposed.³³

Oklahoma’s Uniform Post-Conviction Procedure Act (Act) establishes six exclusive bases for collaterally challenging

²² Interview with Kristi Christopher, Div. Chief, Capital Post-Conviction Div., Okla. Indigent Def. Sys. (Mar. 14, 2107) (on file with author).

²³ 373 U.S. 83 (1963).

²⁴ 886 P.2d 999, 1002 (1994).

²⁵ See, e.g., *Walker v. State*, 887 P.2d 501, 511 (Okla. Crim. App. 1994) (finding that the introduction of 911 tape of a victim saying “he’s killing me” and “I’m dead” was irrelevant and prejudicial because it did not name the defendant nor prove malice aforethought, but further finding that, due to the overwhelming evidence of guilt, the introduction of the tape was harmless error); *Robison v. State*, 677 P.2d 1080, 1085 (Okla. Crim. App. 1984) (an in-court identification made after an eyewitness has undergone hypnosis was inadmissible but “not grave enough to predicate reversal of the conviction”).

²⁶ OKLA. STAT. tit. 21, § 701A3(E)(2).

²⁷ OKLA. STAT. tit. 21, § 701A0a(l)(a).

²⁸ *Id.*

²⁹ OKLA. STAT. tit. 21, § 701A0a(l)(b).

³⁰ *Van Woudenberg v. State*, 818 P.2d 915, 917 (Okla. Crim. App. 1991); see also *id.* (“This approach of reweighing the aggravating circumstances against the mitigating evidence to determine the validity of the death sentence focuses on the individual circumstances of the homicide and the characteristics of each defendant. It ensures that the death penalty will not be ‘wantonly’ or ‘freakishly’ imposed.” (citing *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Stewart, J., concurring))).

³¹ See, e.g., *Hayes v. State*, 845 P.2d 890, 895 (Okla. Crim. App. 1992) (citing *Stout v. State*, 817 P.2d 757 (Okla. Crim. App. 1991); *Clemons v. Mississippi*, 494 U.S. 738 (1990)).

³² Interview with Kristi Christopher, Div. Chief, Capital Post-Conviction Div., Okla. Indigent Def. Sys. (Sept. 28, 2106) (on file with author).

³³ E-mail from Kristi Christopher, Div. Chief, Capital Post-Conviction Div., Okla. Indigent Def. Sys. (Oct. 17, 2016) (on file with author).

a conviction or sentence in state court.⁵⁴ In capital cases, however, the vast majority of claims raised in post-conviction proceedings concern one of the following three grounds for relief: 1) the conviction or sentence is in violation of the U.S. Constitution, Oklahoma Constitution, or laws of Oklahoma; 2) evidence of material facts exists that was not previously presented and heard and that requires vacating the conviction or sentence “in the interest of justice;” or 3) the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error available under any common law, statutory, or other writ, motion, petition, proceeding, or remedy.⁵⁵

In addition to limiting the bases for relief, the Act also requires petitioners to satisfy two additional conditions. First, a claim for relief cannot have been available to the petitioner during prior litigation.⁵⁶ Accordingly, any claim for relief that might have been raised on direct appeal—whether because the claim was apparent on the face of the record or because it could have been explored through the OCCA’s rule on supplementation—will not be considered on the merits, even if it pertains to a serious constitutional violation that undermines confidence in the inmate’s trial.⁵⁷ Second, for a claim to be cognizable on post-conviction review, a petitioner must show either a causal connection between the error and the outcome of his or her trial or that he or she “is factually innocent.”⁵⁸ The petitioner must also state specific facts to satisfy each of these two requirements.⁵⁹

In capital cases, applications for post-conviction relief are filed directly with the OCCA.⁴⁰ The time limits for filing an application are strictly adhered to and, unlike most jurisdictions,⁴¹ occur prior to the exhaustion of the direct appeal process. Oklahoma law requires post-conviction counsel to file the application within 90 days of either the date the appellee files his or her direct appeal brief or the date the appellant files his or her reply brief (if any) on direct appeal, whichever date comes later.⁴² By contrast, individuals who have not been sentenced to death may file an initial application for post-conviction relief at any time, provided an appeal is not pending.⁴³

If an application is timely filed and raises grounds for relief that are not procedurally barred, the OCCA may grant relief or, if need be, order the district court that imposed the sentence to designate “the issues of fact to be resolved and the method by which the issues shall be resolved.”⁴⁴ The OCCA may also order the district court to engage in fact-finding. For example, in *Murphy v. State*, the OCCA remanded an inmate’s application

⁵⁴ OKLA. STAT. tit. 22, § 1080.

⁵⁵ *Id.* The other three bases written into the statute are (1) the trial court was without jurisdiction to impose the sentence; (2) the sentence exceeds the maximum authorized by law; and (3) the defendant’s sentence has expired; the defendant’s suspended sentence, probation, parole, or conditional release has been unlawfully revoked; or the defendant is otherwise being unlawfully held in custody or other restraint. *Id.*

⁵⁶ OKLA. STAT. tit. 22, § 1089(C).

⁵⁷ The statute explicitly imposes a waiver on all grounds for relief that could have been raised “before the last date on which an application could be timely filed.” OKLA. STAT. tit. 22, § 1089(D)(2); *see also* Brecheen v. State, 855 P.2d 117, 118 (Okla. Crim. App. 1992) (“[W]e will address [on post-conviction review] only those propositions which could not have been brought at the time of the direct appeal. All other allegations are not properly before the Court.”).

⁵⁸ OKLA. STAT. tit. 22, § 1089(C)(2); *see also* Okla. Ct. Crim. App. R. 9.7(B)(2) (“The application shall state specific facts explaining why each claim was not or could not be presented on direct appeal; and how each claim supports a conclusion that the outcome of the trial would have been different but for the errors, or that the petitioner is factually innocent. These specific facts shall be supported by materials found in the record made at trial or filed in accordance with subsection 9.7(D) of this Rule or by caselaw.”).

⁵⁹ *Id.* The statute specifies that the OCCA “may issue any orders as to discovery or any other orders necessary to facilitate post-conviction review.” *Id.* at § 1089(D)(3). *See also* Okla. Ct. Crim. App. R. 9.7(D) (concerning supplementation of the record and discovery procedures at the post-conviction stage).

⁴⁰ OKLA. STAT. tit. 22, § 1089(D)(1).

⁴¹ *See, e.g.*, ALA. R. CRIM. P. 52.2(c) (in Alabama, a defendant must file an application for post-conviction relief within one year after the conviction and sentence have been affirmed on direct appeal); ARIZ. REV. STAT. § 13-4254(D) (2015) (in Arizona, a defendant must file his application within 60 days after the conviction and sentence have been affirmed on direct appeal); FLA. R. CRIM. P. 3.851(d)(1) (in Florida, a defendant must file his application within one year after the judgment and sentence become final); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(a) (in Indiana, a defendant may file for post-conviction relief “at any time”); KY. R. CRIM. P. 11.42(10) (in Kentucky, a defendant must file his application within three years after the judgment and sentence become final); MO. SUP. CT. R. 24.033(b), 29.15(b) (in Missouri, a defendant must file his application within 90 days after the conviction and sentence have been affirmed on direct appeal); MONT. CODE § 46-21-102 (in Montana, a defendant must file his application within one year after the judgment and sentence become final); PA. R. CRIM. P. 901(A) (in Pennsylvania, a defendant must file his application within one year after the judgment and sentence become final); TENN. CODE § 40-30-102(a) (2013) (in Tennessee, a defendant must file an application for post-conviction relief within one year after the conviction and sentence have been affirmed on direct appeal); VA. CODE § 8.01-654.1 (in Virginia, a defendant must file his application within 60 days after the judgment and sentence become final).

⁴² *Id.*

⁴³ OKLA. STAT. tit. 22, § 1081.

⁴⁴ OKLA. STAT. tit. 22, § 1089(D)(3). The district court is explicitly prohibited from “permit[ting] any amendments or supplements to the issues remanded by the Court of Criminal Appeals except upon motion to and order of the Court of Criminal Appeals.” *Id.*

for post-conviction relief to the district court for an evidentiary hearing on the issue of whether the inmate was intellectually disabled—a factual assertion that, if satisfied, would have served to bar the imposition of the death penalty against him.⁴⁵

If the OCCA remands the petition to the district court, it must act within strict deadlines established under the Act. If a hearing is held, for instance, the district court has 45 days to file its findings of fact and conclusions of law with the OCCA.⁴⁶ The parties have a comparably limited window to “seek review by the [OCCA] of the district court’s determination of the issues.”⁴⁷

The division chief of the OIDS Capital Post-Conviction Division—which represents nearly all of Oklahoma’s death-sentenced inmates in their state post-conviction proceedings—reports that, in her over 20 years of experience, the OCCA has not remanded an initial post-conviction application for fact-finding or discovery.⁴⁸ Without the benefit of live testimony that would be assessed at such a hearing, however, fact finders are much less able to evaluate the credibility and effectiveness of witnesses whose statements have been memorialized in any affidavits attached to the petition.

Evidentiary hearings also permit counsel to examine adverse witnesses in an effort to arrive at the truth; in *Douglas v. Workman*, for example, a federal district court found “highly suspect” a prosecutor’s denials as to whether he had offered a witness in a capital case favorable treatment in exchange for inculcating testimony.⁴⁹ The resolution of other claims for relief—notably, those relating to ineffective trial counsel—also may be facilitated through more searching fact-finding measures, as when an applicant’s trial attorneys offer strategic rationales for their decisions that post-conviction counsel challenge as subsequent rationalizations.

As with initial applications for post-conviction relief, subsequent applications face limitations on the OCCA’s ability to consider claims. Oklahoma law bars the OCCA from considering the merits of or granting relief based on claims raised in a subsequent application unless one of two conditions is satisfied:

- 1) The legal basis for the newly-raised claim was unavailable at the time of filing of the original application or in a previously considered application; or
- 2) The factual basis for the newly-raised claim was unavailable at the time of filing of the original application or in a previously considered application and could not have been ascertained through the exercise of reasonable diligence. In addition, these facts, if proven and viewed in light of the evidence as a whole, must be “sufficient to establish by clear and convincing evidence that, but for the alleged error, no reasonable fact finder would have found the applicant guilty of the underlying offense or would have rendered the penalty of death.”⁵⁰

If both these conditions are satisfied, the claims raised in a subsequent application for post-conviction relief will be considered on the merits.⁵¹ On rare occasions, the OCCA has remanded successor applications for fact-finding by the trial court, but the vast majority of these remands were ordered in the wake of the U.S. Supreme Court’s decision in *Atkins v. Virginia*, which held that individuals with intellectual disability were ineligible to be executed.⁵²

In addition to the above-mentioned hurdles, state post-conviction counsel do not have the benefit of a general

⁴⁵ *Murphy v. State*, 54 P.3d 556, 570 (Okla. Crim. App. 2002), *superseded on other grounds by* *Blonner v. State*, 127 P.3d 1155, 1159 (Okla. Crim. App. 2006).

⁴⁶ OKLA. STAT. tit. 22, § 1089(D)(6).

⁴⁷ See OKLA. STAT. tit. 22, § 1089(D)(6)–(7).

⁴⁸ E-mail from Kristi Christopher, Div. Chief, Capital Post-Conviction Div., Okla. Indigent Def. Sys. (Oct. 17, 2016) (on file with author).

⁴⁹ 560 F.3d 1156, 1169 (10th Cir. 2009).

⁵⁰ OKLA. STAT. tit. 22, § 1089(D)(8).

⁵¹ See *Rojem v. State*, 888 P.2d 528, 529–50 (Okla. Crim. App. 1995).

⁵² E-mail from Kristi Christopher, Div. Chief, Capital Post-Conviction Div., Okla. Indigent Def. Sys. (Oct. 17, 2016) (on file with author).

right to discovery and must, instead, request court-ordered discovery through the OCCA.⁵³ Furthermore, the rules of the OCCA require that all requests for discovery be filed “in conjunction with the application,”⁵⁴ which requests must be accompanied by supporting affidavits that are “sufficient to raise a substantial question of compliance with earlier discovery orders” and that also demonstrate that “the material being sought would have resulted in a different outcome at trial.”⁵⁵ Although OIDS regularly files these requests, they are routinely denied.⁵⁶

Post-conviction counsel’s lack of a general right to discovery substantially hinders their ability to uncover the factual bases to meritorious claims to relief that may exist but are unknown to such counsel. Moreover, counsel’s success in obtaining an evidentiary hearing depends upon their showing—in their pleadings and “by clear and convincing evidence”—that *known* materials “have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief.”⁵⁷ Thus, if relevant materials exist but are unknown to post-conviction counsel, a request for a hearing and for further factual development may be denied when it otherwise would be granted.

Each of the above factors may explain, in part, the small percentage of capital cases in which the OCCA has granted post-conviction relief. In the Commission’s independent evaluation of appeals of all 321 death-sentenced inmates between 1977 and 2014 in Oklahoma—discussed in *Appendix I*—the OCCA granted relief in post-conviction proceedings in just 19 cases; by comparison, the federal courts granted relief, reversing either the conviction or sentence, in 46 Oklahoma capital cases during that same time.

III. Conclusion and Recommendations

At every stage of a capital case, the judiciary has an important role in ensuring that a just outcome has been reached. Judicial rulings, whether pretrial, during jury selection, or during trial, can affect which party—the defense or the prosecution—is likely to prevail. For their part, appellate judges should strike a balance between finality and a defendant’s right to a trial free from serious error. Oklahomans rely on the professionals within the state’s judiciary to use their knowledge of the law, as well as their professional judgment, to safeguard due process and fundamental constitutional rights, particularly in complex capital cases where a defendant’s life hangs in the balance.

In addition, Oklahomans expect that the appellate and post-conviction review processes will afford defendants full and fair opportunities to bring error to the courts’ attention. After all, defendants’ rights to effective counsel, their right to be apprised of all information in the prosecution’s possession that may help their case, their right to an impartial jury of their peers, and all other such constitutional and statutory rights are but empty promises if there exists no avenue to meaningfully correct violations of those rights.

Mindful of the critical role judges play in capital cases and of the importance of the review process on appeal and during post-conviction proceedings, the Commission makes the following recommendations:

⁵³ See Okla. Ct. Crim. App. R. 9.7(D).

⁵⁴ Okla. Ct. Crim. App. R. 9.7(D)(2).

⁵⁵ Okla. Ct. Crim. App. R. 9.7(D)(5).

⁵⁶ E-mail from Kristi Christopher, Div. Chief, Capital Post-Conviction Div., Okla. Indigent Def. Sys. (Oct. 17, 2016) (on file with author).

⁵⁷ Okla. Ct. Crim. App. R. 9.7(D)(5).

Recommendation 1:**Oklahoma judges should receive regular training on the trial of capital cases.**

The law governing capital cases is notably complex, and judges—no less than the practitioners who appear before them—would benefit from training specific to the standard of care required of capital counsel, particularly as it pertains to the penalty-phase investigation and presentation; the proper scope of inquiry for jury selection in capital cases; and procedural requirements to which death-sentenced inmates seeking appellate and post-conviction relief must adhere. Furthermore, to improve the judiciary's ability to function as a gatekeeper for questionable forensic evidence, judges also should receive training on issues related to forensic evidence.

Recommendation 2:**Oklahoma law should be amended to clearly provide that failure to raise extra-record claims within a direct capital appeal will not constitute waiver of those same claims on capital post-conviction review.**

Oklahoma law is an outlier in requiring capital litigants to raise extra-record claims (for example, claims that their trial counsel were ineffective) on direct appeal, rather than in post-conviction proceedings. In the Commission's judgment, the interests of justice would be better served by requiring capital litigants to raise all extra-record claims in their initial post-conviction applications. Although a litigant may wish to raise an obvious extra-record claim in his or her direct appeal, he or she should not be required to do so. Instead, the direct appeal would offer a final opportunity to raise record-based claims, whereas the initial application for post-conviction relief would offer the final opportunity to raise all extra-record claims that can be raised at that point (because they are known or may be discovered following a reasonable investigation). Such a framework represents a sensible division of labor between appellate and post-conviction counsel and better ensures that counsel will be able to efficiently litigate all issues on their client's behalf.

Recommendation 3:**To obtain discovery by order of the Oklahoma Court of Criminal Appeals within either a direct appeal or a post-conviction proceeding, counsel for a death-sentenced inmate should be required to show only good cause for the requested discovery.**

Some violations of a capital defendant's rights may only come to light through vigorous investigative efforts post-trial. However, as discussed in this chapter, there are significant limitations to the discovery rights of a capital defendant during state appeals. On direct appeal, no statute or court rule provides for discovery. On state post-conviction appeal, counsel must request court-ordered discovery through the Oklahoma Court of Criminal Appeals (OCCA) and demonstrate "by clear and convincing evidence the materials sought to be introduced have or are likely to have support in law and fact to be relevant to an allegation raised in the application for post-conviction relief."⁵⁸ This burden is difficult to meet when a defendant may not know the specifics of the information that may be helpful to claims for relief (for example, the details of a defendant's childhood medical records that may demonstrate intellectual disability). Therefore, the OCCA should amend its rules to require capital litigants to show only good cause for requested discovery at both the direct appeal and post-conviction stages.

⁵⁸ Okla. Ct. Crim. App. R. 9.7(D).

Recommendation 4:

The Legislature should amend Oklahoma law so that capital direct appeals and state post-conviction proceedings run consecutively, rather than concurrently; and a defendant's initial application for post-conviction relief should be filed with the Oklahoma Court of Criminal Appeals within one year from the date on which the Oklahoma Court of Criminal Appeals issues its decision and mandate on the defendant's direct appeal in the case.

In most jurisdictions with capital punishment, a death-sentenced inmate's conviction and sentence become final before post-conviction counsel is appointed and begins investigating extra-record claims for relief. In Oklahoma, by contrast, appellate and post-conviction counsel represent death-sentenced clients concurrently. Moreover, the attorneys for each proceeding are not the same.⁵⁹ If, however, the OCCA vacates a conviction or death sentence on direct appeal, the resources spent to provide the inmate with post-conviction counsel may be wasted, a situation easily avoided by developing a more robust, yet coherent review process—as is done in Florida, Kentucky, and many other jurisdictions with the death penalty. Furthermore, so that post-conviction counsel will have time enough to complete their work upon being appointed to a case, counsel should have one year from the direct appeal order—i.e., from when the OCCA issues its decision and mandate in the defendant's direct appeal—in which to file an application for post-conviction relief.

⁵⁹ Note that on direct appeal, depending on the where the litigation takes place, defense counsel may be with the Tulsa County or Oklahoma County Public Defenders or from the Oklahoma Indigent Defense System (OIDS) Homicide Direct Appeals Division. The OIDS Capital Post-Conviction Division represents all death-sentenced inmates in their state post-conviction proceedings. *See e.g., Role of the Defense* chapter.

Death Eligibility

I. Introduction

Not every person who commits a heinous crime may receive the death penalty. Identifying the offenders and types of offenses that are eligible to be capitally prosecuted is a threshold inquiry for any system of capital punishment. Who may be sentenced to death, and for what kind of offense, is referred to as “death eligibility.” Imposition of a death sentence is largely determined by a state’s first-degree murder statute (determining which defendants may be prosecuted capitally) and its corresponding aggravating circumstances (determining which defendants may be sentenced to death), as well as how a state’s capital punishment laws and federal and state jurisprudence determine who is ineligible for a death sentence (for example, those of a certain age and those with intellectual disability).¹ Aggravating circumstances—circumstances that add to the seriousness of the crime or the dangerousness of the defendant—are defined statutorily by each jurisdiction with the death penalty.

The United States Supreme Court has defined the outer parameters of death eligibility. The Court has recognized retribution and deterrence as the dual penological goals of the death penalty.² In order to be constitutional, the imposition of the death penalty must “measurably contribute[]” to one or both of these goals.³ Retribution is served only when the severity of the punishment is proportionate to the culpability of the offender.⁴ The Court has further observed that the death penalty is a deterrent “only when murder is the result of premeditation and deliberation.”⁵ Finally, the Court has emphasized that the death penalty is reserved for the most serious crimes, and that even “the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State.”⁶

As discussed in the Overview chapter, *Furman v. Georgia*⁷ sparked a nationwide moratorium on the death penalty that lasted four years, until the U.S. Supreme Court’s decision in *Gregg v. Georgia*.⁸ The Court’s intent in *Gregg* was to ensure that the death penalty was not applied in an arbitrary or capricious manner.⁹

¹ Of special interest for this chapter are persons with intellectual disability and those who are incompetent to be executed.

² The U.S. Supreme Court has defined retribution as “the interest in seeing that the offender gets his ‘just deserts’” and deterrence as “the interest in preventing capital crimes by prospective offenders.” *Atkins v. Virginia*, 536 U.S. 304, 319 (2002).

³ *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 798 (1982)).

⁴ *Id.*

⁵ *Id.* (quoting *Enmund*, 458 U.S. at 799).

⁶ *Id.*

⁷ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁸ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁹ Subsequent opinions of the Court further have refined the substantive limits to capital punishment and the procedural requirements for capital cases. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“[C]apital punishment must ‘be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them ‘the most deserving of execution.’” (internal quotations omitted))).

Two specific changes arose from *Gregg*. First, capital trials were split into two phases—a guilt phase and a sentencing phase—and heard by the same jury. Second, capital trials now allow the jury to consider the individual circumstances of the offense and the offender during the sentencing phase—also known as a penalty phase—when the jury decides whether the appropriate punishment is death or a sentence less than death (e.g., life without possibility of parole, life, or a term of years). In many states with capital punishment, including Oklahoma, “penalty phase instructions require the jurors to determine whether the state has proven ‘beyond a reasonable doubt’ the existence of specific statutory aggravating circumstances,” which, if found, are compared (or weighed) by the juror against any mitigating circumstances in deciding the sentence.¹⁰ After *Gregg*, many states, including Oklahoma, also modified their first-degree murder statutes.¹¹

Today, in the 31 states with the death penalty, a death sentence can only be sought against a defendant who is convicted of murder.¹² Since *Gregg*, the Supreme Court has recognized that it violates the Eighth Amendment’s ban on cruel and unusual punishment to subject certain crimes and certain groups of people to the death penalty.¹³ In 1977, in *Coker v. Georgia*, the U.S. Supreme Court held that the death penalty for the rape of an adult woman is unconstitutional.¹⁴ Thirty-one years later, in *Kennedy v. Louisiana*, the Court determined that the death penalty is unconstitutional for the rape of a child where the crime did not result in the victim’s death.¹⁵

The Supreme Court has also restricted the death penalty for juveniles, first by holding in *Thompson v. Oklahoma* that states could not execute anyone who was under the age of 16 at the time of the crime.¹⁶ In 2005, in *Roper v. Simmons*, the Court extended *Thompson*’s exclusion to all defendants who were under the age of 18 at the time of the crime.¹⁷

In 2002, the Supreme Court held, in *Atkins v. Virginia*,¹⁸ that it is unconstitutional to execute persons with intellectual disability (previously referred to as “mental retardation”).¹⁹ While *Atkins* left the determination of

¹⁰ Richard L. Wiener et al., *The Role of Declarative and Procedural Knowledge in Capital Murder Sentencing*, 28 J. APP. SOC. PSYCHOL. 124–44 (1998).

¹¹ See OKLA. STAT. tit. 21, § 701.7 (1976).

¹² *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CTR., <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Jan. 30, 2017). Previously in some states, including Oklahoma, a defendant could be prosecuted capitally for the rape of a child and other crimes not involving murder. See OKLA. STAT. tit. 21, §§ 1114–15 (2002).

¹³ It is well established that “the Eighth Amendment [is not] a static concept.” *Gregg*, 428 U.S. at 172–73. Instead, the Eighth Amendment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)). In evaluating whether a particular punishment comports with evolving standards, the U.S. Supreme Court looks to “objective factors,” such as state legislative enactments and jury verdicts. *Atkins*, 536 U.S. at 311–12. Determining whether a punishment is constitutionally excessive or cruel and unusual is judged by current norms, not by those that existed at the time the Eighth Amendment was ratified. *Id.* An Eighth Amendment inquiry involves viewing the concept “less through a historical prism than according to ‘the evolving standards of decency that mark the progress of a maturing society.’” *Miller v. Alabama*, 132 S. Ct. 2435, 2463 (2012) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop*, 356 U.S. at 101)) (finding sentences of mandatory life in prison without the possibility of parole for juvenile homicide offenders constitutionally impermissible). “It is not so much the number of . . . States that is significant, but the consistency of the direction of change.” *Roper v. Simmons*, 543 U.S. 551, 566 (2005) (quoting *Atkins*, 536 U.S. at 315). Thus, in *Atkins*, the Court was persuaded that the Eighth Amendment barred the execution of intellectually disabled defendants because “no State that had already prohibited the execution of the mentally retarded had passed legislation to reinstate the penalty.” *Roper*, 543 U.S. at 566 (citing *Atkins*, 536 U.S. at 315).

¹⁴ 433 U.S. 584 (1977).

¹⁵ 554 U.S. 407 (2008).

¹⁶ *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

¹⁷ *Roper*, 543 U.S. 551. Before the Supreme Court decided *Roper* in 2005, six minors ranging in age from 15 to 17 were sentenced to death in Oklahoma; two of them—Sean Sellers and Scott Allen Hain—were executed. See Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentencing and Executions for Juvenile Crimes, January 1, 1973 – April 30, 2004*, DEATH PENALTY INFORMATION CTR., <http://www.deathpenaltyinfo.org/documents/JuvDeathApril2004.pdf> (last visited Dec. 1, 2016).

¹⁸ *Atkins*, 536 U.S. 504.

¹⁹ In recent years, the American Association on Intellectual and Developmental Disabilities (AAIDD) has begun using the term *intellectual disability* in lieu of *mental retardation*. See AM. ASS’N INTELLECTUAL & DEV. DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) [hereinafter “AAIDD MANUAL”]. In like fashion, the current edition of the *Diagnostic and Statistical Manual of Mental Disorders*—published by the American Psychiatric Association—likewise replaces *mental retardation* with *intellectual disability* as a diagnostic term. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 33 (5th ed. 2013) [hereinafter “DSM-5”]. See also *Hall v. Florida*, 134 S. Ct. 1986 (2014) (using “intellectual disability” to refer to the “identical phenomenon” of mental retardation). According to the AAIDD, “[t]he term intellectual disability covers the same population of individuals who were diagnosed previously with mental retardation in number, kind, level, type, duration of disability, and the need of people with this disability for individualized services and supports.” *FAQs on Intellectual Disability*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, <http://aaid.org/intellectual-disability/definition/faqs-on-intellectual-disability> (last visited Feb. 28, 2017).

intellectual disability up to the states, the Court's 2014 decision in *Hall v. Florida*²⁰ recognized that IQ testing is inherently imprecise and that the results of such testing are best understood as a range rather than an exact number; accordingly, the Court held that a bright-line cutoff of an IQ score of 70 or below is unconstitutional and found that persons with IQ test scores in the 71 through 75 range should be allowed to attempt to establish intellectual disability through evidence of "difficulties in adaptive functioning."²¹ Finally, under *Ford v. Wainwright*, decided in 1986, defendants who are insane or incompetent at the time of execution may not be executed.²² The Court's seminal case law on intellectual disability and incompetency to be executed are discussed in greater detail in Sections II and IV, respectively.

Through its jurisprudence, the Supreme Court has created a framework for evaluating the constitutionality of capital punishment statutes. Three overarching principles have emerged from the Court's major decisions on capital punishment and statutory construction. Any statute imposing capital punishment must 1) include safeguards that minimize the risk of arbitrariness and discrimination in the application of the death penalty,²³ corresponding with the heightened need for reliability in capital cases²⁴; 2) genuinely narrow the class of offenses eligible for the death penalty²⁵; and 3) be consistent with "evolving standards of decency that mark the progress of a maturing society."²⁶

Because the purpose of *Gregg* was to eliminate arbitrariness from the death penalty, a relevant question is whether the changes sparked by *Gregg* have been successful. In other words, is the death penalty less arbitrary now, 40 years later, than at the time that *Gregg* was decided?²⁷

In examining Oklahoma's death penalty system, answering the above question requires considering who may be capitally prosecuted, sentenced to death, and executed. The state's capital punishment system must treat intellectually disabled and incompetent (or insane) capital defendants in a manner consistent with the Supreme Court's mandates in *Furman*, *Gregg*, and their progeny. It also must meaningfully narrow the offenses and offenders eligible for the death penalty. Accordingly, this chapter explores Oklahoma law as it pertains to intellectual disability, the aggravating circumstances necessary for a defendant to be sentenced to death, and issues concerning a defendant's competency to be executed.

II. Intellectual Disability

For an appropriate professional to diagnose "intellectual disability," he or she must find three criteria: 1) significantly subaverage intellectual functioning, 2) concurrent deficits in adaptive functioning, and 3) onset during the developmental period (i.e., onset before the age of 18).²⁸ Intellectual disability can have many different causes, and its origin often is unknown.²⁹ Persons with intellectual disability are often physically indistinguishable from persons without intellectual disability, can sometimes develop normal verbal skills, and

²⁰ *Hall*, 154 S. Ct. 1986.

²¹ *Id.* at 2000 (noting "the Court's independent assessment that an individual with an IQ test score 'between 70 and 75 or lower' may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning") (internal citation omitted).

²² *Ford v. Wainwright*, 477 U.S. 599 (1986).

²³ See *Pulley v. Harris*, 465 U.S. 37, 44–45 (1984) (observing that, post-*Furman*, capital sentencing and appellate review statutes in several states were upheld because these revised systems "minimized the risk of wholly arbitrary, capricious, or freakish sentences").

²⁴ See *Woodson v. North Carolina*, 428 U.S. 280 (1976).

²⁵ See *Gregg*, 428 U.S. at 188–92.

²⁶ *Id.* at 173.

²⁷ Looking at various aspects of capital punishment over the past 40 years, one author concluded that *Gregg* has failed in its goal of reducing the arbitrariness of the death penalty. See Evan J. Mandery, *It's Been Forty Years Since the Supreme Court Tried to Fix the Death Penalty—Here's How it Failed*, THE MARSHALL PROJECT, Mar. 30, 2016, <https://www.themarshallproject.org/2016/03/30/it-s-been-40-years-since-the-supreme-court-tried-to-fix-the-death-penalty-here-s-why-it-failed>.

²⁸ See *FAQs on Intellectual Disability* *supra* note 19; DSM-5, *supra* note 19, at 33.

²⁹ See generally DSM-5, *supra* note 19.

may have many areas of competence that coexist with their impairments.⁵⁰

Significantly subaverage intellectual functioning is generally defined as an IQ score that is two standard deviations or more below the mean; for most IQ tests, two standard deviations below the mean is represented by an IQ score of 70 or less.⁵¹ However, the American Association on Intellectual and Developmental Disabilities (AAIDD), a leading national organization on intellectual disability, advises against enforcement of a strict IQ cutoff for the diagnosis of intellectual disability.⁵² The AAIDD states that “[t]he intent of this definition is not to specify a hard and fast cutoff point/score for meeting the significant limitations in intellectual functioning criterion of ID [intellectual disability]”⁵³ and emphasizes that substantial limitations in intellectual functioning is only one of the three criteria used to diagnose intellectual disability.⁵⁴

Adaptive functioning, the second criterion for intellectual disability, is “an individual’s ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so.”⁵⁵ An individual’s adaptive functioning is assessed across three domains: conceptual, practical, and social. Deficits in adaptive functioning may appear in multiple areas or be concentrated in one or two. In a person with intellectual disability, “limitations often coexist with strengths.”⁵⁶ The third criterion—onset during the developmental period—is generally described as onset before the age of 18.⁵⁷ In capital cases, determinations of intellectual disability almost always are retrospective; accordingly, evidence of adaptive functioning typically is found in historical records (e.g., school, employment, and health records), as well as through interviews with persons who are familiar with the defendant’s pre-18 adaptive functioning (e.g., family, friends, school teachers, and employers).

A. The Supreme Court and Intellectual Disability

As mentioned above, the U.S. Supreme Court held in 2002 that the execution of persons with intellectual disability violates the Eighth Amendment.⁵⁸ In *Atkins v. Virginia*, the Court cited to the definitions of intellectual disability (then referred to as “mental retardation”) of two national organizations—the AAIDD⁵⁹ and the American Psychiatric Association.⁴⁰ The definition of intellectual disability for both organizations requires significantly subaverage intellectual functioning, together with limitations in adaptive functioning (in the areas

⁵⁰ J. Gregory Olley, *The Death Penalty, the Courts, and What We Have Learned about Intellectual Disability*, 36 PYSCHOL. INTELL. & DEVELOPMENTAL DISABILITIES 1, 3 (2010), <http://www.iapsych.com/iqmr/olley2010.pdf>.

⁵¹ DSM-5, *supra* note 19, at 37. The standard error of measurement recognizes that any standardized instrument, including intelligence tests, have an inherent margin of error that must be recognized. In terms of an IQ test, this means that a person’s observed IQ test score is not a “true” IQ and must be interpreted as a range that captures the error for that particular instrument. In general, the standard error of measurement for IQ tests is three to five points. Furthermore, and as described by the AAIDD, “[a]n IQ score is subject to variability as a function of a number of potential sources of error, including variations in test performance, examiner’s behavior, cooperation of the test taker, and other personal and environmental factors.” AAIDD MANUAL, *supra* note 19, at 36. The AAIDD therefore cautions that “variation in scores may or may not represent the individual’s actual or true level of intellectual functioning.” *Id.* Accordingly, the Supreme Court stated in *Hall v. Florida* that an IQ is “a range, not a fixed number,” and rejected a bright-line cutoff of 70 for finding subaverage intellectual functioning, because it failed to comport with medical community standards and the scientifically recognized standard error of measurement. *See Hall*, 134 S. Ct. at 2001.

⁵² AAIDD MANUAL, *supra* note 19, at 40 (“A fixed point cutoff score for ID [intellectual disability] is not psychometrically justifiable.”).

⁵³ *Id.* at 35.

⁵⁴ *Id.*

⁵⁵ *Hall*, 134 S. Ct. at 1991; *see also* DSM-5, *supra* note 19, at 37. In capital cases, as most determinations of intellectual disability are retrospective, evidence of adaptive functioning is often found in historical records such as school, employment and health records, as well as through interviews with persons familiar with the defendant’s pre-18 adaptive functioning like family, friends, school teachers and employers.

⁵⁶ AAIDD MANUAL, *supra* note 19, at 1.

⁵⁷ *See, e.g.*, Tony Cox, *Brain Maturity Extends Well Beyond Teen Years*, NPR: TELL ME MORE (Oct. 10, 2011), <http://www.npr.org/templates/story/story.php?storyId=141164708>.

⁵⁸ *Atkins*, 536 U.S. 504.

⁵⁹ At the time *Atkins* was decided, the AAIDD was known as the American Association on Mental Retardation.

⁴⁰ The Court referred to each organization’s respective publication: *Mental Retardation: Definition, Classification and Systems of Support* (AAIDD) and the *Diagnostic and Statistical Manual of Mental Disorders* (APA). *See Atkins*, 536 U.S. at 509 (citing AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORT (10th ed. 2002); AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 2000)).

of communication, self-care, home living, social skills, community use, self-direction, functional academic skills, work, leisure, or health and safety) that manifest before age 18.⁴¹

In deciding *Atkins*, the Court looked to whether the execution of persons with intellectual disability furthered the penological goals of retribution and deterrence. Discussing retribution, the Court concluded that the “lesser culpability of the mentally retarded offender surely does not merit” the death penalty as a form of retribution,⁴² explaining:

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.⁴³

The Court likewise held that the goal of deterrence is not served by the execution of persons with intellectual disability, because the “cognitive and behavioral impairments” of intellectually disabled individuals, including their “diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses,” make it less likely that they can understand that execution is a possible penalty and control their conduct based on that possibility.⁴⁴

Further, the Court recognized the “enhanced” risk that intellectually disabled defendants would be convicted and sentenced to death, despite their innocence or factors calling “for a less severe penalty.”⁴⁵ This risk is due not only to the possibility of false confessions, but also to:

The lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.⁴⁶

Intellectual disability, therefore, can be a “two-edged sword” because it may be seen by juries as an aggravating factor, rather than a mitigating factor; hence, it may result in wrongful executions.⁴⁷

While *Atkins* left it to the states to develop “appropriate ways to enforce” the prohibition against executing the intellectually disabled,⁴⁸ the Court has since provided the states with additional guidance. In its 2014 decision in *Hall v. Florida*, the Court struck down as unconstitutional Florida’s law requiring an IQ test score of 70 or below for a defendant to present evidence of intellectual disability.⁴⁹ The Court’s decision emphasized that

⁴¹ *Atkins*, 536 U.S. at 309.

⁴² *Id.* at 319.

⁴³ *Id.* at 318.

⁴⁴ *Id.* at 320.

⁴⁵ *Id.* (internal quotations and citation omitted).

⁴⁶ *Id.* at 320–21.

⁴⁷ *Atkins*, 536 U.S. at 324 (citing *Penry v. Lynaugh*, 492 U.S. 302, 323–25 (1989)).

⁴⁸ *Id.* at 317.

⁴⁹ *Hall*, 134 S. Ct. 1986.

“intellectual disability is a condition, not a number”⁵⁰ and indicated that courts must recognize the inherent range of testing error in intelligence tests, as does the medical community.⁵¹

B. Oklahoma and Intellectual Disability

After *Atkins*, the Oklahoma Court of Criminal Appeals (OCCA) addressed intellectual disability in Oklahoma death penalty cases. In its 2002 decision in *Murphy v. State*, the OCCA set forth a definition and procedure for claims of intellectual disability, in order to fill the gap that then existed in Oklahoma law.⁵² This procedure shifted over the next four years, as the Court refined and expanded upon the procedure articulated in *Murphy*.⁵³ In 2006, the Oklahoma Legislature enacted Title 21, Section 701.10b, into law, presumably to codify and clarify the OCCA’s rulings, which are discussed below. That provision remains in effect.

In *Murphy*, the OCCA defined intellectual disability as significantly subaverage intellectual and adaptive functioning that manifested before age 18.⁵⁴ Under *Murphy*, “no person shall be eligible to be considered mentally retarded unless he or she has an intelligence quotient of 70 or below.”⁵⁵ *Murphy* also provided that, unless it was resolved prior to trial, intellectual disability would be decided during the sentencing phase of a capital trial.⁵⁶ The defendant in that case, Vandor Murphy, had the burden of proving his intellectual disability by a preponderance of the evidence—that is, “more probable than not.”⁵⁷

In *Lambert v. State*, the OCCA remanded the petitioner’s case to the trial court for a jury determination of intellectual disability.⁵⁸ Ultimately, the court granted the petitioner relief under *Atkins*.⁵⁹ In its decision remanding the case for a hearing, the OCCA noted:

Lambert’s criminal conviction and death sentence are not relevant to this issue [intellectual disability]. The jury should not hear evidence of the crimes for which Lambert was convicted, unless particular facts of the case are relevant to the issue of mental retardation. Any such evidence should be narrowly confined to that issue.⁶⁰

A few years after *Lambert*, the OCCA reaffirmed that a determination of intellectual disability is a separate consideration from the criminal conduct of a defendant. In 2006, in *Blonner v. State*, the OCCA set out a procedure providing for a pretrial jury determination of intellectual disability. The OCCA specified that “[t]he potential jurors should not be death qualified, because the sole issue to be determined is whether the defendant is mentally retarded” and again emphasized that “[e]vidence relating to the crime with which the defendant is charged is not admissible unless that evidence is specifically relevant to refute the defendant’s evidence of mental retardation.”⁶¹ This is consistent with the recommendation of the AAIDD, which states that criminal

⁵⁰ *Id.* at 2001.

⁵¹ *Id.* (“This Court agrees with the medical experts that when a defendant’s IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.”).

⁵² See *Murphy v. State*, 54 P.3d 556 (Okla. Crim. App. 2002). In 2002, then-Governor Frank Keating vetoed a bill from the Oklahoma Legislature that would have limited the execution of capital defendants with intellectual disability, shortly before *Atkins* was decided. *Id.* at 566, n.14.

⁵³ See, e.g., *Lambert v. State*, 71 P.3d 30 (Okla. Crim. App. 2003); *State v. Lane*, 87 P.3d 629, 632–33 (Okla. Crim. App. 2004); *Lambert v. State*, 126 P.3d 646 (Okla. Crim. App. 2003); *Blonner v. State*, 127 P.3d 1133 (Okla. Crim. App. 2006).

⁵⁴ *Murphy*, 54 P.3d at 567.

⁵⁵ *Id.*

⁵⁶ *Id.* at 568.

⁵⁷ *Id.* at 568, 571.

⁵⁸ 71 P.3d 30.

⁵⁹ See *Lambert*, 126 P.3d 646.

⁶⁰ *Lambert*, 71 P.3d at 31.

⁶¹ *Blonner*, 127 P.3d at 1140–41.

behavior should not be used to infer a level of adaptive functioning.⁶²

Shortly after *Blonner*, the Oklahoma Legislature enacted Section 701.10b, which changed the definition of intellectual disability, as well as the procedure for raising such claims. Under this new provision, intellectual disability is defined as “significantly subaverage general intellectual functioning, existing concurrently with significant limitations in adaptive functioning,” and “the onset of the mental retardation must have been manifested before the defendant attained the age of eighteen (18) years.”⁶³ Under Oklahoma law, subaverage intellectual functioning requires that a defendant: 1) have an IQ test score of 70 or below, considering the particular test’s “standard measurement of error,”⁶⁴ and 2) shall *not* have an IQ test score of 76 or above—meaning that a single IQ test score of 76 or above precludes a finding of mental retardation.⁶⁵ Although the preclusive effect of an IQ score of 76 or above is clear, the practical effect of the statutory language referring to a particular test’s “standard measurement of error” is unclear, because not all IQ scores, especially scores found in older records, will carry with them information about the standard measurement of error for the test at issue.

Deficits in adaptive functioning are defined as “significant limitations in two or more of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health, safety, functional academics, leisure skills, and work skills.”⁶⁶ Historical records—such as school, employment, and medical records—can be critical to making a retrospective determination of intellectual disability, but may be difficult to obtain in cases involving older defendants.⁶⁷ Because a diagnosis of intellectual disability is based on deficits in intellectual functioning and adaptive behavior, it does not rest solely on a test score.

Furthermore, Oklahoma law provides that a defendant may choose to have the trial judge determine pretrial whether the defendant is intellectually disabled or, instead, to have the jury make this determination during the capital sentencing phase—that is, after the jury has heard the guilt/innocence phase evidence and convicted the defendant of first-degree murder. As a result, the law imposes a higher burden of proof on defendants who seek a pretrial determination. Specifically, if a defendant requests a pretrial judicial determination of intellectual disability, he or she must prove intellectual disability by “clear and convincing” evidence. By contrast, the defendant’s burden at sentencing is to make this showing by a “preponderance” of the evidence.⁶⁸

Under Oklahoma’s current statute, a capital defendant with multiple IQ scores—for example, 71 and 76—would appear to meet the threshold requirement of an IQ of 70 or below (considering the standard error of

⁶² See AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, USER’S GUIDE: INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 18 (2012) (“Distinguish between adaptive behavior and problem behavior(s). They are independent constructs and not opposite poles of a continuum. Information regarding problem behavior does not inform the clinician regarding the person’s adaptive behavior.”); *id.* at 20 (“Do not use past criminal behavior or verbal behavior to infer level of adaptive behavior. The diagnosis of intellectual disability is based on meeting three criteria: significant limitations in intellectual functioning; significant limitations in adaptive behavior as expressed in conceptual, social, and practical adaptive skills; and age of onset prior to age 18. The diagnosis of ID is not based on the person’s ‘street smarts,’ behavior in jail or prison, or ‘criminal adaptive functioning.’”). Leading experts on intellectual disability likewise agree with the AAIDD on this point. See, e.g., Gilbert S. Macvaugh III & Mark D. Cunningham, Atkins v. Virginia: *Implications and Recommendations for Forensic Practice*, 37 J. PSYCHIATRY & L. 131, 169 (2009) (“Evaluators are discouraged from utilizing criminal behavior to ascertain the presence or absence of deficits in adaptive functioning.”); see also Stephen Greenspan, *The Briseno Factors*, in THE DEATH PENALTY AND INTELLECTUAL DISABILITY 219, 228 (Edward A. Polloway ed., 2013). Texas is the only state that has adopted a legal (but explicitly non-clinical) test for consideration of past criminal behavior in assessing intellectual disability. See *Ex parte Briseno*, 135 SW3d 1 (Tex. Crim. App. 2004). The U.S. Supreme Court is currently considering the constitutionality of Texas’s legal requirements for finding intellectual disability. *Moore v. Texas*, No. 15-797 (U.S. argued Nov. 29, 2016).

⁶³ See OKLA. STAT. tit. 21, tit. 21, § 701.10b; see also *Murphy*, 54 P.3d 336.

⁶⁴ See OKLA. STAT. tit. 21, § 701.10b(C).

⁶⁵ *Id.* (“[I]n no event shall a defendant who has received an intelligence quotient of seventy-six (76) or above on any individually administered, scientifically recognized, standardized intelligence quotient test . . . be considered mentally retarded.”). In a forensic setting, test subjects may have an incentive to perform poorly on an IQ test so as to more easily satisfy the intellectual functioning prong of the intellectual disability diagnosis. Mindful of this possibility, experts in psychology and neuropsychology have devised multiple standalone tests and methods for determining whether a test subject is exerting less than full effort during an examination (a phenomenon generally referred to as “malingering”). See generally JOEL E. MORGAN ET AL., NEUROPSYCHOLOGY OF MALINGERING CASES (2008).

⁶⁶ See OKLA. STAT. tit. 21, § 701.10b(A)(2).

⁶⁷ See *Hall*, 134 S. Ct. at 1995.

⁶⁸ Compare OKLA. STAT. tit. 21, § 701.10b(E), with *id.* at § 701.10b(F).

measurement). However, that same defendant would be barred from litigating the issue of intellectual disability because, under the statute, any score of 76 or higher prevents a finding of intellectual disability. And the standard error of measurement is not considered for a score of 76 or above.

In fact, this scenario arose in the case of Michael Dewayne Smith. Smith's case—considered by the OCCA after section 701.10b went into effect—involved IQ test scores of 71, 76, and 79.⁶⁹ The OCCA, in rejecting Smith's claim that his attorney was ineffective for failing to raise the issue of intellectual disability in post-conviction proceedings, stated: "It is clear then, that with two IQ scores of 76 and 79, Smith's current claim fails under the express language of [section] 701.10b."⁷⁰ Given Smith's range of IQ scores, this definitive cutoff is arguably contrary to the U.S. Supreme Court's subsequent opinion in *Hall v. Florida*, in which the Court expressed its "agree[ment] with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."⁷¹

Relatedly, the changes in Oklahoma's procedure have resulted in similarly-situated defendants being treated differently under the law, depending on the time the case was considered. For example, Darrin Pickens, who had an IQ score of 79 (as well as scores of 70, 71, and 76), was granted *Atkins* relief by the OCCA in 2005.⁷² After section 701.10b went into effect in 2006, Michael Dewayne Smith—who had IQ scores almost identical to Pickens—was denied relief, because some of his IQ scores were considered too high under the requirements of the new statute.⁷³

Section 701.10b also encompasses a risk warned of by the OCCA in *Lambert*—that if the intellectual disability determination is made by a jury during the sentencing phase, then the overwhelming evidence of a capital crime presented by the state during the guilt phase of trial could cause "prejudice and confusion of the issues" and "shift[] the focus away from [the defendant's] mental capabilities and to his criminal actions."⁷⁴

Finally, a defendant's higher burden of proof for a pretrial determination of intellectual disability under section 701.10b—of "clear and convincing" evidence—is the same as the burden of proof for competency to stand trial that was found unconstitutional by the U.S. Supreme Court in *Cooper v. Oklahoma*.⁷⁵ In *Cooper*, the Supreme Court looked to common law traditions, as well as the states' historical and current practices, in deciding that use of a clear and convincing evidence standard for competence to stand trial violates due process.⁷⁶ Turning to the fundamental fairness of such a burden, the Supreme Court noted that the "more stringent the burden of proof a party must bear, the more that party bears the risk of an erroneous decision."⁷⁷ Weighing the defendant's interest against the state's interest in that case, the Court concluded that, while the state's interest is "modest," "an erroneous determination of competence"—i.e., finding a defendant competent to stand trial when he is not—"threatens a 'fundamental component of our criminal justice system'—the basic fairness of the trial itself."⁷⁸

Similar to the Supreme Court's analysis in *Cooper*, the overwhelming majority of states with the death penalty

⁶⁹ Smith v. State, 245 P3d 1233 (Okla. Crim. App. 2010).

⁷⁰ *Id.* at 1237.

⁷¹ See *Hall*, 134 S. Ct. at 2001.

⁷² Pickens v. State, 126 P3d 612 (Okla. Crim. App. 2005).

⁷³ *Id.*

⁷⁴ *Lambert*, 126 P3d at 638.

⁷⁵ Cooper v. Oklahoma, 517 U.S. 348 (1996) (finding unconstitutional the requirement that incompetency to stand trial be proven by clear and convincing evidence). After *Cooper*, the standard became preponderance of the evidence. Grant v. State, 205 P3d 1, 8 (Okla. Crim. App. 2009) ("The law may presume a defendant is competent, and require him to shoulder the burden of proving his incompetence by a preponderance of evidence." (citing *Medina v. California*, 505 U.S. 437, 432–33 (1992))).

⁷⁶ *Id.* at 355–62.

⁷⁷ *Id.* at 362–63 (quoting *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 283 (1990)).

⁷⁸ *Id.* at 364 (quoting *United States v. Cronin*, 466 U.S. 648, 653 (1984)).

require that a defendant prove intellectual disability by a preponderance of the evidence, while only five use the clear and convincing standard.⁷⁹ In addition, two states—Oklahoma and North Carolina—use a mixed scheme of clear and convincing evidence for a pretrial judicial determination and preponderance of the evidence for a jury trial determination. This uncommonly high burden of proof can produce a finding that a defendant is *not* intellectually disabled when, as a factual matter, he or she is. The result would be the execution of a person who is not constitutionally eligible for the death penalty—an even graver concern than that presented in *Cooper*.

C. Other Concerns: Severe Mental Illness, Brain Damage, and Mental Age of a Juvenile

The U.S. Supreme Court's capital punishment eligibility rulings in *Roper* (on the age of the defendant at the time the crime occurred) and *Atkins* (on intellectual disability) raise questions about when an execution serves the goals of retribution and deterrence. The Court's discussion of the lesser moral culpability of juveniles and those with intellectual disability (due to their cognitive and behavioral limitations) is also relevant to capital defendants with severe mental illness, severe brain damage, and the mental age of a juvenile. The Court's observation in *Atkins* that persons with intellectual disability may 1) be more apt to falsely confess, 2) have more difficulty presenting compelling mitigation, (3) be impaired in their ability to assist counsel, (4) be generally ineffective witnesses, and (5) have a demeanor that may "create an unwarranted impression of lack of remorse"⁸⁰ also can apply with comparable force to defendants with severe mental illness, brain damage, and the mental age of a juvenile.⁸¹

Indeed, four national organizations—the American Psychiatric Association, the American Psychological Association, the National Alliance for the Mentally Ill (NAMI), and the American Bar Association (ABA)—formally oppose the execution of defendants with severe mental illness.⁸² NAMI's formal position is as follows:

NAMI opposes the execution of persons with serious mental illness or those who are mentally disabled. Generally, NAMI opposes the execution of individuals who when committing the crime had serious mental illness or mental disability. This mental disability or illness must be severe enough that they have a significantly impaired ability to appreciate the consequences or wrongfulness of their actions, exercise rational judgment or control their conduct in conformance with the law. Substance abuse disorders do not meet [these] criteria.⁸³

The ABA's resolution on the subject recommends exempting from execution capital defendants who, at the time of the offense, had intellectual disability, dementia, a traumatic brain injury, or severe mental disorder or disability; the resolution further recommends exempting from execution capital defendants who develop a severe mental disorder or disability after a death sentence has been imposed.⁸⁴ Since the development of this report,

⁷⁹ Eighteen states use the preponderance of the evidence standard: Alabama, Arkansas, California, Idaho, Kentucky, Louisiana, Missouri, Nebraska, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington. Five states use the clear and convincing evidence standard: Arizona, Colorado, Delaware, Florida, and Indiana. Georgia is the only state that requires a defendant to prove intellectual disability beyond a reasonable doubt.

⁸⁰ *Atkins*, 536 U.S. at 320–21.

⁸¹ A 1985 decision of the United States Supreme Court illustrates how mental illness can effectively become an aggravating factor at the sentencing phase of a capital trial. See *Ake v. Oklahoma*, 470 U.S. 68, 86–87 103 S. Ct. 1087, 1098 (1985) ("Ake's [the defendant's] future dangerousness was a significant factor at the sentencing phase. The state psychiatrist who treated Ake . . . testified at the guilt phase that, because of his mental illness, Ake posed a threat of continuing criminal violence. This testimony raised the issue of Ake's future dangerousness, which is an aggravating factor under Oklahoma's capital sentencing scheme, and on which the prosecutor relied at sentencing.")

⁸² See American Bar Association Resolution 122A, <http://www.deathpenaltyinfo.org/documents/122A.pdf> (para 1. is endorsed by American Psychiatric Assoc., American Psychological Assoc. and Mental Health America); *Death Penalty*, NAT'L ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty#sthash.ZNGYJ4tp.dpuf> (last visited Nov. 1, 2016).

⁸³ *Death Penalty*, NAT'L ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-Public-Policy/Death-Penalty#sthash.ZNGYJ4tp.dpuf> (last visited Nov. 1, 2016). Note that NAMI uses the phrase "mentally disabled" to refer to those with intellectual disability.

⁸⁴ American Bar Association Resolution 122A, <http://www.deathpenaltyinfo.org/documents/122A.pdf>.

the ABA has issued a new publication affirming and expanding upon their resolution.⁸⁵

At least one state, Connecticut,⁸⁶ has extended a statutory exemption from the death penalty to an individual whose “mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution.”⁸⁷ Oklahoma has no such exemption.⁸⁸ Finally, Oklahoma law does not exempt from execution defendants with severe brain damage and the mental age of a juvenile.

III. Death Qualifiers and Aggravating Circumstances

The U.S. Supreme Court’s decision in *Gregg* to uphold Georgia’s capital punishment system rested, in part, on the state’s judicial and legislative narrowing of the class of offenders subject to the death penalty.⁸⁹ The cases for which death may be sought are referred to as “death-qualified offenses.” Following the Supreme Court’s decision in *Kennedy v. Louisiana*—which found that, in cases involving crimes against persons, death is appropriate only when the crime included an intentional killing⁹⁰—first-degree murder became a necessary (but not sufficient) condition to qualify an offense as death-eligible.⁹¹

Even if an offense is potentially death-eligible and has been prosecuted as a capital case, a conviction for that offense does not automatically subject the defendant to the death penalty. In making its sentencing determination, a jury must first be convinced, beyond a reasonable doubt, that the prosecution has proved the existence of one or more statutory aggravating circumstances. And in Oklahoma, even if the jury finds that at least one aggravating circumstance exists, the defendant will only receive a death sentence if the jury also determines that death is the appropriate sentence. The jury is never required to sentence the defendant to death.

In practical terms, the combination of the death-qualification requirement (which bears on the charging decision) and aggravating-circumstances requirement (which bears on the penalty decision) is intended to reserve the death penalty for the worst crimes and the worst offenders, as is required by the Eighth Amendment.⁹² In Oklahoma, death qualifiers—used by the prosecution to charge the case as a capital one—are found in the state’s first-degree murder statute, and aggravating circumstances—used by the jury during

⁸⁵ AM. BAR ASS’N, SEVERE MENTAL ILLNESS AND THE DEATH PENALTY (2016), http://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.

⁸⁶ The Connecticut Legislature prospectively repealed the death penalty in 2012, and the Connecticut Supreme Court ruled that it was unconstitutional in 2013, which resulted in life sentences for the 11 defendants who remained on death row.

⁸⁷ CONN. GEN. STAT. §§ 55a, 46a(h)(2) (1994).

⁸⁸ While Oklahoma law allows for the conviction of defendants with mental illness as “guilty with mental defect,” the statutory language seems to anticipate only incarceration as a penalty, not death. OKLA. STAT. tit. 22, § 1161. The law defines this culpability finding as follows: “[T]he person committed the act and was either unable to understand the nature and consequences of his or her actions or was unable to differentiate right from wrong, and has been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged.” *Id.* at § 1161(H)(5). “Antisocial personality disorder” under the law is tied to the definition of DSM-5 or subsequent editions. *Id.* at § 1161(H)(1). A defendant may be found “not guilty by reason of mental illness” (previously termed “not guilty by reason of insanity”) if he or she “committed the act while mentally ill and was either unable to understand the nature and consequences of his or her actions or was unable to differentiate right from wrong, and has *not* been diagnosed with antisocial personality disorder which substantially contributed to the act for which the person has been charged.” OKLA. STAT. tit. 22, § 1161(H)(6) (emphasis added).

⁸⁹ See *Gregg*, 428 U.S. at 196.

⁹⁰ 554 U.S. at 437–58.

⁹¹ The Court in *Kennedy* explicitly declined to address “crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State,” not persons. *Id.* at 437.

⁹² *Atkins*, 536 U.S. at 319.

the sentencing phase—are set forth in Oklahoma’s law governing the capital sentencing process.⁹⁵ Oklahoma’s statutory aggravating circumstances are as follows:

1. The defendant was previously convicted of a felony involving the use or threat of violence to the person;
2. The defendant knowingly created a great risk of death to more than one person;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The murder was especially heinous, atrocious, or cruel;
5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or prosecution;
6. The murder was committed by a person while serving a sentence of imprisonment on conviction of a felony;
7. The existence of a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; or
8. The victim of the murder was a peace officer . . . or correctional employee of an institution under the control of the Department of Corrections, and such person was killed while in performance of official duty.⁹⁴

In Oklahoma, mitigating circumstances—i.e., factors presented to the jury that *disfavor* the imposition of a death sentence—are not statutory (unlike aggravating circumstances). A juror may consider any circumstance he or she finds mitigating in determining the appropriate sentence. Mitigating circumstances need not be found unanimously and are not required to be found beyond a reasonable doubt.⁹⁵ Oklahoma is a weighing state, which means that the jury must find that any aggravating circumstances “outweigh” any mitigating circumstances in order to sentence a defendant to death.⁹⁶ At least one aggravating factor must be found unanimously and beyond a reasonable doubt by the jury before it can even consider a sentence of death.⁹⁷ However, even if a jury finds an aggravating circumstance and finds no mitigating circumstances, or finds that any aggravating circumstances outweigh any mitigating circumstances, the jury can always choose to sentence a defendant to life imprisonment with or without the possibility of parole.⁹⁸

⁹⁵ Oklahoma’s statutory death qualifiers are found in Title 21, Sections 701.7 and 1268.2, and its statutory aggravating circumstances are found in Title 21, Section 701.12. Sections 701.7 and 1268.2 define the death qualifiers that permit a defendant to be *prosecuted* capitally, whereas section 701.12 defines the aggravating circumstances that permit a defendant to be *sentenced* to death.

⁹⁴ OKLA. STAT. tit. 21, § 701.12.

⁹⁵ See OUJI-CR 4-78.

⁹⁶ See OUJI-CR 4-80.

⁹⁷ See OKLA. STAT. tit. 21, § 701.11; see also OUJI-CR 4-78.

⁹⁸ See OUJI-CR 4-80.

A. The “Heinous, Atrocious and Cruel” Aggravating Circumstance

As mentioned, Oklahoma’s statutory aggravating circumstances are meant to reserve the death penalty for only the most serious crimes and offenders. In the wake of *Furman*, many states, including Oklahoma, approved statutes containing an aggravating circumstance that “premised death-eligibility on the sheer depravity of the crime.”⁹⁹ States like Oklahoma that adopted a “heinous, atrocious, or cruel” aggravating circumstance modeled the aggravator on the now-repealed Model Penal Code Section 210.6.¹⁰⁰

In 1987, the U.S. Court of Appeals for the Tenth Circuit held, in *Cartwright v. Maynard*, that Oklahoma’s heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague.¹⁰¹ In a separate case decided a month later, the OCCA required that any murder falling under the heinous, atrocious, or cruel aggravator must include “torture or serious physical abuse.”¹⁰² The U.S. Supreme Court, in *Maynard v. Cartwright*, affirmed the Tenth Circuit’s decision, finding that the words “heinous,” “atrocious,” and “cruel” do not, on their face, offer sufficient guidance to the jury and leave open the possibility that a jury could find that “every unjustified, intentional taking of human life is ‘especially heinous.’”¹⁰³ The heinous, atrocious, and cruel aggravator is still in use today, with the OCCA’s 1987 limiting requirement of “torture or serious physical abuse.” The required factual finding in support of the heinous, atrocious, or cruel aggravating circumstance is that the victim remained conscious and suffered for a period of time during the murder.¹⁰⁴

B. The “Continuing Threat” Aggravating Circumstance

After the nationwide moratorium on executions sparked by *Furman* ended in 1976, the continuing threat aggravator—commonly referred to as “future dangerousness” in other states—increasingly became used as an aggravating factor at the sentencing phase of capital trials. Decided on the same day in 1976 as *Gregg v. Georgia*, which effectively ended the moratorium on executions by holding Georgia’s revamped capital punishment scheme constitutional,¹⁰⁵ *Jurek v. Texas* upheld the use of “future dangerousness” as a criterion in the sentencing phase of a capital case and opened the door for its use as an aggravating factor in capital cases.¹⁰⁶

⁹⁹ Andy Twang, *Deserving of Life: A Mitigation Factor Approach to the Narrowing Mandate in Capital Sentencing*, 52 HARV. J. ON LEGIS. 509, 520 (2015).

¹⁰⁰ *Id.* at 520 n.80; see also MODEL PENAL CODE § 2106.6(3)(h) (AM. LAW INST. 1962). In rescinding the whole of Section 210.6 from the Model Penal Code, the American Law Institute (ALI) noted that the section “was an untested innovation” when it was adopted in 1962, and it listed multiple reasons for doubting whether “the capital-punishment regimes in place in three-fourths of the states . . . meet or are likely ever to meet basic concerns of fairness in process and outcome,” including (1) the tension between clear statutory identification of which murders should receive the death penalty and the constitutional requirement of individualized determination; (2) the difficulty of limiting the list of aggravating factors so that they do not cover a large percentage of murderers; (3) the near impossibility of addressing by legal rule the conscious or unconscious racial bias within the criminal-justice system, which has resulted in statistical disparity in death sentences based on the race of the victim; (4) the enormous economic costs of administering a death-penalty regime, combined with studies showing that the legal representation provided to some criminal defendants is inadequate; and (5) the likelihood, especially given the availability and reliability of DNA testing, that some persons sentenced to death will later, and perhaps too late, be shown to not have committed the crime for which they were sentenced.” AM. LAW INST., REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY 4–5 (2009).

¹⁰¹ *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987).

¹⁰² *Stouffer v. State*, 742 P.2d 562, 565 (Okla. Crim. App. 1987) (restricting the heinous, atrocious, and cruel aggravator those murders in which torture or serious physical abuse is present).

¹⁰³ *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) (affirming the United States Court of Appeals for the Tenth Circuit’s decision in *Cartwright v. Maynard*, 822 F.2d 1477 (10th Cir. 1987)); see also OKLA. STAT. TIT. 21, § 701.12(4) (“The murder was especially heinous, atrocious, or cruel.”).

¹⁰⁴ See, e.g., *Martinez v. State*, 984 P.2d 813 (Okla. Crim. App. 1999) (upholding heinous, atrocious, cruel aggravator and noting that victim was conscious for some period of time before death); *Ledbetter v. State*, 935 P.2d 880 (Okla. Crim. App. 1997) (same); *Harmon v. State*, 248 P.3d 918 (Okla. Crim. App. 2011) (same); *Brogie v. State*, 695 P.2d 538 (Okla. Crim. App. 1985) (same); *Murphy v. Sirmons*, 497 F. Supp. 2d 1237 (E.D. Okla. 2007) (same); *Le v. State*, 947 P.2d 535 (Okla. Crim. App. 1997) (same); *Powell v. State*, 906 P.2d 765 (Okla. Crim. App. 1995) (same); *Jones v. State*, 201 P.3d 869 (Okla. Crim. App. 2009) (same). See also OUJI-CR 4-73 (uniform jury instruction defining “heinous, atrocious, or cruel”).

¹⁰⁵ See *Gregg*, 428 U.S. 153.

¹⁰⁶ It is important to note that the testimony in *Jurek v. Texas* regarding future dangerousness was given by a lay witness—this means that the Court has tacitly approved the use of lay testimony for violence risk prediction, which further undermines the reliability of predictions in capital cases. In *Johnson v. Texas*, the Court affirmed the use of future dangerousness as a statutory aggravator where anecdotal evidence of the defendant’s violent behavior in the community was presented by lay witnesses. 509 U.S. 350, 355 (1993). See also Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 50 (1997) (discussing the U.S. Supreme Court’s holding in *Johnson v. Texas*).

Four states, including Oklahoma, include a statutory aggravating circumstance as to whether a capital defendant will remain a “continuing threat” or present a “future danger” to society.¹⁰⁷ The specific language of Oklahoma’s statute is whether there exists “a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”¹⁰⁸ This factor commonly is referred to as the “continuing threat aggravator.”¹⁰⁹ Between 1976 and early 2009, the continuing threat aggravating factor was found by the jury in 65 of 89 of the cases ending in execution in Oklahoma.¹¹⁰

The OCCA has held that the “callousness” of a capital crime and the defendant’s lack of remorse are adequate to prove the continuing-threat aggravator.¹¹¹ In addition to these two factors, the OCCA also has allowed consideration of a defendant’s prior criminal history, threatening statements, and attempts to prevent others from calling law enforcement when determining whether the state has shown that a defendant constitutes a continuing threat to society.¹¹² Although the OCCA has looked to these factors in upholding a jury’s finding that the defendant poses a continuing threat, they do not appear in the statute. Oklahoma’s case law does not specifically define the operative terms set forth in the text of the continuing threat aggravating circumstance, *viz.*, “probability,” “criminal acts of violence,” “continuing threat to society,” and “society.”¹¹³

Jury determinations as to whether a defendant poses a continuing threat of violence play a prominent role in capital cases across the country:

Jury anticipation of future violence by a capital defendant played a role in a substantial proportion of the 1158 executions carried out in the United States between 1976 and April 2009. . . . [These determinations were] made in all 436 executions carried out by Texas [as required by Texas law], was the sole aggravating factor in 24 of Virginia’s 103 executions, and was one of the aggravating factors in 50 others. . . .¹¹⁴

Texas, Oklahoma, and Virginia lead the nation in executions during the modern era of the death penalty and account for about half of the post-*Furman* executions in the United States.¹¹⁵ While a direct connection is unclear between the rate of executions and a finding that a capital defendant will commit future violence, research has shown that the idea of “future dangerousness” is “among the most compelling aggravating factors in the jury’s death deliberations,” even if not formally asserted or overtly argued by the prosecution.¹¹⁶

The reliability of violence risk prediction is, however, highly suspect, and social science research demonstrates that jurors and experts alike regularly overestimate the odds that capital defendants will commit future acts

¹⁰⁷ The four states are Idaho, Oklahoma, Virginia, and Wyoming. IDAHO CODE § 19-2515(9)(i) (2016); OKLA. STAT. tit. 21, § 701.12(7) (2015); VA. CODE §§ 19.2–264.2, 264.4(c) (2016); WYO. STAT. § 6-2-102(h)(xi) (2015); *see also* Mark D. Cunningham et al., *Capital Jury Decision-Making: Limitations of Predictions of Future Violence*, 15 PSYCHOL., PUB. POL’Y & L. 223, 224 (2009).

¹⁰⁸ OKLA. STAT. tit. 21, § 701.12(7).

¹⁰⁹ In two other states—Texas and Oregon—this aggravator is a special issue that must be found by the jury in order to sentence a defendant to death. OR. REV. STAT. § 163.150(1)(b)(B) (2016); TEX. CODE CRIM. PROC. art. 37.071(b)(1) (2016). Oregon currently has a moratorium on executions. Shelby Sebens, *New Oregon Governor Kate Brown to Extend Death Penalty Moratorium*, REUTERS, Feb. 20, 2015, <http://www.reuters.com/article/us-usa-politics-oregon-idUSKBNOL02E420150220>.

¹¹⁰ Cunningham et al., *supra* note 107, at 224.

¹¹¹ *Johnson v. State*, 911 P.2d 918, 929 (Okla. Crim. App. 1995).

¹¹² *Medlock v. State*, 887 P.2d 1535, 1549 (Okla. Crim. App. 1994).

¹¹³ *See Johnson v. State*, 665 P.2d 815, 821 (Okla. Crim. App. 1982); *See Salazar v. State*, 975 P.2d 515, 526 (Okla. Crim. App. 1998) (noting continuing threat aggravator is not limited to any particular segment of society); *see also McCarty v. State*, 977 P.2d 1116, 1137 (Okla. Crim. App. 1998), *aff’d by Ramano v. Gibson*, 239 F.3d 1156, 1177 (10th Cir. 2001).

¹¹⁴ Cunningham et al., *supra* note 107, at 225.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 225–26. The U.S. Supreme Court has explicitly held that a defendant’s future dangerousness may be considered by juries “in fixing appropriate punishment” in capital cases. *Simmons v. South Carolina*, 512 U.S. 154, 163 (1994).

of violence.¹¹⁷ Social science research further suggests that convicted murders are not especially prone to commit serious acts of violence. For example, a 2000 study examining the records of more than 6,390 convicted murderers in the Texas prison system showed that the vast majority of murderers in prison do not have disciplinary records of serious institutional violence: After an average of 4.33 years in prison, “one in one thousand inmates had committed a homicide” and “[o]ne-half of one percent of the incarcerated murderers were responsible” for a total of 33 aggravated assaults.¹¹⁸ Recognizing the fallibility of judgments concerning an individual’s propensity to commit criminal acts of violence, the American Psychiatric Association has long maintained that “psychiatric testimony on future dangerousness impermissibly distorts the fact-finding process in capital cases” because “[t]he forecast of future violent conduct on the part of a defendant in a capital case is, at bottom, a lay determination, not an expert psychiatric determination.”¹¹⁹

IV. Felony Murder

In addition to the issues discussed above—intellectual disability, mental illness, brain damage, mental age of a juvenile, and the “heinous, atrocious, or cruel” and “continuing threat to society” aggravating circumstances—Oklahoma’s capital punishment system also allows a defendant to be sentenced to death who has not actually taken another’s life.

Allowing for a “murder” conviction for an accomplice to a felony (that resulted in a death) who did not actually take another’s life is generally referred to as the *felony-murder rule*.¹²⁰ The rule’s constitutionality has been examined by the U.S. Supreme Court in two cases—*Enmund v. Florida* and *Tison v. Arizona*—and, while the Court has upheld the rule, it has also limited its application. In *Enmund*, the defendant, Earl Enmund, had served as the getaway driver to a robbery but “ha[d] no intention or purpose that life [would] be taken.”¹²¹ The Court also placed great weight on the fact that the likelihood of a killing in the course of a robbery was not substantial enough to suggest that Enmund could or should have predicted that his accomplices would kill the robbery victims.¹²² Accordingly, the Court held that his culpability “must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt.”¹²³ And because robbery, though “a serious crime deserving serious punishment,” was not found by the Court to be “so grievous an affront to humanity that the only adequate response may be the penalty of death,”¹²⁴ Enmund’s death sentence violated the Eighth Amendment.¹²⁵

¹¹⁷ See, e.g., Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 ALB. L. REV. 843, 848–50 (1990) (using data from Texas to show that “dangerousness is vastly over-predicted, and that predictions of nondangerousness are far more accurate than are predictions of dangerousness”); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984); Thomas J. Reidy, Mark D. Cunningham & Jonathan R. Sorensen, *From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana*, 28 CRIM. JUST. & BEHAV. 62 (2001).

¹¹⁸ See Jonathon R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1231, 1236, 1261–62 (2000).

¹¹⁹ Brief for Am. Psychiatric Ass’n as Amicus Curiae Supporting Petitioner at 3, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080). Because the question of whether a defendant poses a continuing threat is a critical inquiry in Texas capital cases, studies have been conducted focusing on the reliability of these predictions in Texas capital cases, specifically. A 2004 review undertaken by the Texas Defender Service (TDS) found that “state-paid expert predictions [regarding defendants’ propensity to commit criminal acts of violence] were inaccurate 95% of the time.” TEX. DEFENDER SERV., DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS 34 (2004). TDS used archival records to identify 133 inmates in the Texas Department of Criminal Justice who, since the reinstatement of the death penalty in 1976, “(1) were the subject of state expert testimony at trial declaring them a ‘continuing threat to society’ and, (2) received a death sentence at the time of their trial.” *Id.* at 21. The disciplinary records of these inmates revealed that eight inmates (3%) “engaged in assaultive behavior requiring treatment beyond first aid,” 31 inmates (20%) “ha[d] no record[] reflecting disciplinary violations,” and the remaining 116 inmates (75%) “committed disciplinary infractions involving conduct not amounting to serious assaults.” *Id.* at 23.

¹²⁰ *Enmund v. Florida*, 458 U.S. 782, 786 (1982).

¹²¹ *Id.* at 799.

¹²² *Id.* at 799–800.

¹²³ *Id.* at 801.

¹²⁴ *Id.* at 797 (quoting *Gregg v. Georgia*, 428 U.S. 153, 184 (1976)).

¹²⁵ *Id.* at 801.

By contrast, in *Tison v. Arizona*, the Supreme Court upheld a death sentence on a theory of accomplice liability because, unlike Enmund, defendants Ricky and Raymond Tison had sufficiently participated in the underlying felonies—which involved breaking their father, Gary Tison, and another convicted murderer out of prison, auto theft, and the kidnapping of four captives (who were later murdered by the two escaped inmates)—so as to develop “the culpable mental state of reckless indifference to human life.”¹²⁶ The Court explained that the Tison brothers had not merely sat “in a car away from the actual scene of the murders acting as the getaway driver to a robbery,” as did Enmund, but were “actively involved in every element of the kidnaping-robbery and [were] physically present during the entire sequence of criminal activity culminating in the murder of the Lyons family and the subsequent flight.”¹²⁷

Notwithstanding the limiting principles of *Enmund* and *Tison*, the application of capital punishment to defendants who have not themselves committed a murder raises concerns that death sentences will not be reserved for the worst offenders.¹²⁸ However, the Commission’s review of Oklahoma capital cases did not uncover a case in this state in which the felony-murder rule was applied injudiciously—that is, inconsistently with the Supreme Court’s sensible holding in *Tison* limiting the imposition of the death penalty to an accomplice who was a major participant in a felony and whose conduct demonstrated a reckless indifference to human life.¹²⁹

V. Competency to be Executed

A. Background

Under the law, there are different definitions of legal “competency” depending on the procedural posture of a case. For instance, the federal and Oklahoma standard for competency to stand trial requires that a defendant have both a rational and actual (or factual) understanding of the proceedings and be able to consult with his or her attorney.¹³⁰ However, competency to be executed has a different definition and entails a different procedure from competency to stand trial.

In *Ford v. Wainwright*,¹³¹ the U.S. Supreme Court held that a person who is insane shall not be executed:

It is as true today as [in 1680] . . . that most men and women value the opportunity to prepare, mentally and spiritually, for their death. Moreover, today as at common law, one of the death penalty’s critical justifications, its retributive force, depends on the defendant’s awareness of the penalty’s existence and purpose. Thus, it remains true that executions of the insane both impose a uniquely cruel penalty and are inconsistent with one of the chief purposes of executions generally.¹³²

As in its subsequent decision in *Atkins*, the Court left it up to the states to determine the procedure for

¹²⁶ 481 U.S. 437, 451 (1987).

¹²⁷ *Id.* at 458.

¹²⁸ See Jolie McCullough, *Execution Halted for Jeff Wood, Who Never Killed Anyone*, TEX. TRIBUNE, Aug. 19, 2016, <https://www.texastribune.org/2016/08/19/execution-halted-jeff-wood-who-never-killed-anyone> (noting that Texas’s law of the parties led to the imposition of a death sentence against defendant Jeffrey Woods “even though he was sitting outside in the truck” while his accomplice to a robbery, Daniel Reneau, killed a clerk inside a convenience store).

¹²⁹ *Id.*

¹³⁰ See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (to be competent to stand trial, defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and must have “a rational as well as factual understanding of the proceedings against him”); see also OKLA. STAT. tit. 22, § 1175.1 (defining competency to stand trial); *Middaugh v. State*, 767 P.2d 432, 434 (Okla. Crim. App. 1988) (establishing a two-part test requiring, first, that an accused have a sufficient ability to consult with his or her attorney and, second, that an accused have a “rational and actual understanding of the proceedings against him”).

¹³¹ *Ford*, 477 U.S. at 409–40.

¹³² *Id.* at 421.

determining a defendant's competency to be executed.¹⁵³ In *Panetti v. Quarterman*, however, the Court clarified that, for an execution to be consistent with the standard articulated in *Ford*, a prisoner's comprehension and awareness cannot be based in a delusion so powerful as to "impair the prisoner's concept of reality that he cannot reach a rational understanding of the reason for the execution."¹⁵⁴ Thus, while the petitioner in *Panetti* understood that the state claimed it was seeking his execution for two murders he had committed, he "believe[d] in earnest that the stated reason is a 'sham' and the state in truth want[ed] to execute him 'to stop him from preaching.'" The Court held that this kind of delusion could render an execution unconstitutional, since it could undermine the defendant's rational understanding that he was being executed as punishment for a crime.¹⁵⁵

B. Competency To Be Executed in Oklahoma

The statutes governing competency—or "sanity," as it is termed in the statutes—to be executed in Oklahoma were enacted in 1911 and have not been modified since 1913.¹⁵⁶ The law provides that only the warden has standing to raise the issue of a defendant's competency to be executed.¹⁵⁷ Specifically, if the warden has "good reason to believe that a defendant under judgment of death has become insane, [he] must call such fact to the attention of the district attorney of the county in which the prison is situated."¹⁵⁸ The district attorney in the county where the prison is located must then file a petition in the district or superior court requesting that the court inquire into "the question of [the defendant's] sanity," which must be determined by a jury of 12 persons.¹⁵⁹

As noted by one scholar, "[q]uestions surrounding the legal conception of insanity to be executed have received less than adequate attention in Oklahoma jurisprudence and scholarship," which is likely due to the infrequency of such cases coming before the courts.¹⁴⁰ Indeed, based on current research, a formal judicial inquiry into an Oklahoma capital defendant's competency to be executed has been initiated in only four instances since Oklahoma became a state just over 109 years ago.¹⁴¹

The rarity with which these competency issues are litigated arguably is a function of the law giving only the warden standing to raise the issue—a party less likely to be concerned about a defendant's constitutional rights than the defendant himself or herself. In many other jurisdictions outside Oklahoma, defendants themselves or a "next friend," i.e., an individual appointed as guardian to one who is under a legal disability and who is empowered to bring suit on the latter's behalf, have standing.¹⁴²

When the ability to raise the question of competency to be executed is left solely to the discretion of the executive branch, a defendant is unlikely to receive the substantive and procedural protections required by the U.S. Constitution because prison administrators and correctional officers are not trained as psychiatric professionals and, therefore, are in no position to recognize—let alone diagnose—incompetency.

¹⁵³ *Id.* at 427.

¹⁵⁴ 551 U.S. 950, 958 (2007).

¹⁵⁵ *Id.* at 958-60.

¹⁵⁶ The relevant statutes are OKLA. STAT. tit. 22, §§ 1005–08; Bryan Lester Dupler, *The Uncommon Law: Insanity, Executions, and Oklahoma Criminal Procedure*, 33 OKLA. L. REV. 1, 10 (2002).

¹⁵⁷ OKLA. STAT. tit. 22, § 1005.

¹⁵⁸ See OKLA. STAT. tit. 22, § 1005. Oklahoma State Penitentiary, which houses male death row inmates, is located in Pittsburg County. Mabel Bassett Correctional Center, which houses female death row inmates, is located in Pottawatomie County.

¹⁵⁹ Dupler, *supra* note 156, at 10. If considered by a jury, the issue of a defendant's competency to be executed would be decided by a jury in Pittsburg or Pottawatomie Counties, where death row inmates are housed.

¹⁴⁰ *Id.* at 2.

¹⁴¹ *Mitts v. State*, 170 P.2d 565 (Okla. Crim. App. 1946) (death sentence later vacated, 345 P.2d 915); *Bingham v. State*, 169 P.2d 511 (Okla. Crim. App. 1946) (affirming the jury's determination of sanity to be executed and holding the court has no authority to review the jury's determination); *In re Van Woudenberg*, No. C-94-585 (Okla. Dist. Ct. July 10, 2001); *Allen v. State*, 265 P.3d 754, 755 (Okla. Crim. App. 2011) (noting that the warden "initiated proceedings [pursuant to OKLA. STAT. tit. 22, § 1005] so that the question of Allen's sanity could be adjudicated").

¹⁴² See, e.g., LA. REV. STAT. § 45:567.1 (giving standing to a capital defendant, next friend and the secretary of the Department of Corrections).

The U.S. Court of Appeals for the Tenth Circuit has ruled that Oklahoma's statute designating the warden as the gatekeeper of the process for competency to be executed is constitutional.¹⁴³ If the warden refuses to find that the defendant is incompetent, then the only question before a reviewing court is whether the warden was reasonable in finding that he or she lacked a "good reason" to doubt a defendant's competency to be executed; if the court upholds the warden's finding, then the defendant cannot seek a jury's consideration of the evidence showing that he or she is, in fact, not competent to be executed.

This very situation recently occurred in Oklahoma. In 2015, a federal district court remanded Benjamin Cole's case to the state court for a determination of whether the warden, who refused to request a jury trial on the issue, had "good reason" to believe that Cole was incompetent to be executed.¹⁴⁴ After holding a hearing to determine whether the warden had acted reasonably, the state court concluded that the warden had "good reason" to believe that Cole was competent to be executed.¹⁴⁵ Because the trial court determined that there was "good reason" for the warden's belief that Cole was competent, Cole was not entitled to a jury trial on the question of his competency to be executed.

As stated by the U.S. Supreme Court in *Ford v. Wainwright*,

Historically, delay of execution on account of insanity was not a matter of executive clemency (ex mandato regis) or judicial discretion (ex arbitrio legis); rather, it was required by law (ex necessitate legis). Thus, history affords no better basis than does logic for placing the final determination of a fact, critical to the trigger of a constitutional limitation upon the State's power, in the hands of the State's own chief executive. In no other circumstance of which we are aware is the vindication of a constitutional right entrusted to the unreviewable discretion of an administrative tribunal.¹⁴⁶

Ford raises serious concerns as to the constitutionality of Oklahoma's statute empowering the warden—and only the warden—to raise the issue of an inmate's competency to be executed, for it vests "the final determination of a fact, critical to the trigger of a constitutional limitation upon the State's power," in the hands of an executive officer of the state.¹⁴⁷ Because the statute gives standing only to the warden to raise the issue of a condemned inmate's competency to be executed,¹⁴⁸ Oklahoma law effectively allows for the execution of an inmate without a merits determination as to competence, provided the warden does not, on his or her own initiative, raise the issue of the inmate's competency.

VI. Conclusion and Recommendations

Because of its severity, capital punishment should be limited only to those offenders who are among "the worst of the worst." As recounted in this chapter, the law accomplishes this narrowing goal in a variety of ways—namely, by disallowing death sentences for the intellectually disabled and youthful offenders, and by narrowing the class of first-degree murder cases for which a death sentence may be imposed through statutory death-qualifiers and aggravating circumstances. These measures collectively reflect society's growing appreciation for the heightened culpability that must be present before a defendant may be sentenced to death. As a related measure, the prohibition of the execution of the mentally ill guards against the cruel application of the death

¹⁴³ See, e.g., *Ochoa v. Trammell*, 504 Fed. App'x 705, 708 (10th Cir. 2012).

¹⁴⁴ *Cole v. Trammell*, No. 15-CV-049-GKF-PJC, 2015 U.S. Dist. LEXIS 88412 (N.D. Okla. July 8, 2015).

¹⁴⁵ See Cary Aspinwall, *Benjamin Cole and the 'Bakersfield Prophecy'*, THE FRONTIER, Aug. 29, 2015, <https://www.readfrontier.com/investigation/benjamin-cole-and-the-bakersfield-prophecy>.

¹⁴⁶ *Ford*, 477 U.S. at 416 (internal citations omitted).

¹⁴⁷ *Id.*

¹⁴⁸ OKLA. STAT. tit. 22, § 1005.

penalty by ensuring that its retributive ends are understood by the condemned inmate. Given the importance of reserving capital punishment only for the most deserving of offenders, the Commission makes the following recommendations:

Recommendation 1:

Because it is unconstitutional to execute a defendant who is intellectually disabled/mentally retarded, a defendant should be required to prove his or her intellectual disability/mental retardation only by a preponderance of the evidence, regardless of whether the determination is made by a judge or a jury and regardless of whether the determination is made before or during the defendant's murder trial.

There is little justification for raising a defendant's burden of proof to the "clear and convincing" evidence standard when the defendant elects to argue ineligibility for the death penalty to the trial judge, rather than to the jury. Moreover, given the important values at stake in avoiding the execution of the intellectually disabled, the proof required to establish one's intellectual disability should not be so onerous that the criminal justice system risks applying the death penalty in constitutionally inappropriate cases.

Recommendation 2:

In light of *Hall v. Florida*, Oklahoma law and the Oklahoma Uniform Jury Instructions should be amended to clarify that capital defendants should be permitted to attempt to establish their ineligibility for a death sentence on the basis of intellectual disability/mental retardation if they have at least one IQ score in the range of 71–75 or lower. In addition, capital defendants with at least one IQ score of 75 or less should be permitted to attempt to establish intellectual disability/mental retardation regardless of whether they have one or more IQ scores of 76 or higher.

To give effect to the U.S. Supreme Court's holding in *Hall v. Florida*, Oklahoma law should permit capital defendants to argue they are intellectually disabled and ineligible for the death penalty when they have one or several IQ test scores within those tests' standard error of measurement for significantly subaverage intellectual functioning. As a practical matter, this means permitting defendants to raise the issue of their intellectual disability when they have one or more IQ test scores within the range of 71 to 75 or lower, as most IQ tests set a score of 70 as two standard deviations below the mean and, at that number, have a standard error of measurement of plus or minus five points. This will ensure that Oklahoma errs on the side of not sentencing intellectually disabled defendants to death.

Likewise, Oklahoma law should not prohibit capital defendants from arguing that they are intellectually disabled simply because they have an IQ test score above 75. Any number of factors can produce outlier results, including errors in the administration of the test. Allowing an outlier score to foreclose further inquiry into a defendant's true intellectual capacity is potentially violative of *Hall v. Florida* and unduly risks imposing the death penalty in improper cases.

Finally, the jury instruction given to capital jurors when the defendant's intellectual disability is at issue should reflect the parameters of what constitutes intellectual disability, pursuant to *Hall v. Florida*. As fact-finders, jurors depend upon the trial court for guidance in carrying out their responsibilities, and the court's instructions are of even greater importance when they concern a technical subject that could determine whether a death sentence may be imposed.

Recommendation 3:

Because it is unconstitutional to execute someone who is incompetent/insane at the time of execution, Oklahoma law should be amended to permit persons other than the warden to raise the issue of the condemned inmate's competency to be executed. The prosecution, the condemned inmate's counsel, the inmate's legal guardian, the warden of the facility where the inmate is incarcerated, or a court sua sponte should all be allowed to raise the issue of the inmate's competency to be executed, pursuant to the standards set forth in *Ford v. Wainwright* and *Panetti v. Quarterman*.

As indicated in the chapter, Oklahoma only empowers the warden to raise the issue of a condemned inmate's competency to be executed. Although the warden, as custodian of the inmate, may have information relevant to this inquiry, the inmate's counsel and legal guardian can be expected to more zealously advocate on an inmate's behalf, particularly if the inmate is of questionable competency. Accordingly—and as is the case in most (if not all) other capital jurisdictions—Oklahoma law should, at minimum, expand the prerogative to raise this issue to include those individuals more likely to act in the best interests of the inmate.

Recommendation 4:

Because it is unconstitutional to execute someone who is incompetent/insane at the time of execution, Oklahoma law should be amended to provide that if it can be shown by a preponderance of the evidence that a condemned inmate is incompetent/insane, the state should not be allowed to execute that inmate. If such a finding is made, the state should only be subsequently allowed to execute the inmate if it is able to show, by a preponderance of the evidence at a later evidentiary hearing, that the defendant has become competent to be executed.

Just as prevailing standards of decency prohibit sentencing to death individuals who suffer from intellectual disabilities, so too do they prohibit carrying out a death sentence against individuals who lack a rational and factual understanding of the proceedings intended to deprive them of their lives. No matter how terrible the condemned inmate's crimes, our society is measured against the principles that we have long espoused and given the force of law. Accordingly, the showing necessary to prevent a death sentence from being carried out in violation of the Constitution should not be so onerous that the system tends to err on the side of ignoring, rather than upholding, these time-honored principles.

Clemency

In the death penalty system, clemency refers to a grant of leniency, mercy, or “grace” in the form of a pardon, a commutation, or a reprieve (or a combination thereof).¹ A pardon grants an inmate an exemption from punishment,² but is not, by itself, a declaration of “actual innocence.” A commutation alters a death sentence to a lesser penalty—for example, life without parole. A reprieve or a “stay,” is a delay in an execution, but does not alter a sentence.³

I. Introduction

A. Historical Overview

In the seventeenth and eighteenth centuries—before appellate courts were established—clemency was the only means of correcting legal errors during criminal trials.⁴ Prior to the creation of penitentiaries, the death penalty was mandatory for all felonies and even some minor crimes in the United States.⁵ Clemency decisions considered the severity of a crime, as well as an offender’s age and criminal history to ensure that the punishment was proportionate to the offense.⁶ Contemporary capital sentencing schemes in the U.S. were later enacted to serve this function.⁷

The U.S. Supreme Court first defined executive clemency as an “act of grace,”⁸ and has interpreted the executive’s clemency power broadly.⁹ Clemency, however, was “not a private act of grace from an individual happening to possess power,” wrote Justice Holmes in 1927.¹⁰ Instead, he emphasized, executive clemency was “part of the Constitutional scheme.”¹¹ In *Gregg v. Georgia*,¹² the Court noted that a capital punishment system that included a prohibition on executive clemency would be “totally alien to our notions of criminal justice.”¹³

¹ Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. L. 37, 40-2 (2009).

² *Id.* at 39.

³ *Id.*; Nicole F. Dailo, “Give me Dignity by Giving me Death”: Using Balancing to Uphold Death Row Volunteers’ Dignity Interests Amidst Executive Clemency, 23 S. CAL. REV. L. & SOCIAL JUSTICE 249, 253 (2014).

⁴ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 738–39 (Kindle Edition 2003).

⁵ EVAN J. MANDREY, *A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICAN* 5 (W. W. Norton & Co., 1st ed. 2014) (Kindle Edition).

⁶ Banner, *supra* note 4, at 781–83.

⁷ *Id.* at 773–77.

⁸ See James R. Acker & Charles S. Lanier, *May God—or the Governor—Have Mercy: Executive Clemency and Executions in Modern Death Penalty Systems*, 36 CRIM. L. BULLETIN 200, 206 (2000), <http://www.deathpenaltyinfo.org/documents/AckerClemency.pdf>; *United States v. Wilson*, 32 U.S. 150, 260 (1833).

⁹ See Acker, *supra* note 8; see, e.g., *Schick v. Reed*, 419 U.S. 256, 266 (1974); *Ex parte Wells*, 59 U.S. 307 (1853).

¹⁰ *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

¹¹ See Acker, *supra* note 8; *Biddle*, 274 U.S. at 486.

¹² See *Overview*.

¹³ *Gregg v. Georgia*, 428 U.S. 153, 199 n.50 (1976) (noting that in the federal system, it “also would be unconstitutional to prohibit a President from deciding, as an act of executive clemency, to reprieve one sentenced to death); see also Acker, *supra* note 8.

In 1993, the U.S. Supreme Court further recognized the role of clemency as a “fail safe” in our criminal justice system.”¹⁴ The Court “placed extreme confidence in the clemency function to remedy wrongful convictions.”¹⁵ In holding that a death row inmate’s claim of actual innocence—absent another constitutional violation in the case—was not a ground for relief,¹⁶ the Court noted that the petitioner was not without an avenue to present his innocence claim. It asserted that state clemency processes were available to the petitioner, and that clemency is “the historic remedy for preventing miscarriages of justice where the judicial process has been exhausted.”¹⁷

The U.S. Supreme Court has also considered what due process rights a death row inmate is entitled to during the clemency process.¹⁸ In 1998, the Court, reiterating earlier decisions, stated that clemency decisions are “rarely, if ever, appropriate subjects for judicial review” and preferred to leave such decisions within “the authority of the executive.”¹⁹ At the same time, some constitutional safeguards are required, and thus, courts may have to intervene, to avoid a completely arbitrary clemency process

Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process.²⁰

In the early half of the twentieth century, governors granted clemency in about 20 to 25 percent of death penalty cases.²¹ Since the U.S. Supreme Court decided *Gregg v. Georgia* in 1976, clemency figures have significantly decreased.²² One out of every four or five death sentences was commuted to life imprisonment in the first half of the twentieth century. Between 1976 and 2013, in contrast, there were 1,300 executions and only 66 individual commutations.²³ In the post-*Furman* national landscape,²⁴ the rate of clemency grants has declined to just above zero.

Because governors either are exclusively responsible for clemency decision-making or are partially responsible through the appointment of members to a pardon and parole board, electoral politics may help explain the high rate of clemency denials. Elected officials must respond to constituents’ concerns for public safety and may want to be perceived as “tough on crime.”²⁵

¹⁴ *Herrera v. Collins*, 506 U.S. 390, 411–15 (1993) (acknowledging that while executive clemency may not be granted in all cases involving actual innocence—“our judicial system, like the human beings who administer it, is fallible”—clemency is “exercised frequently” in death penalty cases demonstrating actual innocence); see also Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. L. 37, 42 (2009), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1025&context=bjcl>.

¹⁵ Sarah Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 CAL. W. L. REV. 55, 56 (2014), <http://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?article=1442&context=cwlr>.

¹⁶ *Herrera*, 506 U.S. at 390. The Court in *Herrera* held that “A prisoner’s claim of actual innocence in the face of execution does not entitle him to habeas corpus relief, unless that actual innocence claim was complemented by another claim asserting an independent constitutional violation. Although *Herrera* alleged that his imprisonment in light of new evidence proving his innocence amounted to violations of the Eighth and Fourteenth Amendments, the Court determined that such violations, if they existed at all, occurred only after his state criminal proceedings. Because the constitutional violations did not impact the fairness of his state court trial, the violations could only serve as the ‘basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits.’ Indeed, the Court emphasized that ‘few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.’” Matthew Agliatori, Note, *A Case for Actual Innocence*, 25 CORNELL J.L. & PUB. POL’Y 635, 636 (2014).

¹⁷ *Herrera*, 506 U.S. at 412.

¹⁸ See generally *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998).

¹⁹ *Id.* at 275 (quotations omitted).

²⁰ *Id.* at 289 (O’Conner, J., concurring).

²¹ Laura Schaefer, *The Importance of Clemency in the Death Penalty System*, CATHOLICS MOBILIZING NETWORK, http://catholicsmobilizing.org/10895/the-importance-of-clemency-in-the-death-penalty-system/#VwOlP_LKICho (last visited Mar. 24, 2017).

²² Banner, *supra* note 4, at 3980–84 (asserting that the figure is close to zero); Schaefer, *supra* note 21 (asserting that the figure is four percent).

²³ Adam Gershowitz, *Rethinking the Timing of Capital Clemency*, 115 MICH. L. REV. 1 (2014), <http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1180&context=mlr>.

²⁴ See *Overview*.

²⁵ Banner, *supra* note 4, at 3891–92; Schaefer, *supra* note 21.

Most post-*Gregg* commutations of death sentences, for example, were conferred by governors not pursuing reelection.²⁶ A study by the American Bar Association (ABA) found, however, that governors who granted clemency to death row inmates between 1992 and 2002 did not suffer adverse consequences at the polls, although some received sharp criticism.²⁷ Instead, as one scholar noted, “themes of redemption and forgiveness as tenets of religious faith or constitutional duty can . . . offer a competing political narrative that may shield governors who exercise their pardon power from attack.”²⁸

Decision makers’ increasing disinclination to grant clemency in capital cases may have other societal consequences. After reviewing every grant of clemency in death penalty cases over the last four decades, one study contends that if governors had initiated robust clemency reviews at the conclusion of the state direct appeal in each case—and not at the end of the appellate process—states like Florida, Louisiana, Maryland, North Carolina, Ohio, Oklahoma, and Texas would have removed potentially innocent prisoners from death row decades earlier.²⁹ This could have saved hundreds of hours in wasted judicial review, and tens of millions of dollars in litigation costs.³⁰ “[I]n the majority of cases,” the study notes, “the reason for commutation was known at the conclusion of direct appeals—years or even decades before the [federal] habeas process ended.”³¹

The extrajudicial and discretionary nature of mercy, enshrined in executive clemency, safeguards interests that the judiciary is not always empowered to contemplate.³² Clemency decision-makers, however, may refuse to examine serious miscarriages of justice, because they may believe the judicial review process has addressed doubt regarding innocence and other potential miscarriages of justice.³³ Yet, the ABA recommends that the “clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.”³⁴ Indeed, one commentator summarized this challenge:

One of the few contexts in which some death row inmates have gotten clemency is when they have presented new evidence that has engendered substantial doubt about their guilt. Yet, even where such doubt should exist, governors, pardons and paroles boards, and other clemency bodies usually deny relief In doing so, they often cite the number of times the inmate unsuccessfully attempted to get relief in the courts. These recitations almost never mention that the courts either completely failed to consider the new evidence bearing on guilt/innocence, or considered the evidence under such an extraordinarily difficult standard that only a conclusive DNA exclusion or other 100% proof of innocence might lead to relief.³⁵

²⁶ Banner, *supra* note 4, at 3984–85.

²⁷ “Of the 15 governors who granted clemency since 1993, only one was defeated for re-election (James) while three were re-elected or elected to higher office (Carnahan re-elected governor; Allen, Bush, Carnahan elected Senator). Five were barred by law from seeking re-election (Wilder, Gilmore, Hunt, Glendening, Keating); two retired (Edgar, Batt); and three face re-election in 2002 or 2004 (Huckabee, Easley, Barnes).” AM. BAR ASS’N CLEMENCY AND CONSEQUENCES: STATE GOVERNORS AND THE IMPACT OF GRANTING CLEMENCY TO DEATH ROW INMATES 2 (2002) (footnotes omitted), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_jdpclemeffect02.authcheckdam.pdf.

²⁸ “Governors [Mike] Huckabee [of Arkansas] and [Timothy] Kaine [of Virginia] were explicit in the role that religion played in their executive decisions, and their decisions to forgive offenders and give them a second chance fit well within a faith-based narrative. For his part, Ehrlich relied on his constitutional duty to ensure that errors were corrected in criminal cases and that just sentences were meted out.” Rachel Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED’L SENT’G REP. 133 (2009), http://www.law.nyu.edu/sites/default/files/ecm_pro_062016.pdf.

²⁹ Gershowitz, *supra* note 25.

³⁰ *Id.*

³¹ *Id.*

³² On the extra-judicial nature of mercy, see *Capital Clemency and Traditions of Mercy*, AM. BAR ASS’N, http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/capital-clemency-resource-initiative/capital-clemency-news-developments.html (last visited Dec. 8, 2016).

³³ See Banner, *supra* note 4, at 4205–40 (quoting Missouri Governor John Ashcroft as saying, in 2000, “It would have been arrogant and irresponsible of me to second-guess the people and the court system by arbitrarily reversing the decision of unimpeached juries and judges”).

³⁴ AM. BAR ASS’N, DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF DEATH PENALTY IN THE UNITED STATES 26 (2001), <http://death-penaltyprocon.org/sourcefiles/ABA%20Death%20without%20Justice.pdf>.

³⁵ AM. BAR ASS’N, THE STATE OF CRIMINAL JUSTICE 269–344 (2013), http://www.americanbar.org/content/dam/aba/publications/criminaljustice/scj2016_ch19_capital_punishment.authcheckdam.pdf.

B. Clemency in the Twenty-First Century

Since 1976, 282 death row inmates have been granted clemency in the United States.⁵⁶ Illinois accounts for 187 of those grants of clemency because two Illinois governors issued broad grants of clemency for those on death row.⁵⁷ In 2003, following the revelation that 13 men on Illinois's death row were innocent—and after a multi-year study of the death penalty and moratorium on executions—then-Governor George Ryan, a Republican, issued a blanket commutation for the 167 individuals on Illinois's death row.⁵⁸ In 2011, Illinois Governor Pat Quinn, a Democrat, commuted the death sentences of those convicted after 2003, just before he signed a bill to repeal the state's death penalty.⁵⁹ Similarly, in 2007, New Jersey Governor Jon Corzine granted clemency to all death row inmates, one day before the death penalty was abolished in the state.⁴⁰ In Maryland, Governor Martin O'Malley commuted the sentences of remaining inmates on death row in 2015—two years after signing the bill to repeal the state's death penalty.⁴¹ Other expansive clemency grants occurred under Ohio Governor Richard Celeste in 1991 and New Mexico Governor Toney Anaya in 1986.⁴² Between 1976 and 2016, there were an additional 69 individualized grants of clemency of death row inmates.⁴³ In this same period, over 8,618 men and women were sentenced to death across the country and 1,442 had been executed.⁴⁴

With rare exceptions, only those responsible for making clemency decisions know the reasons for a grant or denial. The clemency process lacks transparency or even those most directly affected by the decision—victims, inmates, and their families—to understand why decisions were made. Indeed, similarly situated inmates may receive different decisions. One study attempted to identify reasons for clemency decisions in capital cases—individualized commutations by state executives between 1976 and 2013—by reviewing news reports, direct appeals, and habeas corpus decisions, and speaking with attorneys involved in the cases. The study found that the most common reason for commuting a sentence was doubt about guilt, followed by defendant-specific characteristics, such as mental capacity or severe mental illness, a history of being abused, and age at the time of offense (i.e., juvenile).⁴⁵ Less common reasons for clemency were concerns about the validity and reliability of evidence and procedures, disparate sentences for co-defendants, support for clemency by jurors or the victim's family members,⁴⁶ ineffective assistance of counsel, racial discrimination, and religious conversion.⁴⁷

⁵⁶ *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Mar. 24, 2017).

⁵⁷ *Id.*

⁵⁸ *Id.* Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. TIMES (Jan. 12, 2003), <http://www.nytimes.com/2003/01/12/us/citing-issue-of-fairness-governor-clears-out-death-row-in-illinois.html>. Ohio ranks second, although only 19 clemencies have been granted. *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Mar. 24, 2017).

⁵⁹ Don Babwin, *Illinois' Death Row Officially Shuts Down*, USA TODAY (July 2, 2011), http://usatoday30.usatoday.com/news/topstories/2011-07-01-944325810_x.htm.

⁴⁰ *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Mar. 24, 2017); *New Jersey*, DEATH PENALTY INFORMATION CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Dec. 22, 2016); <http://www.deathpenaltyinfo.org/new-jersey-1> (last visited Dec. 22, 2016).

⁴¹ *Maryland Governor Will Commute Sentences of Remaining Death Row Inmates*; DEATH PENALTY INFO.CTR., <http://www.deathpenaltyinfo.org/node/3995> (last visited Dec. 22, 2016).

⁴² In 1991, Ohio governor Richard Celeste granted clemency to eight death row inmates. In 1986, New Mexico governor Toney Anaya granted clemency to all death row inmates. See *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Mar. 24, 2017).

⁴³ *Id.* Since 1976, under broad grants 211 individuals obtained clemency; while 69 received individualized grants. *Id.*

⁴⁴ Between 1976 and 2013, there were 8,466 people sentenced to death. See BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2013 – STATISTICAL TABLES 19 (Dec. 2014), <http://www.bjs.gov/content/pub/pdf/cp13st.pdf>. In 2014, there were 73 death sentenced imposed. In 2015, there were 49 death sentenced imposed. In 2016, there were 50 death sentences imposed. See *Facts about the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Feb. 28, 2017); *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited Feb. 28, 2017).

⁴⁵ In 2003, for example, Kentucky Governor Paul Patton commuted the death sentence of Kevin Stanford because Governor Patton believed sentencing a juvenile to death was “excessive punishment.” Stanford had been sentenced to death for a 1981 murder that he had committed at age 17, and his sentence had been upheld by the U.S. Supreme Court in 1989. This precedent was later overturned in the 2005 case of *Roper v. Simmons*, which determined that death sentences for juveniles were inconsistent with the Eighth Amendment and therefore unconstitutional. See Gershowitz, *supra* note 23, at 14.

⁴⁶ In 1990, the Georgia parole board commuted the death sentence of William Neal Moore with the support of the victim's family. See *id.* at 20–21.

⁴⁷ *Id.*

Clemency processes in death penalty states typically fall into one of four categories. In a plurality of current death penalty states—13 in total—the governor retains sole authority to determine clemency.⁴⁸

Eight states, including Oklahoma, require a recommendation for clemency from a board or advisory group in order for the governor to grant clemency;⁴⁹ in two of these eight states—Louisiana and Pennsylvania⁵⁰—the advisory board's recommendation to the governor must be unanimous for a recommendation for clemency to issue.⁵¹ In eight other death penalty states, a board may issue a non-binding recommendation for clemency to the governor.⁵² Only four death penalty states fall into a fourth category, whereby a state board has exclusive decision-making power respecting clemency.⁵³

II. Clemency in Oklahoma

The Oklahoma Pardon and Parole Board (PPB) is responsible for reviewing clemency applications from death row inmates and making a recommendation to the governor of Oklahoma. If a majority of PPB members agree to recommend clemency, the governor makes a final decision on whether to grant clemency.⁵⁴

The Oklahoma Court of Criminal Appeals (OCCA) has upheld the executive's authority to grant clemency and any legislative changes to the judiciary's sentencing power “in no way limits, detracts from, or interferes with the constitutional power of the executive department to commute, parole or pardon.”⁵⁵ At the same time, the OCCA has emphasized that executive clemency is not without limit.⁵⁶ The judiciary does have the power to review the validity of a pardon where a governor seeks to revoke it after it was granted.⁵⁷

There have been four grants of clemency in Oklahoma since 1976.⁵⁸ Oklahoma Governor Frank Keating commuted Phillip Dewitt Smith's death sentence in 2001 because of doubts regarding Smith's culpability.⁵⁹

⁴⁸ These 13 states are Alabama, California, Colorado, Kentucky, Mississippi, New Mexico, North Carolina, Oregon, South Carolina, South Dakota, Virginia, Washington, and Wyoming. In 2009, New Mexico repealed the death penalty for prospective cases, but the state still has two inmates on death row. California prohibits the governor from granting clemency to individuals twice convicted of a felony unless the California Supreme Court recommends clemency, with at least four judges concurring. *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Mar. 24, 2017).

⁴⁹ These eight states are Arizona, Delaware, Florida, Idaho, Louisiana, Oklahoma, Pennsylvania, and Texas. *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Dec. 8, 2016). The Delaware Supreme Court ruled that the state's death penalty law was unconstitutional in August 2016. *Rauf v. State*, 145 A.3d 430, 433 (Del. 2016) (per curiam). In Florida, the governor sits on the board. Email from Laura Schaefer, Counsel, Capital Clemency Resource Initiative, Death Penalty Due Process Review Project, Am. Bar Ass'n., to author (Feb. 6, 2017) (on file with author).

⁵⁰ Governor Tom Wolf of Pennsylvania issued a moratorium on executions in February 2015 while awaiting the results of a commission empaneled to study the commonwealth's capital punishment system. See GOV. TOM WOLF, MEMORANDUM (Feb. 13, 2015), <https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration>. The constitutionality of Governor Wolf's moratorium was unanimously upheld by the Pennsylvania Supreme Court. *Commonwealth v. Williams*, 129 A.3d 1199, 1201 (Pa. 2015).

⁵¹ *Id.*

⁵² These eight states are Arkansas, Indiana, Kansas, Missouri, Montana, New Hampshire, Ohio, and Tennessee. *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Mar. 24, 2017).

⁵³ These four states are Georgia, Nebraska, Nevada, and Utah. *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Mar. 24, 2017). In Nevada, the governor sits on the board. Email from Laura Schaefer, Counsel, Capital Clemency Resource Initiative, Death Penalty Due Process Review Project, Am. Bar Ass'n., to author (Feb. 6, 2017) (on file with author).

⁵⁴ *Pardons and Commutations*, OKLA. PARDON AND PAROLE BOARD, https://www.ok.gov/ppb/Pardons_and_Commutions/index.html (last visited Mar. 24, 2017).

⁵⁵ *White v. Coleman*, 475 P.2d 404, 406 (Okla. Crim. App. 1970); see also *Ex parte Swain*, 202 P.2d 225 (Okla. Crim. App. 1949); *Ex parte Hines*, 289 P.2d 972 (Okla. Crim. App. 1955); *Ex parte Barrett*, 152 P.2d 657 (Okla. Crim. App. 1945); *Ex parte Crump*, 135 P. 428 (Okla. Crim. App. 1915); *Ex parte Clendenning*, 97 P. 650 (Okla. 1908).

⁵⁶ See NAT'L GOVERNOR'S ASS'N CTR. FOR POLY RES., GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES 129 (1988), <https://www.ncjrs.gov/pdffiles1/Digitization/114588NCJRS.pdf>.

⁵⁷ *Id.*; see also “As previously indicated, the governor has no power to revoke a full and unconditional pardon that has been delivered; therefore his order purporting to revoke this pardon was necessarily a mere nullity.” See *Ex parte Crump*, 135 P. at 436 (2010).

⁵⁸ *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Dec. 8, 2016).

⁵⁹ *Id.*; see also Cheyenne Hopkins, *Keating Proposes Death Penalty Standard*, DAILY OKLAHOMAN, June 23, 2001 (“Because evidence had been lost and other factors in the case had changed, [Keating] could not say with moral certainty that Smith committed the crime.”).

Governor Brad Henry commuted the sentence of three inmates condemned to die.⁶⁰ In the instance of Osvaldo Torres, a Mexican national, Governor Henry cited as a basis for granting clemency the failure of the government to notify Mexico that one of its foreign nationals had been arrested, in contravention of the Vienna Convention on Consular Relations.⁶¹ Of those executed in the state of Oklahoma in the last six years, the PPB denied clemency to death row inmates 12 times and recommended it twice.⁶² Governor Mary Fallin did not approve either recommendation for commutation from the PPB.⁶³

A. Oklahoma Pardon and Parole Board Overview

The PPB was established in 1946 under Article VI, Section 10, of the Oklahoma Constitution.⁶⁴ The PPB is charged with “mak[ing] an impartial investigation and study of applicants for commutations, pardons or paroles, and by a majority vote [to] make its recommendations to the governor of all persons deemed worthy of clemency.”⁶⁵ The governor is authorized to grant commutations or pardons to offenders “after conviction and after favorable recommendation by a majority vote” by the PPB.⁶⁶ The Oklahoma Constitution prohibits the governor from granting clemency to any person not favorably recommended by the PPB.⁶⁷ However, as PPB recommendations for clemency are not binding, the governor may decline to grant clemency when the PPB recommends it.⁶⁸ The governor is further limited from granting parole to any inmate who was sentenced to death or to life imprisonment without parole. The governor does not need a recommendation from the PPB to grant a temporary reprieve from execution. However, those reprieves may not exceed more than 60 days without the action of the PPB.⁶⁹

The part-time PPB is composed of five members tasked with reviewing applications for clemency.⁷⁰ Members are required by Oklahoma statute⁷¹ to possess, at minimum, a bachelor’s degree and must have three to five years of experience in the “criminal justice field.”⁷² Three members of the PPB are appointed by the governor.⁷³ A fourth member is appointed by the Chief Justice of the Oklahoma Supreme Court.⁷⁴ A fifth is appointed by

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *Rapist and Murderer Executed by Injection in Oklahoma*, USA TODAY (June 25, 2013), <http://www.usatoday.com/story/news/nation/2013/06/25/oklahoma-execution-davis/2458205>; Rachel Petersen, *Okla. Death Row Inmate Garry Allen Executed*, MCALESTER NEWS (Nov. 6, 2012), http://www.mcalesternews.com/news/okla-death-row-inmate-garry-allen-executed/article_45385e9f-45f9-5963-b40a-95fa3b827d3e.html. Four inmates waived their right to clemency. See Spreadsheet regarding Review of Okla. Pardon and Parole Board created by author (on file with author).

⁶³ A review of clemency decisions for prisoners executed in Oklahoma between 2011 and 2016 was conducted. Garry Allen, one of the two death row inmates executed after Governor Fallin’s rejection of the PPB’s recommendation, was diagnosed with schizophrenia. Petersen, *supra* note 62.

⁶⁴ OKLA. CONST. art. VI, § 10.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ The governor has no power to grant a pardon or parole absent a favorable recommendation of the Pardon and Parole Board. See Op. Atty. Gen. 76-216 (1976) in NAT’L GOVERNOR’S ASS’N CTR. FOR POL’Y RES., *supra* note 56.

⁶⁸ OKLA. STAT. tit. 57, § 352.2.

⁶⁹ OKLA. CONST. art. VI, § 10. Regarding the interpretation that the board’s action is required for a reprieve of more than 60 days, see NAT’L GOVERNOR’S ASS’N CTR. FOR POL’Y RES., *supra* note 56.

⁷⁰ The Chairman is statutorily compensated at \$24,800 per year, and each board member is statutorily compensated at \$22,800 per year. See OKLA. STAT. tit. 57, § 352.4 (2014). Board members also are reimbursed for expenses incurred in the performance of their official duties, including travel expenses. See 57 OKLA. STAT. tit. 57, § 352.4a (2014). Actual salaries for Oklahoma Pardon and Parole Board members range from \$3,800 to \$23,802. The total payroll for 2015 was \$1,387,498. See *Pardon and Parole Board*, OKLAHOMA WATCH DATA, <http://oklahomawatchdata.org/state-salaries/506n> (last visited Dec. 8, 2016).

⁷¹ See OKLA. STAT. tit. 57, § 352.1B.

⁷² *Pardon and Parole Board*, OK.GOV, https://www.ok.gov/ppb/Agency_and_Board_Meeting_Information/Board_Members/index.html (last visited Dec. 18, 2016).

⁷³ *Id.*

⁷⁴ *Id.*

the presiding judge of the OCCA.⁷⁵ Prior PPB members have included “ranchers, bankers, pastors, as well as lawyers and law enforcement.”⁷⁶ The current composition of the PPB is exclusively former law enforcement, prosecutors, and judges.⁷⁷

The composition of the PPB may affect its decision-making in capital cases. One task force study on clemency in Massachusetts found that a lack of diversity on the state’s clemency board statistically correlated to a decline in grants of clemency and parole.⁷⁸ Like Oklahoma, the Massachusetts Advisory Board of Pardons is largely composed of officials with backgrounds in law enforcement and criminal justice.⁷⁹ Scholars argue that diverse boards “add expediency, political cover, and legitimacy to grants of clemency.”⁸⁰ Clemency boards should be “careful to mix law enforcement interests with those of defense lawyers and former offenders so that each side can learn from the other and increase the likelihood that sound conclusions will be reached and less subject to political attack.”⁸¹

A survey of state clemency boards by one recent law review article found a “distinct lack of diversity in board composition.”⁸² However, several states—such as Kentucky, Ohio, Pennsylvania, and South Carolina—have more diverse expertise represented on their boards, though still not without some critiques:

[T]he Kentucky Board brings together members from legal, investigative, teaching, medicine, corrections, and social work backgrounds. Ohio’s Board is comprised of members with varying experience in victims’ rights, rehabilitation and corrections, and law. The Pennsylvania Board integrates members with experience in offender mentoring, specialized courts, corrections, law enforcement, parole, medical technology, science, and law, including criminal defense. South Carolina’s Board includes individuals with backgrounds in religious practice, administration, parole, probation, social work, nursing, pharmaceuticals, management, realty, automotive brokering, personal training, teaching, and military service. The Board in South Carolina is, however, nearly devoid of members aligned with the criminal defense community and, instead, consists mostly of individuals aligned with state prosecutorial services or organizations.⁸³

The PPB term runs coterminous with that of the governor, but board members may be reappointed by those entities outlined in the Oklahoma Constitution.⁸⁴ The board’s chairperson and vice chairperson are elected by a majority of the members.⁸⁵ To initiate a removal of a member, the PPB must pass a resolution by a majority

⁷⁵ OKLA. STAT. tit. 57, § 57-552.1B. Section 57-552.1B, which is effective as of November 1, 2011, states that, “[t]o be eligible for appointment as a Pardon and Parole Board member, a person shall possess at least one of the following minimum qualifications: (1) A bachelor’s degree in the social sciences from an accredited college or university and five (5) years of experience in the criminal justice field; (2) A master’s degree and four (4) years of experience in the criminal justice field; or (3) A juris doctorate and three (3) years of experience in the criminal justice field.” *Id.*

⁷⁶ Jennifer Palmer, *Oklahoma Parole Board Grants Few Approvals*, NEWSOK (Jan. 31, 2015), <http://newsok.com/oklahoma-parole-board-grants-few-approvals/article/3589540>.

⁷⁷ The board’s current members are The Honorable Thomas Gillert, Esq.; Mrs. Patricia High, Esq.; Mrs. Vanessa Price; Mr. Robert Macy; and Mr. William Latimer. *Pardon and Parole Board*, OKGOV, https://www.ok.gov/ppb/Agency_and_Board_Meeting_Information/Board_Members/index.html (last visited Dec. 18, 2016).

⁷⁸ Although Massachusetts abolished the death penalty in 1984, a study found that a lack of diversity on the state’s clemency board statistically correlated to a decline in grants of clemency and parole. See ANDREW NOVAK, COMPARATIVE EXECUTIVE CLEMENCY: THE CONSTITUTIONAL PARDON POWER AND THE PREROGATIVE OF MERCY IN GLOBAL PERSPECTIVE 298 (2015), <https://books.google.com/books?id=psVmCgAAQBAJ>.

⁷⁹ The current Director of the Oklahoma Department of Corrections likewise has expressed concerns that a lack of diversity on the PPB has affected its disposition to decline clemency for eligible non-capital and non-violent offenders, where such a grant could be appropriate. Interview with Joe M. Allbaugh, Dir., Okla. Dep’t of Corr. (Nov. 8, 2016) (on file with author).

⁸⁰ Barkow, *supra* note 28.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Pardon and Parole Board*, OKGOV, https://www.ok.gov/ppb/Agency_and_Board_Meeting_Information/Board_Members/index.html (last visited Dec. 18, 2016).

⁸⁵ OKLA. PARDON & PAROLE BD., POLICY 101 – DUTIES AND RESPONSIBILITIES OF THE PARDON AND PAROLE BOARD (2015), <https://www.ok.gov/ppb/documents/Policy%20101%20-%20Duties%20and%20Responsibilities%20of%20the%20PPB%20Revised%202016.pdf>.

detailing the alleged misconduct.⁸⁶ Such removal is subject to provisions outlined in Oklahoma law.⁸⁷

B. PPB Clemency Review Process in Capital Cases

The PPB has adopted administrative policies and procedures concerning the clemency process for death row inmates awaiting execution.⁸⁸ Following the issuance of an execution date by the OCCA, the PPB will automatically set a date for a clemency hearing for the inmate awaiting execution and will notify the attorney general and the inmate's legal counsel of the hearing date.⁸⁹ The PPB general counsel is also directed to send a "Voluntary Waiver of Intent to Appear Form (004-13-A)" to defense counsel.⁹⁰ If the general counsel is unable to determine if the inmate has counsel, the form is sent directly to the inmate.⁹¹ The death row inmate or his or her legal counsel must affirmatively request a clemency hearing, regardless of whether the offender intends to appear before the board at the clemency hearing.⁹² Failure to return the form affirming a death row inmate's request for a clemency hearing within 10 days is considered an intent to waive the hearing.⁹³

Within 20 days after the OCCA schedules an execution, the death row inmate must submit a "Clemency Hearing Packet" containing "any written argument, documents and/or exhibits to be presented" to the PPB at his or her hearing.⁹⁴ Failure to deliver the packets in the prescribed time—without prior written approval for an extension by the PPB chairperson—constitutes a waiver of the clemency process.⁹⁵

In Oklahoma, administrative and substantive protocols guide the scope of the PPB's review of a death row inmate's clemency application.⁹⁶ No specific guideline exists to direct the PPB to review matters not raised in the packet or at the hearing.⁹⁷ The condemned prisoner is allowed 40 minutes to present his or her case before the PPB. The state is then provided 40 minutes.⁹⁸ After both parties appear before the PPB, the victim's representatives receive 20 minutes to address the board. If the parties have reserved time from their 40-minute allotments, the state may make a second presentation, followed by legal counsel of the death row inmate.⁹⁹ Finally, the inmate is granted 20 minutes to make a statement and address the PPB. PPB members may then ask recognized parties to answer questions.¹⁰⁰

⁸⁶ *Id.*

⁸⁷ Failure to attend meetings constitutes a cause for removal. *See id.*

⁸⁸ *See* OKLA. PARDON & PAROLE BD., POLICY AND PROCEDURE MANUAL, PROCEDURE 004-13 (2005) (obtained via email from Melissa L. Blanton, Staff Attorney, Pardon and Parole Bd., to author (July 1, 2016) (on file with author)).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* The packet may not have an argument longer than 50 pages; or an appendix of exhibits longer than 150 pages. In the alternative, should video be used, one hour running time is equal to 50 pages. The condemned prisoner must also provide additional copies of the packet for each board members as well as one copy for the administrative office of the PPB. *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

After parties make their presentations and the question and answer period concludes, the matter is put to a vote.¹⁰¹ There is no recess for members to discuss the matter.¹⁰² The vote is then announced orally.¹⁰³ PPB members are not required to state the reasons for their votes.

As previously mentioned, the PPB's recommendation in support of clemency is not binding, but it is required in order for the governor to grant clemency.¹⁰⁴ The governor has the final authority to grant or deny clemency.¹⁰⁵ The Oklahoma Constitution directs the governor to communicate to the Oklahoma Legislature about each reprieve, commutation, and pardon granted, as well as the "name of the person receiving clemency, the crime of which the person was convicted, the date and place of conviction, and the date of commutation, pardon, parole or reprieve."¹⁰⁶

Like most states, Oklahoma does not outline its scope or breadth of review in considering clemency decisions for death row inmates awaiting execution. Oklahoma law and PPB manual do not address how to assess innocence claims or other issues relevant to death penalty cases during the clemency process. The PPB manual also does not address the myriad procedural obstacles that may result in the court system's failure to review constitutional claims of error or allegations of innocence on the merits.¹⁰⁷ While PPB board members are provided with 12 hours of training in their first year, and six hours of training in subsequent years, there is no specific training on matters related to capital punishment.¹⁰⁸

The ABA has raised serious concerns about the significant lack of resources and training available to relevant parties concerning the clemency process, as compared to those available during other phases of death penalty litigation.¹⁰⁹ The ABA recommends that "[c]lemency decisionmakers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency."¹¹⁰ The ABA further recommends that states should:

[A]dopt guidelines directing its members to independently review all clemency applications and consider all factors that might lead a decision-maker to conclude that death is not the appropriate punishment. A set of standards or guidelines by which clemency petitions are evaluated would help create common ground among Board members, better insulate the Board from political considerations or impacts, and assist advocates who represent death row inmates in the preparation of clemency applications.¹¹¹

These considerations should include constitutional claims that were barred from court proceedings due to

¹⁰¹ E-mail from Patti Palmer Ghezzi, Ass't Fed'l Defender, Capital Habeas Unit, W.D. Okla. Fed'l Pub. Defender, to author (June 28, 2016) (on file with author) [hereinafter *Ghezzi E-mail*].

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Dec. 8, 2016).

¹⁰⁵ *Id.*

¹⁰⁶ OKLA. CONST. art. VI, § 10.

¹⁰⁷ OKLA. PARDON & PAROLE BD., OKLAHOMA PARDON AND PAROLE BOARD MANUAL (1994), <https://www.ncjrs.gov/pdffiles1/Digitization/148744NCJRS.pdf>. A more recent manual was not available.

¹⁰⁸ OKLA. PARDON & PAROLE BD., *supra* note 85.

¹⁰⁹ *Capital Clemency Resource Initiative*, AM. BAR ASS'N, http://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/capital-clemency-resource-initiative.html (last visited Dec. 8, 2016).

¹¹⁰ AM. BAR ASS'N, *supra* note 34, at 27.

¹¹¹ AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE TEXAS CAPITAL PUNISHMENT ASSESSMENT REPORT (2015), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/tx_complete_report.authcheckdam.pdf.

procedural default,¹¹² racial or geographic disparity, intellectual competence, and innocence.¹¹³

Finally, while the PPB has 24 investigators to prepare investigative reports for parole consideration in non-capital cases, only one investigator is assigned to look into relevant clemency issues for capital cases.¹¹⁴ That investigator provides a report to the PPB members primarily based on a review of available information.¹¹⁵

C. Access to Counsel During Clemency Proceedings

Oklahoma law does not require that death row inmates be assigned counsel to assist with preparation and presentation of their clemency petition. The law also does not ensure adequate compensation for clemency counsel or provide for investigators, experts, or other forms of support to assist a condemned prisoner at clemency.

If the Capital Habeas Unit (CHU) for the Western District of Oklahoma has represented a death row inmate, it will continue to represent him or her during the clemency process.¹¹⁶ Attorneys appointed pursuant to the federal Criminal Justice Act¹¹⁷ have also represented Oklahoma death row inmates during the clemency process.¹¹⁸

Importantly, entities like the ABA recommend that inmates sentenced to death have access to highly-skilled and experienced counsel at every phase of its specialized administration, including applications for clemency.¹¹⁹ Further, because Oklahoma law does not provide counsel for condemned prisoners at clemency, the state may also run afoul of best practices that recommend clemency counsel be afforded “sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that state may present in opposing clemency.”¹²⁰

D. Transparency in Clemency Proceedings

Although clemency hearings for death row inmates awaiting execution were once conducted in person at the Oklahoma State Penitentiary at McAlester, they are now conducted off-site¹²¹ and partly via closed circuit television.¹²² The only parts of a clemency hearing that an inmate may witness are when 1) giving a statement, either personally or in writing, and 2) when answering questions from the PPB.¹²³

All PPB meetings are required to comply with Oklahoma’s Open Meeting Act and are open to the public, except

¹¹² AM. BAR ASS’N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE OHIO CAPITAL PUNISHMENT ASSESSMENT REPORT (2007), http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/ohio_chapter9.authcheckdam.pdf.

¹¹³ AM. BAR ASS’N, *supra* note 34, at 26.

¹¹⁴ *Pardon and Parole Board*, OK.GOV, https://www.ok.gov/ppb/Agency_and_Board_Meeting_Information/Board_Members/index.html (last visited Dec. 18, 2016); Ghezzi E-mail, *supra* note 101.

¹¹⁵ See OKLA. PARDON & PAROLE BD., *supra* note 88.

¹¹⁶ Ghezzi E-mail, *supra* note 101.

¹¹⁷ 18 U.S.C. § 3006A (2004).

¹¹⁸ Ghezzi E-mail, *supra* note 101.

¹¹⁹ AM. BAR ASS’N, *supra* note 34, at 27.

¹²⁰ *Id.* at 26.

¹²¹ “The meetings are held at the same location as the monthly Pardon and Parole Board business meetings and parole hearings, which is the Kate Barnard Correctional Center, 3300 Martin Luther King Ave., Oklahoma City, OK 73111.” Email from Melissa L. Blanton, Staff Attorney, Pardon and Parole Bd., to author (July 7, 2016) (on file with author).

¹²² “Also, although they used to do the clemency hearings at OSP in McAlester and have the inmate present in person to be questioned by PPB members and to make his statement, there are no personal appearances anymore. The inmate appears by closed circuit TV at the end of the hearing. He is not allowed to view the proceedings that occur before he is presented by video. As far as I know there have never been reports of misconducts between the PPB hearing and the Governor’s actions.” Ghezzi E-mail, *supra* note 101.

¹²³ *Id.*

when excluded by law, security regulations, or meeting room capacity.¹²⁴ The parole and commutation docket are available online.¹²⁵ PPB records, which are not confidential or privileged, are accessible for inspection and copying in the PPB's principal office.¹²⁶

III. Conclusion and Recommendations

Clemency remains an essential safeguard in any capital punishment system. The distinct issues under consideration in capital clemency diverge from those in non-death penalty cases, where, for example, decisions may be guided more by the lens of rehabilitation. By the time a death penalty case reaches the clemency stage, it should not be assumed that every issue has been reviewed by the judiciary—indeed, many issues may have been procedurally barred. This final safeguard allows for the Oklahoma Pardon and Parole Board and the Oklahoma governor to thoroughly and fairly evaluate whether a person should be executed. This critical piece of the capital punishment system should be guided by principles of mercy and justice. It is with these principles in mind that the Commission offers the following recommendations:

Recommendation 1:

The composition of the Oklahoma Pardon and Parole Board should be more open and should not be restricted to individuals with experience in the criminal justice field.

Currently, to serve as a member of the Oklahoma Pardon and Parole Board (PPB), one must possess a degree in “the social sciences,” a master’s degree or juris doctorate degree, *and* “experience in the criminal justice field.”¹²⁷ This requirement eliminates a large pool of Oklahomans from serving on the PPB, including those who are college-educated, but whose degrees are not in the “social sciences.” The “criminal justice field” requirement eliminates most educators, school counselors, mental health professionals, religious leaders, journalists, community leaders, and many other qualified Oklahomans. Indeed, it appears that the current composition of the PPB is exclusively former law enforcement, prosecutors, and judges.

After studying the capital punishment system, the Commission believes that clemency is an important final safeguard before an execution involving a crime that may have impacted an entire community of Oklahomans. A broader representation of societal interests should be a goal of the clemency process. Accordingly, PPB members should comprise Oklahomans from all backgrounds who can be trusted to consider factors that weigh both for and against exercising mercy before making reasoned judgments.

¹²⁴ OKLA. STAT. tit. 25, §§ 301–14; OKLA. STAT. tit. 57 § 352.2(O) (pertaining to the availability of PPB records).

¹²⁵ See ADMIN. CODE & REGISTER, <http://www.oar.state.ok.us> (last visited Dec. 8, 2016).

¹²⁶ OKLA ADMIN. CODE § 515:1-5-2.

¹²⁷ See 57 OKLA. STAT. § 37-352.1B.

Recommendation 2:

The Oklahoma Pardon and Parole Board should compose, adopt, and publish substantive guidelines on the exercise of its clemency powers.

Like most states, Oklahoma does not outline any specific type or breadth of review in considering clemency for death row inmates awaiting execution. No provisions of law or of the PPB manual address how to assess innocence claims or other issues relevant to death penalty cases which may arise during the clemency process, nor does the PPB manual address the myriad procedural obstacles that may result in the court system's failure to review constitutional claims of error or allegations of innocence on the merits. Indeed, given the complexity of capital cases—as the Commission learned in reviewing Oklahoma's system—standards by which clemency petitions are evaluated would serve an important purpose. For example, a set of common principles or guidelines could insulate the PPB from political considerations and allow decision-makers to focus on specific issues in a case that are deemed notable. As discussed in detail in this chapter, the American Bar Association offers clemency guidelines available for states to adopt. Those guidelines offer a helpful foundation for the PPB to create its own set of standards for capital clemency decisions.

Recommendation 3:

The Oklahoma Pardon and Parole Board should create guidelines for recusal of any member who may have a conflict of interest in evaluating a condemned inmate's petition for clemency.

The PPB should protect the independence of capital clemency decisions from undue influence by involved parties. This recommendation should be distinguished from existing law which prevents PPB members (and their law firms and partners) from representing incarcerated inmates and further prevents them from voting on requests for pardon or parole filed by their former clients.¹²⁸ The existing provision, as written, has prevented former or current defense attorneys from serving on the PPB, but not those who may be former prosecutors, law enforcement, or members of the judiciary. Thus, a more robust provision for recusal should be in place to ensure that the public can trust that the PPB is independent and free of all potential conflicts.

Recommendation 4:

Condemned inmates should have the option to listen to and watch (via closed-circuit television) the entire presentation of their clemency petition to the Oklahoma Pardon and Parole Board.

As this chapter discusses, death row inmates do not attend their clemency hearing in person. Instead, inmates appear near the end of the clemency hearing via closed-circuit television. Inmates are not allowed to view the proceedings that occurred earlier. The only part of their clemency hearing that inmates may witness is when they provide a statement to the PPB and answer questions from PPB members. Given the import of clemency proceedings on death row inmates, the entire capital clemency process should be accessible to condemned inmates. They should not be restricted to joining, via closed-circuit television, only a limited portion of their clemency hearing. Condemned inmates should be given a full opportunity to witness and comprehend the entire proceedings and to advocate on their own behalf at their clemency hearing.

¹²⁸ OKLA. STAT. tit. 57, § 532.15 (“[N]o member of the Pardon and Parole Board and/or their law firm or law partners or associate may represent in a legal capacity any inmate incarcerated in any state penal institution”).

Recommendation 5:

The members of the Oklahoma Pardon and Parole Board should engage in a deliberative process before voting on a condemned inmate's petition for clemency.

Given that a person's life hangs in the balance, the Commission felt it essential to underscore the importance of the members of the PPB engaging in a thoughtful, measured, deliberative discussion before voting on a condemned inmate's petition for clemency during this final safeguard before an execution may occur.

Execution Process

Oklahoma's capital sentencing statute gives the Oklahoma Department of Corrections (ODOC) broad discretion to define and amend its execution protocol without notice, oversight, or transparency.¹ By statute, authority rests solely with ODOC in 1) determining the protocol; 2) choosing the drugs for any given execution; and 3) carrying out the execution. As will be discussed in this chapter, investigative reports and court documents indicate that the Oklahoma Office of the Attorney General and possibly other state officials have also had prominent roles in the execution process.²

As detailed in this chapter, recent problems with executions—both in Oklahoma and in other death penalty jurisdictions—have spurred investigations into the execution processes of several states.³ In Oklahoma, these errors include the 2014 botched execution of Clayton Lockett and the use of the wrong drug to execute Charles Warner in 2015, which resulted in a 105-page grand jury report calling for wide-scale overhaul of the state's execution procedures.⁴ Absent this and other necessary measures, the effectiveness and reliability of Oklahoma's execution procedures and the state's competence to administer executions remain in question. Oklahoma's experiences in carrying out executions raises serious concerns as to the wisdom of allowing the state to select, amend, and implement execution procedures behind closed doors.⁵

¹ OKLA. STAT. tit. 22, § 1015(B) (2014) ("The judgment of execution shall take place under the authority of the Director of the Department of Corrections").

² Cary Aspinwall & Ziva Branstetter, *Records Raise Questions About Who Is in Charge of Oklahoma Executions*, FRONTIER, Oct. 9, 2015, <https://www.readfrontier.com/investigation/records-raise-questions-about-who-is-in-charge-of-oklahoma-executions/>; see also Cary Aspinwall & Ziva Branstetter, *Filing: Botched Execution Was 'Bloody Mess'*, TULSA WORLD, Oct. 14, 2014, <http://www.pulitzer.org/files/2015/local-reporting/tulsaworld/06tulsaworld2015.pdf>.

³ See, e.g., Janice Williams, *Death Penalty Drugs Update 2016: Arizona Bans Controversial Sedative after Botched Execution*, INT'L BUS. TIMES, Dec. 20, 2016, <http://www.ibtimes.com/death-penalty-drugs-update-2016-arizona-bans-controversial-sedative-after-botched-2463259> ("A joint stipulation filed by Arizona officials Monday said the Department of Corrections will 'never again use midazolam, or any other benzodiazepine, as part of a drug protocol in a lethal injection execution."); Eric M. Johnson, *Ohio Increases Death Penalty Drug Dosages after Execution Review*, REUTERS, Apr. 29, 2014, <http://www.reuters.com/article/us-usa-execution-ohio-idUSBREA3S09620140429> ("Ohio's prison department said it would increase the amount of two death penalty drugs it uses in executions after reviewing a case in which a condemned inmate was seen convulsing and gasping for breath for some time after being injected.").

⁴ At present, the Office of the Attorney General continues to abide by a self-imposed moratorium on requesting execution dates, at least until ODOC promulgates a revised execution protocol. *Oklahoma Halts Executions until 2016 as Drug Mix-up Investigation Continues*, ASSOCIATED PRESS, Oct. 16, 2015, <http://www.theguardian.com/us-news/2015/oct/16/oklahoma-halts-executions-until-2016-wrong-drug-investigation>.

⁵ See Josh Sanburn, *Oklahoma's Lethal Injection Problems Go from Bad to Worse*, TIME, Oct. 8, 2015, <http://time.com/4067071/oklahoma-lethal-injection-wrong-drug-charles-warner>; *Executive Summary*, The Execution of Clayton D. Lockett (Case # 14-0189SI), Okla. Dep't of Public Safety, <http://deathpenaltyinfo.org/documents/LockettInvestigationReport.pdf> [hereinafter *DPS Executive Summary*]; Interim Report No. 14, In re Multicounty Grand Jury, State of Okla., No. GJ 2014-1 (Okla. May 19, 2016) <https://www.ok.gov/oag/documents/MCGJ%20-%20Interim%20Report%205-19-16.pdf> [hereinafter *Grand Jury Report*].

I. History of Execution Methods in Oklahoma since 1977

A. Adoption of Lethal Injection

Oklahoma was the first state to create and adopt a protocol for lethal injection. In 1977, it pioneered the three-drug formula that has been used by 32 jurisdictions in 1,141 executions over 34 years.⁶ According to legislative history, the sponsors of the execution bill were seeking a more humane method of execution that would cost less than electrocution and the gas chamber, which were the execution methods in place at the time.⁷ Renovations to the electric chair would have cost the state \$50,000, and the expense of constructing a gas chamber was estimated at \$250,000.⁸ In contrast, Senator Bill Dawson informed the Oklahoma Senate that lethal injection would cost only \$10 per execution.⁹

The legislation was developed without the benefit of any medical or scientific studies to support the new method of execution.¹⁰ Instead, the drafting of the statute was based almost entirely on one conversation among Senator Bill Dawson, Representative Bill Wiseman, and Oklahoma's Chief Medical Examiner, Dr. A. Jay Chapman.¹¹ Dr. Chapman, who later stated that he was not an expert in this area,¹² initially recommended a two-drug procedure: an ultra-short acting barbiturate in combination with a chemical paralytic. Correspondences from Representative Wiseman reveal that the statute was purposely left vague—identifying the class of drugs, but not specific drugs—in order to give ODOC discretion to select drugs and procedures.¹³

When the bill was first introduced in the Oklahoma Senate, lawmakers debated issues including “deterrence (with some senators saying that the electric chair was the better deterrent to murder), humaneness (with some senators saying that lethal injection was more humane), and retribution (with some senators arguing that lethal injection was ‘an easy way out’).”¹⁴ In 1977, the bill passed in the Legislature, making Oklahoma the first state in the country to authorize death by lethal injection.¹⁵

B. Three-Drug Lethal Injection Protocol

Oklahoma performed an execution by lethal injection for the first time in September 1990 and has carried out 112 executions using a three-drug protocol.¹⁶ Although the drugs used in executions and the details of their administration have changed over the years—in response to both litigation and market forces in the pharmaceutical industry—Oklahoma has retained the three-drug procedure.

⁶ Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 63 (2007) [hereinafter Denno, *The Lethal Injection Quandary*]; *Executions in the United States*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-united-states> (last visited Nov. 17, 2016).

⁷ See, e.g., Martin McKown, Comment, *Unconstitutional Killing: The Deadly Dilemma Surrounding Oklahoma's Lethal Injection Secrecy Statute*, 53 DUQ. L. REV. 611, 617 (2015) (“Lethal injection protocol originated in Oklahoma after legislators sought a potentially more humane alternative to the electric chair in 1977”).

⁸ Denno, *The Lethal Injection Quandary*, *supra* note 6, at 71.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 65 n.117, 65–70; see also Nathaniel A. W. Crider, *What You Don't Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 COLUM. J.L. & SOC. PROBS. 1, 8 (2014) (“[D]espite no medical or scientific justification, the three-drug lethal injection cocktail was born: sodium thiopental, pancuronium bromide, and potassium chloride.”).

¹² Dr. Chapman admitted that he was “an expert in dead bodies but not an expert in getting them that way.” Denno, *The Lethal Injection Quandary*, *supra* note 6.

¹³ *Id.* at 67 n.106.

¹⁴ *Id.* at 70–71.

¹⁵ *Id.*

¹⁶ Ken Raymond, *Lethal Injection Made Its Debut in Oklahoma 20 Years Ago*, NEWSOK (Sept. 7, 2010), <http://newsok.com/article/3492556>; *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., [HTTP://WWW.DEATHPENALTYINFO.ORG/NUMBER-EXECUTIONS-STATE-AND-REGION-1976](http://www.DEATHPENALTYINFO.ORG/NUMBER-EXECUTIONS-STATE-AND-REGION-1976) (last visited Apr. 20, 2016); Denno, *The Lethal Injection Quandary*, *supra* note 6, at 63–75; Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 82 IOWA L. REV. 319, 376 (1997).

The three-drug protocol developed by Oklahoma quickly became the standard lethal injection procedure across the country. The three-drug protocol was used in every lethal injection execution nationwide from December 1982 (when Texas carried out the first execution by lethal injection) until Ohio carried out the first single-drug execution in December 2009.¹⁷

Although there were differences in the drug doses and details of administration among the states' procedures, the process generally called for serial administration of a barbiturate anesthetic, followed by a paralytic, followed by concentrated potassium chloride. Oklahoma's most recent execution protocol¹⁸ gives ODOC three options to choose from to carry out an execution: 1) a single-drug pentobarbital procedure¹⁹, 2) a single-drug sodium thiopental procedure²⁰, or 3) a three-drug procedure with midazolam, vecuronium bromide, and potassium chloride.²¹ The drugs can be manufactured or sourced from a licensed compounding pharmacy. According to the protocol, ODOC director must provide a condemned prisoner with written notice of the drug formula to be used in the execution 10 calendar days before the execution date.²²

Because of the use of a paralytic drug and concentrated potassium chloride, the three-drug protocol carries significant risks of pain and suffering, as recognized by the United States Supreme Court.²³ In order for the execution to comport with the U.S. Constitution's prohibition against cruel and unusual punishment, the first drug, which is intended to anesthetize the prisoner, must render the prisoner unconscious *and* insensate to painful stimuli, which are a product of the next two drugs. The second drug, which paralyzes all skeletal muscles, including the diaphragm, prevents the prisoner from drawing breath, moving, and speaking. The third drug, concentrated potassium chloride, if administered to a conscious person, causes excruciating pain that has been likened to the feeling of having one's veins set on fire. If the first drug fails to induce and then maintain surgical anesthesia throughout the execution, the prisoner would experience conscious asphyxiation and excruciating pain, but be unable to alert the execution team that there is a problem.²⁴

C. Litigation Concerning Oklahoma's Lethal Injection Protocols

Oklahoma's adoption of lethal injection has not gone unchallenged. The following sections detail a few of the major challenges to the protocols adopted by ODOC.

1. *Anderson v. Jones* (2005)

Condemned prisoners first challenged the constitutionality of Oklahoma's execution procedures in 2005. They argued that the three-drug protocol then in effect presented an undue risk of pain and suffering. They also

¹⁷ *Id.*

¹⁸ *Execution of Offenders Sentenced to Death*, OP-04501, OKLA. DEPT OF CORR., effective date June 30, 2015, <https://www.ok.gov/doc/documents/op040501.pdf>.

¹⁹ Despite having the option in its current execution protocol, the Oklahoma ODOC has never performed an execution using a one-drug formula. *See State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Mar. 8, 2017). Since 2014, the Oklahoma ODOC has represented that it is not able to obtain pentobarbital or thiopental from compounding pharmacies. *See Oklahoma Unable to Buy Lethal Injection Drugs for Upcoming Execution*, AL-JAZEERA AMER., Mar. 18, 2014, <http://america.aljazeera.com/articles/2014/5/18/oklahoma-unable-to-buy-lethal-injection-drugs-for-upcoming-execution.html>.

²⁰ *See State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Mar. 8, 2017).

²¹ *See Execution of Offenders Sentenced to Death*, *supra* note 18. The drug formula options are laid out in Appendix D to the procedure: *Preparation and Administration of Chemicals*, <https://www.ok.gov/doc/documents/040501ad.pdf> (last visited Apr. 20, 2016); *see also* James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 105 GEO. L.J. 1215, 1272 (2015) ("Oklahoma[] adopted five different protocols just to hedge its bets").

²² *Execution of Offenders Sentenced to Death*, *supra* note 18.

²³ *Baze v. Rees*, 553 U.S. 35, 55 (2008) ("It is uncontested that, failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk of suffocation from the administration of pancuronium bromide and pain from the injection of potassium chloride"). In 2008, The U.S. Supreme decided *Baze v. Rees*, which upheld the constitutionality of Kentucky's three-drug execution protocol and set the standard for lower courts when deciding method of execution challenges. To constitute cruel and unusual punishment, "there must be a 'substantial risk of serious harm,' an 'objectively intolerable risk of harm' that prevents prison officials from pleading that there were 'subjectively blameless for purposes of the Eighth Amendment.'" *Id.* at 50.

²⁴ Mark Heath, *The Medicalization of Execution: Lethal Injection in the United States*, Public Health Behind Bars: From Prisons to Communities 90 (RB Greninger 1 ed. 2007).

argued that ODOC's method and sequence of drug delivery exacerbated that risk.²⁵ The petitioners maintained that the order of drug administration—an anesthetic, a paralytic, two successive doses of potassium chloride, a second anesthetic, and a second paralytic—demonstrated a flawed understanding of the execution process. The petitioners also contended that the delayed administration of a portion of the anesthetic—until after the condemned prisoner is or was expected to be dead—greatly increased the likelihood that prisoners would regain consciousness during the administration of the paralytic and potassium. As a result, the condemned prisoner would be unable to draw breath, and experience grievous pain.²⁶ The petitioners also presented evidence that previously executed prisoners had not received full doses of the first anesthetic drug. Autopsy reports indicated that in at least two cases, full unused syringes of thiopental—the anesthetic—accompanied the bodies of the prisoners to the medical examiner's office.²⁷

Although these challenges were not decided on the merits due to procedural issues in the case,²⁸ ODOC amended its execution protocol in June 2007 in response to the litigation.²⁹ The new protocol called for “two bilateral doses of each drug to be given simultaneously” in both arms.³⁰ ODOC also amended the protocol to add a five minute wait between administration of the anesthetic and the paralytic.³¹ This revised protocol further provided that at the end of the five minutes, “the physician present in the Execution Room will monitor the condemned inmate's level of consciousness through whatever means the physician believes are appropriate.”³² The protocol also included a requirement that the team member who inserted the IV lines be an “EMT-P [i.e., paramedic] or person with similar qualifications and experience in IV insertion.”³³

2. *Pawatt v. Jones* (2010)

In 2010, condemned prisoners filed another lawsuit challenging ODOC's execution protocol.³⁴ The plaintiffs claimed that ODOC was not adhering to the protocol adopted in the wake of the litigation in *Anderson*, which had been further modified due to the limited availability of drugs required by the protocol. In 2009, Hospira, the sole domestic manufacturer of thiopental—the anesthetic prescribed by ODOC—ceased production of the drug.³⁵ By 2010, thiopental was scarce and states like Oklahoma began searching for alternate sources

²⁵ Pls.' Complaint, *Anderson et al v. Jones*, No. 05-CV-825 F (W.D. Okla. July 20, 2005). The complainants presented evidence to show, *inter alia*, that the execution team did not monitor the IV lines to ensure that they were unobstructed and flowing and that there were untrained and unqualified personnel on the execution team (in particular, a phlebotomist whose training did not include establishing IV access or administering IV fluids). Pls.' Complaint at ¶¶ 42-54, *Anderson et al v. Jones*, No. 05-CV-825 F (W.D. Okla. July 20, 2005); see also *Phlebotomy*, Occupational Outlook Handbook, Bureau of Labor Statistics, <http://www.bls.gov/ooh/healthcare/phlebotomists.htm> (last visited on Nov. 17, 2016).

²⁶ Pls.' Complaint, *supra* note 25 at ¶¶ 55-57; see also Defs.' Mot. to Dismiss at ¶¶ 2-5, *Anderson v. Jones*, No. 05-CV-825 F (W.D. Okla. Sept. 6, 2005).

²⁷ Pls.' Complaint, *supra* note 25 at ¶ 61.

²⁸ See *Taylor v. Workman*, 554 F.3d 879 (10th Cir. 2009).

²⁹ Memoranda to Oklahoma State Penitentiary Warden Simmons from Oklahoma Department of Corrections Director Justin Jones amending OSP-040301, June 13, 2007. After ODOC amended the protocol, the litigation was dismissed as moot because the plaintiffs received sentencing relief.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Procedures for the Execution of Inmates Sentenced to Death, OSP-040301-07, OKLA. DEP'T OF CORR, effective date Aug. 20, 2007, Section IX. B.1. Note that the protocol at the time required the presence of a physician to monitor consciousness. The current protocol does not require a physician to complete this task and does not require continuous monitoring; it only requires a consciousness check. Moreover, according to the protocol, a doctor is just one type of medical professional who can be a team member. In practice, doctors have participated in executions in OK for years. Although the American Medical Association guidelines for ethical behavior prohibit doctors from participating in executions, such guidelines are neither enforceable nor applicable to all doctors because the AMA is a membership organization. See Ty Alper, *The Truth about Physician Participation in Lethal Injection Executions*, 88 N.C. L. REV. 11 (2009), <https://ssrn.com/abstract=1424270>.

³⁴ Pls.' Complaint, *Pawatt v. Jones*, No. 5:10-CV-141 (W.D. Okla. Aug. 17, 2010).

³⁵ Bruce Japsen, CHICAGO TRIBUNE, Jan 21, 2011, http://articles.chicagotribune.com/2011-01-21/business/ct-biz-0122-execution-drug-20110121_1_hospira-executions-capital-punishment.

or replacements of the drug for the three-drug protocol.³⁶ ODOC amended its protocol in October 2010 and specified that it could use either thiopental or pentobarbital as the first drug in the three-drug procedure.³⁷

The petitioners also alleged that the simultaneous administration of drugs through two lines created unconstitutional risks of pain and suffering and that the execution team continued to include untrained personnel who were not adequately monitoring the IV lines.³⁸

Following a limited hearing related to the properties of pentobarbital, the trial court dismissed the prisoners' claims.³⁹ The U.S. Court of Appeals for the Tenth Circuit affirmed the decision.⁴⁰ In December 2010, ODOC substituted pentobarbital as the first drug in its three-drug execution procedure and became the first state to use the drug when it carried out the execution of John Duty on December 16, 2010.⁴¹

3. Oklahoma's Reliance on Compounding Pharmacies

Throughout 2013 and into 2014, Oklahoma continued to use pentobarbital as the first drug in its three-drug execution procedure. However, as subsequent litigation later revealed, ODOC had not been able to obtain its pentobarbital from Lundbeck,⁴² the only manufacturer of FDA-approved pentobarbital.⁴³ Instead, Oklahoma and many other states turned to compounding pharmacies—facilities that make small batches of drugs to-order—to obtain pentobarbital.⁴⁴

Compounded drugs are not FDA-approved and are not evaluated for identity, purity, potency, safety, or effectiveness.⁴⁵ For a lethal injection execution to proceed and cause death in a humane and constitutional manner, the drugs used must be what they purport to be and work as intended. Compounded drugs are made-to-order and are not subject to the same rigorous oversight as manufactured drugs; thus, when a compounded drug is used in an execution, it is not possible to know with certainty that the drug in the syringe is authentic

³⁶ Erik Eckholm and Katie Zezima, *States Face Shortage of Key Lethal Injection Drug*, N.Y. TIMES, Jan. 21, 2011, http://www.nytimes.com/2011/01/22/us/22lethal.html?_r=0. States like Oklahoma and Texas changed their execution protocols to require use of FDA-approved pentobarbital (namely, Nembutal, a product manufactured by the pharmaceutical company Lundbeck) while Arizona, Georgia, Nebraska, and other jurisdictions imported thiopental from foreign distributors in the United Kingdom and India. Chris McGreal, *Lethal Injection Drug Production Ends in the US*, GUARDIAN, Jan. 23, 2011, <http://www.theguardian.com/world/2011/jan/23/lethal-injection-sodium-thiopental-hospira>; see also Owen Bowcott & Chris McGreal, *British Firm Denies Exporting Drug for Arizona Execution*, GUARDIAN, Oct. 27, 2010, <http://www.theguardian.com/business/2010/oct/27/british-firm-denies-exporting-drug>.

Imported thiopental was used in at least four executions before the DEA ensured that states stopped using it, either by seizing the drugs or arranging for the states to surrender them or agree not to use them. Prisoners from three states challenged the FDA's failure to block the importation of unapproved thiopental. The U.S. Court of Appeals for the District of Columbia Circuit held that federal law prohibits the FDA from allowing unapproved or misbranded thiopental to enter the country, a ruling that should prevent future importation of thiopental for use in executions. *Cook v. Food and Drug Administration*, 733 F.3d 1 (D.C. Cir. 2013). With the importation of thiopental effectively blocked, pentobarbital eventually replaced thiopental in both one-drug and three-drug execution protocols and was used in every state that continued carrying out executions. *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Apr. 21, 2016).

³⁷ Procedures for the Execution of Inmates Sentenced to Death at Section IX. C, OSP-040301-07, OKLA. DEPT OF CORR., Effective Date Oct. 21, 2010.

³⁸ Pls.' Complaint at ¶¶ 1-2, 29, *Pavatt v. Jones*, No. 3:10-CV-141 (W.D. Okla. Feb. 12, 2010).

³⁹ *Pavatt v. Jones*, No. CIV-10-141, 2010 WL 7609463 (W.D. Okla. Nov. 22, 2010).

⁴⁰ *Pavatt v. Jones*, 627 F.3d 1336 (10th Cir. 2010).

⁴¹ Ashby Jones, *A Death Penalty First: OK Man Executed With Pentobarbital*, WALL ST. J. LAW BLOG, Dec. 17, 2010, <http://blogs.wsj.com/law/2010/12/17/a-death-penalty-first-ok-man-executed-with-pentobarbital>.

⁴² *Glossip v. Gross*, 135 S. Ct. 2726 (2014); Carimah Townes, *Oklahoma Was Even More Desperate for Lethal Injection Drugs than Previously Thought*, THINK PROGRESS, May 13, 2016, at <http://thinkprogress.org/justice/2015/05/13/3657858/oklahoma-desperate-lethal-injections-drugs-previously-thought>.

⁴³ Press Release, Lundbeck, *Lundbeck Overhauls Pentobarbital Distribution Program To Restrict Misuse* (Jul. 1, 2011), <http://investor.lundbeck.com/releasedetail.cfm?releaseid=605775>. Lundbeck restricted distribution of pentobarbital to prevent its sale to state departments of corrections for use in executions. *Id.*

⁴⁴ Megan McCracken & Jennifer Moreno, *Secret Drugs, Agonizing Deaths*, N.Y. TIMES, Apr. 13, 2014, http://www.nytimes.com/2014/04/14/opinion/secret-drugs-agonizing-deaths.html?_r=0.

⁴⁵ Sarah Sellers & Wulf H. Utian, *Pharmacy Compounding Primer for Physicians: Prescriber Beware*, DRUGS, 72(16): 2043-50, Dec. 2012, [hereinafter *Pharmacy Compounding Primer*]; Ed Silverman, *Safety Issues at Compounding Pharmacy Underscore Oversight Problems*, STAT, Apr. 8, 2016, <https://www.statnews.com/pharmalot/2016/04/08/compounding-pharmacy-drug-safety-fda>; Peter Eisler & Christopher Shnaars, *Safety, Sanitary Problems Prompt Scores of Drug Recalls*, USA TODAY, Oct. 7, 2014, <http://www.usatoday.com/story/news/nation/2014/10/07/compounding-pharmacy-recalls-inspections-contamination/16472741>.

and effective.⁴⁶ Potency testing only reveals the strength of the active ingredient. It does not reveal whether additives, impurities, or contaminants are present. Even a miniscule amount of a contaminant can lead to serious responses, including anaphylactic shock or excruciating pain.⁴⁷ Additionally, lack of transparency prevents the state from knowing whether a compounded drug is effective.⁴⁸ Six states have carried out at least 72 executions using compounded pentobarbital.⁴⁹

4. *Glossip v. Gross* (2014)

Beginning in late 2013, some states turned to a new drug to serve as the first drug in the three-drug procedure—midazolam. Midazolam is a benzodiazepine drug, most commonly used in clinical practice as a perioperative anxiolytic (anti-anxiety) drug.⁵⁰ Whereas both thiopental and pentobarbital are barbiturate, anesthetic drugs, midazolam has never been approved by the FDA for use as a sole anesthetic agent for surgical procedures and is not used to maintain anesthesia throughout surgery.⁵¹

Prior to Oklahoma's first use of midazolam in an execution—that of Clayton Lockett in April 2014⁵²—the drug had been used in only a handful of executions nationwide. Florida—which abandoned its use of the drug in January 2017⁵³—began using midazolam as the first drug in a three-drug procedure at the end of 2013 and carried out seven executions using midazolam prior to Lockett's execution.⁵⁴ Like Oklahoma, Florida's protocol called for the administration of a paralytic drug shortly after administration of midazolam, making it impossible to meaningfully assess the effectiveness of midazolam as an anesthetic.⁵⁵

⁴⁶ See *id.* (noting the “unprecedented spate of drug recalls by compounding pharmacies—and scores of citations for bad practices”); see also *Pharmacy Compounding Primer* at 2044, *supra* note 45 (finding that when a patient has a particularized need that requires use of a compounded product, the risks associated with compounded drugs are generally outweighed by the patient's need for the medication).

⁴⁷ Affidavit of Larry Sasich at 15, *Zinc v. Lombardi*, No. 2:12-CV-4209 (W.D. Mo. Nov. 8, 2013).

⁴⁸ Maurice Chammah, *The Great Ohio Death Drug Mystery*, THE MARSHALL PROJECT (Jan. 31, 2015), <https://www.themarshallproject.org/2015/01/14/the-great-ohio-death-drug-mystery#1kTOJGMaP> (discussing Ohio's secrecy law regarding compounding pharmacies and stating, “there is no independent check that the compounding pharmacy will make drugs that work effectively . . .”).

⁴⁹ *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited Apr. 21, 2016). More recently, several states have claimed they are not able to procure pentobarbital from compounding pharmacies, but Georgia, Missouri, and Texas continue to obtain the drug and carry out executions following a one-drug, pentobarbital protocol. *First Killers Executed since Botched Okla. Lethal Injection*, CBS NEWS (June 18, 2014), <http://www.cbsnews.com/news/ga-inmate-becomes-first-executed-in-u-s-since-botched-one-in-okla/>; Terri Langford, *TDCJ Official: Supreme Court's Ruling Won't Impact Texas Executions*, TEX. TRIBUNE, June 29, 2015, <https://www.texastribune.org/2015/06/29/scotus-ruling-lethal-drugs>.

⁵⁰ *Midazolam*, MAYO CLINIC, <http://www.mayoclinic.org/drugs-supplements/midazolam-injection-route/description/drg-20064815> (last visited Mar. 8, 2017).

⁵¹ Rachel Rettner, *How Does Execution Drug Midazolam Work?*, LIVE SCIENCE (June 29, 2015), <http://www.livescience.com/51384-execution-drug-midazolam-effect.html>.

⁵² Notably, the Attorney General only informed Lockett's counsel and the state trial court that ODOC did not have the drugs necessary to carry out the executions three days prior to Lockett's execution. According to the Attorney General, the compounding pharmacy that was the State's “usual source” of pentobarbital fell through, and the State had not found another source for the drug. Petitioner's Brief at 9, *Glossip v. Gross*, No. 14-79335 (U.S. Mar. 9, 2015). Two days later, the Attorney General announced that midazolam would be used in place of pentobarbital in the three-drug procedure. See Berger, *infra* note 108, at 739 (“Oklahoma [] hastily revised its procedure after the botched execution of Michael Lee Wilson, only to botch Clayton Lockett's execution just a few months later. The State then changed its procedure again, but rather than taking the time to do so carefully, it rushed to complete the revision to continue executions as expeditiously as possible.”); *The Supreme Court 2014 Term* – *Glossip v. Gross*, 129 HARV. L. REV. 271, 271 (2015) (“Oklahoma sought an alternative in order to continue carrying out the death penalty, and turned to midazolam, a move some derided as part of the ‘ongoing experiment in executing people with untested drug combinations.’”). Note that the state did not provide evidence that scientific or medical experts advised the use of midazolam in the new drug protocol. See Petitioner's Brief at 11, *Glossip*, 135 S. Ct. 2726.

⁵³ *State by State Lethal Injection*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/state-lethal-injection> (last visited March 1, 2017).

⁵⁴ Florida executed William Happ on October 15, 2015, the state's first execution using midazolam. Media witnesses to the execution reported, “It appeared Happ remained conscious longer and made more body movements after losing consciousness than other people executed recently by lethal injection under the old [drug] formula.” Ben Crair, *Photos from a Botched Lethal Injection*, NEW REPUBLIC (May 29, 2014), <https://newrepublic.com/article/117898/lethal-injection-photos-angel-diazs-botched-execution-florida>.

⁵⁵ Execution by Lethal Injection Procedures, Florida Department of Corrections, effective September 9, 2015.

Indeed, the history of midazolam's use in executions is brief and troubling. Ohio mixed midazolam with hydromorphone in the lengthy, disquieting execution of Dennis McGuire in January 2014.⁵⁶ Despite the fact that Ohio's experiment with a combination of midazolam and hydromorphone did not go well,⁵⁷ Arizona also used the drug combination in the July 2014 execution of Joseph Wood with disastrous results.⁵⁸ In December 2016, Alabama executed Ronald Smith and used midazolam in its three-drug protocol. During Smith's execution, he "appeared to be struggling for breath and heaved and coughed and clenched his left fist," even after apparently being administered midazolam.⁵⁹ In the two executions where midazolam was used without a paralytic agent, witnesses were able to observe that the prisoners initially lost consciousness, but then regained consciousness and struggled and gasped for breath for protracted periods prior to death.⁶⁰ As is described later in this chapter, Oklahoma inmate Clayton Lockett also regained consciousness following administration of midazolam.⁶¹

In view of midazolam's questionable efficacy, four condemned prisoners in Oklahoma filed a lawsuit and motion for preliminary injunction in federal court in 2014. That litigation—*Glossip v. Gross*—argued that the properties of midazolam make it unsuitable as the first drug in a three-drug execution procedure. The prisoners argued that midazolam is not capable of reliably inducing and maintaining the level of anesthesia necessary to prevent the prisoner from experiencing the grievous pain and suffering caused by the second and third drugs.⁶² The district court denied the motion for preliminary injunction, and the U.S. Court of Appeals for the Tenth Circuit affirmed. The petitioners then appealed to the U.S. Supreme Court, which agreed to hear the case (although only after one of the petitioners, Charles Warner, had been executed).

The U.S. Supreme Court's decision in *Glossip v. Gross* ultimately affirmed the district court's denial of a preliminary injunction, largely on the lower court's rationale.⁶³ First, the Court found that the petitioners failed "to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution."⁶⁴ Second, the Court found that the district court had not committed clear error "when it found that midazolam is highly likely to render a person unable to feel pain during an execution."⁶⁵ The majority opinion deferred to the district court's conclusions, stressing that the "clear error" standard of review does not entitle appellate courts "to overturn a finding 'simply because [they] are convinced

⁵⁶ Ohio executed Dennis McGuire on January 16, 2014. Media eyewitness reports of the execution observed, "McGuire started struggling and gasping loudly for air, making snorting and choking sounds which lasted for at least 10 minutes, with his chest heaving and his fist clinched. Deep, rattling sounds emanated from his mouth." McGuire took almost 30 minutes to die. On July 23, 2014, Arizona executed Joseph Wood with the same combination of drugs in an event that lasted over 90 minutes. Maura Dolan, *Executions Should Be by Firing Squad, Federal Appeals Court Judge Says*, L.A. TIMES, July 23, 2014.

⁵⁷ The two-drug formula was used in the execution of Dennis McGuire, who "struggled, made guttural noises, gasped for air and choked for about 10 minutes" prior to death. Alan Johnson, *Inmate's Death Called 'Horrific' Under New, 2-Drug Execution*, COLUMBUS DISPATCH, Jan. 17, 2014, <http://www.dispatch.com/content/stories/local/2014/01/16/mcguire-execution.html>.

⁵⁸ Bob Ortega et. al, *Execution of Arizona Murderer Takes Nearly 2 Hours*, ARIZ. CENTRAL (July 24, 2014), <http://www.azcentral.com/story/news/local/arizona/2014/07/25/arizona-execution-botched/13070677>.

⁵⁹ Kent Faulk, *Alabama Death Row Inmate Ronald Bert Smith Heaved, Coughed for 15 Minutes during Execution*, AL.COM (Dec. 8, 2016), http://www.al.com/news/birmingham/index.ssf/2016/12/alabama_death_row_inmate_is_se.html.

⁶⁰ *Id.*

⁶¹ See Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC, June 2015, <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/>; see, e.g., Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825, 842 (2015) ("The problem is the drug, not the dosage. And that's especially problematic for Oklahoma executions because the state's three-drug protocol follows midazolam with a paralytic, so unless the injection of the paralytic goes awry (as it did in Lockett's case), the condemned will be paralyzed and unable to express pain.").

⁶² The *Glossip* litigation is part of a long history of challenges to Oklahoma's execution procedures dating back to the early 2000s. There have been various challenges to different aspect of the protocol including the qualification of the team members, method of drug delivery, IV access, changes in the drugs used in the protocol and access to information about the procedures. See discussion, *supra* section I.C.

⁶³ *Glossip v. Gross*, 135 S. Ct. 2726 (2014).

⁶⁴ *Id.* at 2738.

⁶⁵ *Id.* at 2739.

that [they] would have decided the case differently.”⁶⁶ In December 2016, notwithstanding the Supreme Court’s ruling in *Glossip*, Arizona banned the use of midazolam following its review of the two-hour execution of Joseph Wood.⁶⁷

II. Secrecy Laws

A. National Overview

Transparency of the execution process and drugs used in lethal injections can ensure the identity, authenticity, and effectiveness of controlled substances.⁶⁸ Nevertheless, at least 12 states currently have statutes that permit departments of corrections to withhold key information about the source of execution drugs.⁶⁹ While all of

⁶⁶ *Id.* (internal citation omitted); *compare id.* (Sotomayor, J., dissenting) (arguing that an appellate court should find clear error when it “is left with the definite and firm conviction that a mistake has been committed”) (internal citation omitted).

⁶⁷ Janice Williams, *Death Penalty Drugs Update 2016: Arizona Bans Controversial Sedative after Botched Execution*, INT’L BUS. TIMES, Dec. 20, 2016, <http://www.ibtimes.com/death-penalty-drugs-update-2016-arizona-bans-controversial-sedative-after-botched-2463259> (“A joint stipulation filed by Arizona officials Monday said the Department of Corrections will ‘never again use midazolam, or any other benzodiazepine, as part of a drug protocol in a lethal injection execution.’”).

⁶⁸ *Laws, Regulations, Policies and Procedures for Drug Applications*, U.S. FOOD AND DRUG ADMINISTRATION, <http://www.fda.gov/Drugs/DevelopmentApprovalProcess/ucm090410.htm> (last visited Mar. 8, 2017), *Program Description*, DRUG ENFORCEMENT ADMINISTRATION DIVERSION CONTROL DIVISION, http://www.deadiversion.usdoj.gov/prog_dscrpt/index.html (last visited Mar. 8, 2017).

⁶⁹ ARIZ. REV. STAT. § 15-757 C (“The identity of executioners and other persons who participate or perform ancillary functions in an execution and any information contained in records that would identify those persons is confidential and is not subject to disclosure pursuant to title 39, chapter 1, article 2.”); ARK. CODE § 5-4-617(g) (“The procedures under subdivision (e)(1) of this section and the implementation of the procedures under subdivision (e)(1) of this section are not subject to disclosure under the Freedom of Information Act of 1967.”); FLA. STAT. § 945.10(1)(g) (“Except as otherwise provided by law or in this section, the following records and information held by the Department of Corrections are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution: . . . Information which identifies an executioner, or any persons prescribing, preparing, compounding, dispensing, or administering a lethal injection.”); GA. CODE, § 42-5-56(d)(2) (“The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 48 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret.”); LA. REV. STAT. § 15:570 G (The identity of any persons other than the persons specified in Subsection F of this Section who participate or perform ancillary functions in an execution of the death sentence, either directly or indirectly, shall remain strictly confidential and the identities of those persons and information about those persons which could lead to the determination of the identities of those persons shall not be subject to public disclosure in any manner. Any information contained in records that could identify any person other than the persons specified in Subsection F of this Section shall remain confidential, shall not be subject to disclosure, and shall not be admissible as evidence nor discoverable in any proceeding before any court, tribunal, board, agency, or person.”); MO. REV. STAT. § 546.720 (Missouri has made the pharmacy and pharmacist providing compounding drugs a member of the execution team in an attempt to keep their identities secret. The statute requires confidentiality for persons “who administer or provide direct support for the administration of the lethal chemicals.”); N.C. GEN. STAT. § 152-1.2 (Exempts from disclosure the “name, address, qualifications, and other identifying information of 24 any person or entity that manufactures, compounds, prepares, prescribes, 25 dispenses, supplies, or administers the drugs or supplies obtained for any 26 purpose authorized by Article 19 of Chapter 45 of the General Statutes.”); OHIO REV. CODE § 2949.221 (“(B) If, at any time prior to the day that is twenty-four months after the effective date of this section, a person manufactures, compounds, imports, transports, distributes, supplies, prescribes, prepares, administers, uses, or tests any of the compounding equipment or components, the active pharmaceutical ingredients, the drugs or combination of drugs, the medical supplies, or the medical equipment used in the application of a lethal injection of a drug or combination of drugs in the administration of a death sentence by lethal injection as provided for in division (A) of section 2949.22 of the Revised Code, notwithstanding any provision of law to the contrary, all of the following apply regarding any information or record in the possession of any public office that identifies or reasonably leads to the identification of the person and the person’s participation in any activity described in this division: 1) The information or record shall be classified as confidential, is privileged under law, and is not subject to disclosure by any person, state agency, governmental entity, board, or commission or any political subdivision as a public record under section 149.43 of the Revised Code or otherwise.”); S.D. CODIFIED LAWS § 25A-27A-51.2 (“Confidentiality of identity of person or entity supplying or administering intravenous injection substance—Violation as misdemeanor. The name, address, qualifications, and other identifying information relating to the identity of any person or entity supplying or administering the intravenous injection substance or substances under chapter 25A-27A are confidential. Disclosure of the foregoing information may not be authorized or ordered. Disclosure of confidential information pursuant to this section concerning the execution of an inmate under chapter 25A-27A is a Class 1 misdemeanor.”); TENN. CODE ANN. § 10-7-504 (h)(1) (“Identifying an individual as a person who has been or may in the future be directly involved in the process of executing a sentence of death shall be treated as confidential and shall not be open to public inspection. For the purposes of this section “person” includes, but is not limited to, an employee of the state who has training related to direct involvement in the process of executing a sentence of death, a contractor or employee of a contractor, or a volunteer who has direct involvement in the process of executing a sentence of death. Records made confidential by this section include, but are not limited to, records related to remuneration to a person in connection with such person’s participation in or preparation for the execution of a sentence of death. Such payments shall be made in accordance with a memorandum of understanding between the commissioner of correction and the commissioner of finance and administration in a manner that will protect the public identity of the recipients; provided, if a contractor is employed to participate in or prepare for the execution of a sentence of death, the amount of the special payment made to such contractor pursuant to the contract shall be reported by the commissioner of correction to the comptroller of the treasury and such amount shall be a public record. 2) Information made confidential by this subsection (h) shall be redacted wherever possible and nothing in this subsection (h) shall be used to limit or deny access to otherwise public information because a file, a document, or data file contains confidential information.”); TEX. GOV. CODE ANN. § 552.1081 (“Information is excepted from the requirements of Section 552.021 if it contains identifying information under Article 43.14, Code of Criminal Procedure, including that of: 1) any person who participates in an execution procedure, including a person who uses, supplies, or administers a substance during the execution; and 2) any person or entity that manufactures, transports, tests, procures, compounds, prescribes, dispenses, or provides a substance or supplies used in an execution.”).

the statutes generally protect the identities of the entities that supply execution drugs, they differ in both the amount of information they define as confidential and the extent to which they prevent disclosure of the information. The most expansive confidentiality statutes, like Oklahoma's,⁷⁰ cover broad categories of information about execution procedures and prohibit disclosure of the information under almost all circumstances, including subpoena and civil discovery.⁷¹ Other statutes arguably apply only to the disclosure of information in response to a public records request.⁷²

Secrecy laws have been challenged on numerous grounds in both state and federal courts, including challenges under the First and Eighth Amendments, the Due Process Clause, the constitutional guarantee of access to the courts, and the separation of powers. To date, there has been no final judgment invalidating a secrecy law, and the laws have been effective in denying prisoners, the media, courts, and the public access to information about the sources of execution drugs.

State secrecy laws have complicated the process of understanding how states have obtained execution drugs. While one legal observer suggested that such laws are "facilitat[ing] an underground economy of death penalty drugs,"⁷³ secrecy laws have been enacted to encourage drug manufacturers or pharmacies to continue to supply lethal injection drugs without fear of public retaliation.⁷⁴ As is described in greater detail in the next section, Oklahoma obtained five grams of thiopental prior to the execution of Jeffrey Matthews from the Arkansas Department of Corrections when it no longer could purchase the drug from its sole domestic manufacturer. California and Arizona also have traded execution drugs. In September of 2015, Texas repaid a drug debt to Virginia by giving the state pentobarbital to use in the execution of Alfredo Prieto.⁷⁵ However, federal law requires all persons to obtain appropriate licensing to engage in the trade and distribution of controlled substances.⁷⁶ Therefore, when states trade and distribute controlled substances—such as trading execution drugs between one another—those states must obtain appropriate licensing to comply with federal law. Secrecy

⁷⁰ Comparatively, Oklahoma's statute is very restrictive. Georgia's statute, *see infra* note 126, is widely considered the most restrictive because it makes the information a confidential state secret. However, Oklahoma's language—"shall not be subject to discovery in any civil or criminal proceedings"—is an effort to keep the secret even in civil or criminal court. This is beyond a public records exemption because it attempts to prevent even judges from reviewing the information. Several other states use similar language. Some states also add civil or criminal penalty, but in terms of preventing the disclosure of information, the language of Oklahoma's statute is very restrictive.

⁷¹ GA. CODE § 42-5-36(d)(2) (The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret."); OHIO REV. CODE § 2949.221 (The information or record shall be classified as confidential, is privileged under law, and is not subject to disclosure .by any person, state agency, governmental entity, board, or commission or any political subdivision as a public record ... not be subject to disclosure by or during any judicial proceeding, inquiry, or process... not be subject to discovery, subpoena, or any other means of legal compulsion for disclosure"); OKLA. STAT. tit. 22, § 1015 B ("The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings.")

⁷² AMER. BAR. ASS'N, DEATH PENALTY DUE PROCESS REVIEW PROJECT, DEATH PENALTY REPRESENTATION PROJECT, REPORT TO THE HOUSE OF DELEGATES 3–5 (2015).

⁷³ Nathaniel A. W. Crider, *What You Don't Know Will Kill You: A First Amendment Challenge to Lethal Injection Secrecy*, 48 COLUM. J.L. & SOC. PROBS. 1, 27 (2014) (describing the actions of the Missouri Department of Corrections, when it "gave one of its officers \$11,000 dollars in cash and sent him into Oklahoma to purchase lethal injection drugs from a compounding pharmacy not licensed to sell drugs in Missouri").

⁷⁴ Michael Rooney, *Lethal Secrecy*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2014/lethal-secrecy> (last visited Jan. 15, 2017).

⁷⁵ *Texas Prison Officials Send Virginia Sought-After Drug for Execution This Week*, N.Y. TIMES, Sept. 26, 2015, <http://www.nytimes.com/2015/09/27/us/texas-prison-officials-send-virginia-sought-after-drug-for-execution-this-week.html>.

⁷⁶ 21 U.S.C. § 822(a)(1) ("Every person who manufactures or distributes any controlled substance . . . shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him"); *see also* Pharmacist's Manual, Drug Enforcement Administration, https://www.deadiversion.usdoj.gov/pubs/manuals/pharm2/pharm_manual.htm ("Under the framework of the CSA, all controlled substance transactions take place within a 'closed system' of distribution established by Congress. Within this 'closed system' all legitimate handlers of controlled substances – manufacturers, distributors, physicians, pharmacies, and others, must be registered with DEA (unless exempt) and maintain strict accounting for all controlled substance transactions.").

laws prevent the public from fully knowing whether states violate federal law when obtaining these drugs, but states are willing to acknowledge when they have received proper licensing.⁷⁷

States face similar state and federal regulations when purchasing execution drugs from compounding pharmacies. State statutory schemes governing sales of drugs from compounding pharmacies generally require a pre-existing doctor-patient relationship—a particularized patient need that cannot be met with an over-the-counter product—and a patient-specific prescription.⁷⁸ Departments of corrections in several states, however, have found ways to circumvent these requirements, including by retaining a doctor to write a prescription for the drug and promising the pharmacies that their identities will be kept confidential.⁷⁹ When the state is not required to disclose the source of its drugs, any failures to meet statutory requirements (or the affirmative steps it has taken to work around those requirements) are not revealed. Other states have allegedly illegally imported—or attempted to illegally import—drugs from overseas.⁸⁰ The extent of extra-legal activities to obtain drugs is not and cannot be known due to secrecy laws that allow states to keep information concerning these activities hidden.

B. Oklahoma's Secrecy Laws

In 2011, the Oklahoma Legislature revised the state's capital punishment statute to prohibit the disclosure of information that identifies any parties that supply drugs for executions, and to exempt the purchase of execution drugs from the requirements of the Oklahoma Central Purchasing Act.⁸¹ By permitting ODOC to purchase execution drugs with petty cash, the statute creates a mechanism for ODOC to complete the transaction outside of the standard state purchasing process. This means ODOC can make the purchase without creating a record, thereby limiting review by the state, courts, or public concerning the legality or propriety of the purchase, or concerning other accountability issues such as the origin, cost, and reliability of the drugs. ODOC has declined to disclose information about the suppliers of its execution drugs.⁸²

While the Oklahoma Legislature amended the execution statute to make confidential the sources of execution drugs,

⁷⁷ Jolie McCullough, *Texas Sues FDA Over Seized Execution Drugs*, TEX. TRIBUNE, Jan. 3, 2017, <https://www.texastribune.org/2017/01/03/texas-ag-ken-paxton-sues-fda-over-import-execution/> (Texas acknowledging that the state received the proper import license when attempting to obtain an anesthetic previously used by the state in executions from India).

⁷⁸ See General Requirements, 26 Okla. Reg. 2276 (July 7, 2009) ("In specific circumstances a pharmacist may compound an appropriate quantity of a drug . . . based on documentation provided by the prescribing physician of a patient specific medical need"); see also 26 Okla. Reg. 2276 (July 7, 2009) (amended at 30 Okla. Reg. 2010 (July 25, 2013)) («since compounding is already based on the practitioner/ patient/ pharmacy triad, this should be satisfied when a practitioner writes and order to administer the drug in the medical record»; «a compound product shall NOT be sold to a third party for resale»), at <https://www.ok.gov/pharmacy/documents/2015%20Law%20Book.pdf>.

⁷⁹ See, e.g., Terri Langford, *AG: Prisons Can Keep Info about Execution Drugs Secret*, TEX. TRIBUNE, May 29, 2014 (reporting that Texas Attorney General Greg Abbott stated the department must "withhold the identifying information of the pharmacy and pharmacist" due to some "threats" to local compounding pharmacies). Note that Mike Oakley in his interview transcript says that Oklahoma had prescripts written and then pharmacy would fill the script. Interview Transcript of Mike Oakley at 1522, *The Execution of Clayton D. Lockett*, Oklahoma Highway Patrol Investigation # 14-0189SI, June 10, 2014 (on file with author). Note that Georgia also pays a doctor to confidentially write prescriptions. Bill Rankin, *The Secrets of the Death Penalty*, ATLANTA JOURNAL-CONSTITUTION (Oct. 24, 2015), <http://www.myajc.com/news/news/local/the-secrets-of-the-death-penalty/nn7fN>.

⁸⁰ Michael Kiefer, *Arizona Again Tries to Illegally Import Execution Drug*, ARIZONA REPUBLIC (Oct. 25, 2015), <http://www.azcentral.com/story/news/arizona/investigations/2015/10/22/arizona-corrections-import-thiopental-illegal-execution-drug/74406580/>; Dan Solomon, *Supply of Execution Drugs Texas Is Thought to Have Imported Illegally*, TEX.MONTHLY, Oct. 27, 2015, <http://www.texasmonthly.com/the-daily-post/the-fda-confiscated-a-supply-of-execution-drugs-texas-is-thought-to-have-imported-illegally/>; Joe Duggan and Paul Hammel, *FDA Says Nebraska Can't Legally Import Drug Needed for Lethal Injections*, OMAHA WORLD-HERALD, Jun. 1, 2015, http://www.omaha.com/news/legislature/fda-says-nebraska-can-t-legally-import-drug-needed-for/article_0dc1c2d0-0658-14e5-979e-77b47170b978.html.

⁸¹ OKLA. STAT. tit. 22, § 1015(B) ("The identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution shall be confidential and shall not be subject to discovery in any civil or criminal proceedings. The purchase of drugs, medical supplies or medical equipment necessary to carry out the execution shall not be subject to the provisions of The Oklahoma Central Purchasing Act"); see also Mary D. Fan, *The Supply-Side Attack on Lethal Injection and the Rise of Execution Secrecy*, 95 BU. L. REV. 427, 444 (2015) ("The legal battles and controversial executions of Clayton Lockett and Joseph R. Wood have also brought greater attention to the rise of execution secrecy laws. Like other states in recent years, Oklahoma has enacted a law expressly protecting the confidentiality of execution drug suppliers.").

⁸² Erik Eckholm, *One Execution Botched, Oklahoma Delays the Next*, N.Y. TIMES, Apr. 29, 2014, http://www.nytimes.com/2014/04/30/us/oklahoma-executions.html?_r=0 ("Oklahoma later said it had found a federally approved manufacturer to provide the drugs for Tuesday's executions, but refused to identify it.").

it also broadened the categories of drugs that may be used in an execution. Whereas the previous law had specified an “ultrafast-acting barbiturate,” the new statute allows for use of any “lethal quantity of a drug or drugs.”⁸⁵

The Oklahoma execution statute delegates authority to ODOC to determine the execution protocol, including which drugs may be used in executions, without notice, process, transparency, or oversight. This secrecy also masks the extent to which the Office of the Attorney General and other state officials also take part in the determination of the protocol. A recent lawsuit uncovered that, following the botched execution of Clayton Lockett in April 2014,⁸⁴ “top state officials have repeatedly tried to pass the buck regarding responsibility for various problems with Oklahoma’s lethal injections.”⁸⁵

C. Legal Challenges to Oklahoma’s Secrecy Laws

Condemned prisoners—specifically, Clayton Lockett and Charles Warner— have challenged the new secrecy provisions of the execution statute, alleging violations of due process and the right of access to the courts.⁸⁶

Lockett and Warner’s civil lawsuit was filed in February 2014, two months before Lockett’s execution, and initially resulted in a grant of summary judgment by the state trial court. The court found that the secrecy laws—which mandate confidentiality of “[t]he identity of all persons who participate in or administer the execution process and persons who supply the drugs, medical supplies or medical equipment for the execution,” and exempt “[t]he purchase of drugs, medical supplies or medical equipment necessary to carry out the execution” from the provisions of the Oklahoma Central Purchasing Act⁸⁷—were an unconstitutional denial of access to the courts under the Oklahoma Constitution.⁸⁸

When the state trial court’s declaratory judgment decision was appealed to the Oklahoma Supreme Court, the court transferred the accompanying applications for stay of execution to the Oklahoma Court of Criminal Appeals (OCCA). The OCCA refused to assume jurisdiction, reasoning that its authority to issue stays of execution was limited to a pending action in which a death row inmate challenges his conviction or sentence of death.⁸⁹ Although the Oklahoma Supreme Court maintained that the OCCA did have the authority to issue a stay, it nevertheless issued one, finding that to do otherwise would “leave the appellants with no access to the courts for resolution of their ‘grave’ constitutional claims.”⁹⁰

In response to the Oklahoma Supreme Court, Governor Mary Fallin issued an executive order stating that the court had acted “outside the constitutional authority of that body” in staying the executions.⁹¹ The governor

⁸⁵ OKLA. STAT. tit. 22, § 1014 (“The punishment of death shall be carried out by the administration of a lethal quantity of a drug or drugs until death is pronounced by a licensed physician according to accepted standards of medical practice.”).

⁸⁴ See Lockett, *infra* section 13.

⁸⁵ See Cary Aspinwall & Ziva Branstetter, *Records Raise Questions about Who Is in Charge of Oklahoma Executions*, THE FRONTIER, Oct. 9, 2015, at <https://www.readfrontier.com/investigation/records-raise-questions-about-who-is-in-charge-of-oklahoma-executions>.

⁸⁶ See Jeffrey E. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, THE ATLANTIC, June 2015, <https://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/592069/>.

⁸⁷ OKLA. STAT. tit. 22, § 1015(B).

⁸⁸ See Lockett v. Evans, 356 P.3d 58, 60 (Okla. 2014) (per curiam).

⁸⁹ *Id.*; see also OKLA. STAT. tit. 22, § 1001.1(C) (2014).

⁹⁰ *Id.* at 61 (“The ‘rule of necessity’ now demands that we step forward. The rule is a well-established, common-law principle. Generally, it requires a judge to remain in a case regardless of the judge’s preference, if the sole power to decide a controversy resides in that official. Here, the Court of Criminal Appeals’ refused to exercise its rightfully placed jurisdiction, and left this Court in an awkward position. We can deny jurisdiction, or we can leave the appellants with no access to the courts for resolution of their ‘grave’ constitutional claims. As uncomfortable as this matter makes us, we refuse to violate our oaths of office and to leave the appellants with no access to the courts, their constitutionally guaranteed measure.” (emphasis added)).

⁹¹ Governor Mary Fallin, Executive Order No. 2014-08, Apr. 22, 2014; see also Ziva Branstetter, *Fallin: Supreme Court Exceeded Authority in Issuing Execution Stays*, TULSA WORLD, Apr. 22, 2014, http://www.tulsaworld.com/news/courts/fallin-supreme-court-exceeded-authority-in-issuing-execution-stays/article_2fb9fe2e-ca49-11e5-94b8-0017a43b2370.html.

concluded that she could not “give effect to the order” and “remain consistent with [her] oath of office.”⁹² Still, out of deference to the court, she stayed Lockett’s execution for seven days and directed the attorney general to seek guidance from the OCCA on how to implement the execution order. The next day, April 22, 2014, State Representative Mike Christian introduced a resolution seeking impeachment of the five members of the Oklahoma Supreme Court who had voted in favor of issuing stays of execution for the plaintiffs, citing as grounds “willful neglect of duty and incompetence.”⁹³ On April 23, 2014, the Supreme Court reversed the trial court’s findings, allowing Lockett’s and Warner’s executions to proceed.⁹⁴ Lockett was executed on April 29, 2014.

III. Problematic Executions

The first protocol promulgated by ODOC in 1978 was a two-drug protocol: thiopental and a paralytic drug (from a choice of three chemical paralytics).⁹⁵ That protocol was never used in an execution. In 1981, after consultation with Dr. Chapman, Oklahoma’s Chief Medical Examiner—who, as discussed above, first recommended a method for execution by lethal injection—ODOC amended the protocol to add potassium chloride as the third drug in the procedure. Dr. Chapman’s explanation for the addition of potassium chloride is not entirely clear.⁹⁶ Before ODOC carried out its first execution by lethal injection, Dr. Chapman raised concerns about potential problems with the administration of the new method.⁹⁷ Specifically, he warned that if the drugs were not administered properly, the prisoner’s death would be prolonged and he could be subjected to severe pain.⁹⁸

A. Problematic Executions Prior to April 2014

Oklahoma has had a number of high profile executions since the early 1990s, and ODOC performed several troubling executions prior to the execution of Clayton Lockett in April 2014.⁹⁹ Some of the executions, detailed below, are illustrative of the risks inherent in the three-drug procedure, while others demonstrate the risks of maladministration of the execution protocol.

Robyn Lee Parks, who was executed in 1992, reportedly had a violent reaction to the drugs. Approximately two minutes after the execution began, the muscles in his jaw, neck, and abdomen began to react spasmodically for approximately 45 seconds. Parks continued to gasp and violently gag until he died—41 minutes after the drugs were first administered. A *Tulsa World* reporter described the execution as “painful and ugly,” “scary,” and “overwhelming, stunning, disturbing.”¹⁰⁰

In 1997, Scott Dawn Carpenter was executed by lethal injection. Carpenter reportedly began to “gasp and shake. ‘This was followed by a guttural sound, multiple spasms and gasping for air’ until his body stopped moving, three minutes later.”¹⁰¹

⁹² *Id.*

⁹³ Andrew Cohen, *Oklahoma Just Neutered Its State Supreme Court*, THE WEEK, Apr. 29, 2014, <http://theweek.com/articles/447437/oklahoma-just-neutered-state-supreme-court>.

⁹⁴ *Lockett v. Evans*, 350 P.3d 488 (Okla. 2014).

⁹⁵ See Denno, *The Lethal Injection Quandary*, *supra* note 6 at 74 n.130.

⁹⁶ *Id.* at 74 n.131.

⁹⁷ *Id.*

⁹⁸ *Id.* at 72. Dr. Chapman also identified other potential problems including the “major hazard” of “missing the vein” and the need to have “someone knowledgeable in drug injection” administering the drugs. *Id.*

⁹⁹ The botched execution of Clayton Lockett is discussed in detail in the next subsection.

¹⁰⁰ Wayne Greene, *11-Minute Execution Seemingly Took Forever*, TULSA WORLD, Mar. 11, 1992, at A13.

¹⁰¹ Michael Overall & Michael Smith, *22-Year-Old Killer Gets Early Execution*, TULSA WORLD, May 8, 1997, at A1.

Lloyd LaFevers was executed in 2001. Witnesses reported he convulsed and gasped for breath, his chest heaving and his body rising off the gurney.¹⁰² His eyes stayed open and he had a bruise and swelling in his left arm around the IV insertion point.¹⁰³ After six minutes of convulsions he was pronounced dead.¹⁰⁴ The autopsy report by the Oklahoma State Medical Examiner's Office stated that LaFevers' IV "infiltrated after the first drug was administered."¹⁰⁵ The autopsy report also stated that "[t]he family of (LaFevers) is accusing prison officials of diluting the execution drugs or gave it [sic] in the wrong order to make this inmate suffer" and that "[a] prison unit manager had sent two letters to the clemency board stating that this inmate needed to die."

In 2006, Oklahoma executed 74-year-old John Boltz. Boltz's execution was delayed an hour because the medical team had trouble inserting an IV, and he was ultimately executed using a single IV placed in his femoral vein in the groin (the same type of IV that was improperly inserted in Lockett's execution). In a subsequent hearing, Warden Marty Sirmons testified that the doctor carrying out the execution had difficulty establishing an IV. The doctor was not "completely familiar" with operation of the IV supplies provided by the prison.¹⁰⁶

Michael Wilson was executed in January 2014 using compounded pentobarbital as the first drug in the three-drug process. After the start of the execution, witnesses heard Wilson say, "I feel my whole body burning."¹⁰⁷

Plaintiffs in lethal injection litigation have alleged additional problematic executions.¹⁰⁸

B. The Execution of Clayton Lockett

Clayton Lockett's execution in April 2014 was widely reported in state and national media outlets.¹⁰⁹ During the execution, Lockett initially lost consciousness, then subsequently regained consciousness and exhibited signs of pain and struggle.¹¹⁰ Members of the execution team did not know how to address the situation, and the governor cancelled the execution, after which the drugs eventually circulated through Lockett's system and caused his death.¹¹¹ The execution and its aftermath led to sustained national and international media coverage scrutinizing the details of the execution and the subsequent actions of state officials. After the execution, the governor appointed the commissioner of the Oklahoma Department of Public Safety (DPS) to fully investigate the events leading up to and surrounding the execution.¹¹² This section summarizes the main findings from the DPS report, public records, and media reports.

¹⁰² Cary Aspinwall & Ziva Branstetter, *Data Deficit*, TULSA WORLD, June 24, 2014, <http://www.pulitzer.org/files/2015/local-reporting/tulsaworld/05tulsaworld2015.pdf>.

¹⁰³ Declaration of Patrick J. Ehlers, *Patton v. Jones*, No. 5:06-cv-00591 (W.D. Okla. May 31, 2006).

¹⁰⁴ Ziva Branstetter, *Third Defendant in Tulsa QuikTrip Clerk's Murder Is Executed*, TULSA WORLD, Jan. 9, 2014, http://www.tulsaworld.com/homepagelatest/third-defendant-in-tulsa-quicktrip-clerk-s-murder-is-executed/article_50237e24-7990-11e3-88fe-001a4bcf6878.html.

¹⁰⁵ Report of Investigation by Medical Examiner, Lloyd LeFevers, No. 0100628, Office of the Chief Medical Examiner, State of Oklahoma (Jan. 31, 2001), <https://goo.gl/diySEu>.

¹⁰⁶ Ziva Branstetter, *Inside the Execution Chamber*, TULSA WORLD, Sept. 14, 2014, http://www.tulsaworld.com/inside-the-execution-chamber/article_b539785b-47ef-509c-92ac-941dd0639eb7.html.

¹⁰⁷ Charlotte Alter, *Oklahoma Convict Who Felt "Body Burning" Executed with Controversial Drug*, TIME, Jan. 10, 2014, <http://nation.time.com/2014/01/10/oklahoma-convict-who-felt-body-burning-executed-with-controversial-drug>.

¹⁰⁸ See, e.g., Memorandum and Motion to Reactivate Proceedings at 10, *Taylor v. Jones*, No. 5:05-cv-00825 (W.D. Okla. Sept. 28, 2008); see also Eric Berger, *The Executioners' Dilemma*, 49 U. RICH. L. REV. 731, 735 (2015) ("In the past two years, there have been botched executions in South Dakota (Eric Robert), Oklahoma (Michael Lee Wilson and Clayton Lockett), Arizona (Joseph Wood), and Ohio (Dennis McGuire).").

¹⁰⁹ James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 105 GEO. L.J. 1215, 1262 (2015) ("Oklahoma's botched execution was named one of the 'Top 10 Stories of 2014,' a testament to the newfound salience the issue has achieved. Now botched executions, and the spotlight on the death penalty that has come with them, are not only headline news, but also the subject of political satires and late night comedy news shows.").

¹¹⁰ Katie Fretland, *Scene at Botched Oklahoma Execution of Clayton Lockett Was 'a Bloody Mess'*, THE GUARDIAN, Dec. 15, 2014, <http://www.theguardian.com/world/2014/dec/15/botched-oklahoma-execution-clayton-lockett-bloody-mess>.

¹¹¹ *DPS Executive Summary*, *supra* note 5 at 25.

¹¹² Governor Mary Fallin, Executive Order 2014-41, April 30, 2014, <https://www.sos.ok.gov/documents/executive/942.pdf>.

1. Lockett's Execution

After Lockett was brought into the execution chamber and secured to the gurney, an emergency medical technician, licensed as a paramedic, began the IV insertion process.¹¹⁵ The paramedic—who had been licensed in emergency medical services for over 40 years and been a licensed paramedic for over 20 years—estimated that she had participated in all but two lethal injection executions in Oklahoma.¹¹⁴ The paramedic's assignment during the execution was to start an IV, ensure a proper infusion of saline, attach a cardiac monitor to the prisoner, and ensure that the drugs were administered at the correct time and speed.¹¹⁵ She reported that she did not receive any training from ODOC for her role on the execution team.¹¹⁶

When the paramedic first attempted IV access in the left arm, she obtained flashback, an indication of successful vein puncture.¹¹⁷ However, she did not have adhesive tape at hand and was unable to secure the catheter in place and the vein became unviable.¹¹⁸ The paramedic attempted two additional IV insertions into the left arm without success.¹¹⁹

At this point, the physician became involved.¹²⁰ The physician's license was current, he was certified in family medicine, and worked in emergency medicine.¹²¹ The physician had previously been involved in one other execution, four to five years earlier.¹²² Two days before the execution date, he was contacted by ODOC and asked to fill in for another physician who had a scheduling conflict.¹²³ The physician understood that his duties were to assess Lockett's consciousness during the execution and to pronounce his death.¹²⁴

Both the physician and the paramedic sought to place an IV but were repeatedly unsuccessful.¹²⁵ The physician ultimately made the decision to obtain IV access via the femoral line, located in the upper thigh.¹²⁶ Because other needles requested by the physician were not available, the physician used “a short 1¼ [inch] needle” to set the IV.¹²⁷ He told DPS investigators that he had never attempted femoral vein access with that short of a needle.¹²⁸

After Lockett's scrub pants and underwear were cut in order to expose the femoral area, the physician inserted the needle into Lockett's groin area. He obtained good flashback, and believed that he had successfully punctured the femoral vein.¹²⁹ The physician described the line as “positional” because “you had to have it in the

¹¹⁵ *DPS Executive Summary*, *supra* note 5 at 15.

¹¹⁴ *Id.*

¹¹⁵ Interview Transcript of Paramedic at 1597, The Execution of Clayton D. Lockett, Oklahoma Highway Patrol Investigation # 14-0189SI, May 23, 2014 (on file with author).

¹¹⁶ *DPS Executive Summary*, *supra* note 5 at 15.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 15-16.

¹¹⁹ *Id.* at 16.

¹²⁰ *Id.* at 16.

¹²¹ *Physician Transcript* at 2142, The Execution of Clayton D. Lockett, Oklahoma Highway Patrol Investigation # 14-0189SI, May 27, 2014 [hereinafter *Physician Transcript*] (on file with author).

¹²² *Physician Transcript*, *supra* note 121 at 2141-42.

¹²³ *Id.* at 2143.

¹²⁴ *Id.* at 2145.

¹²⁵ *DPS Executive Summary*, *supra* note 5 at 16; *see also Physician Transcript*, *supra* note 121 at 2151.

¹²⁶ *Physician Transcript*, *supra* note 121 at 2146.

¹²⁷ *Id.*

¹²⁸ *DPS Executive Summary*, *supra* note 5 at 16.

¹²⁹ *Id.* at 17.

right position and if you moved it, it was bending the catheter.”¹⁵⁰ However, the physician reported that the line was “flowing.”¹⁵¹ Someone asked him about setting a second IV line, but he said he did not think he would be able to get another line, and he was not going to attempt it.¹⁵² This was not the first execution in Oklahoma that proceeded with only one IV line.¹⁵³

Warden Anita Trammell—who retired in October 2015—made the decision to cover the IV insertion area in order to maintain Lockett’s dignity because his genital area was exposed. This meant that no member of the execution team could observe the IV site and monitor for problems. It was Warden Trammell’s responsibility to observe the IV insertion point for problems, and she believed that if the IV site was visible, the subsequent problems with the line would have been detected earlier.¹⁵⁴ Shortly after the IV was inserted, Warden Trammell announced that it was time for the execution to begin. As required by the protocol, the physician assessed Lockett’s consciousness five minutes after the administration of the first drug, midazolam, and determined he was still conscious.¹⁵⁵ The physician waited two minutes, checked Lockett again, and declared him unconscious.¹⁵⁶ The vecuronium bromide, saline flush, and one full and one partial syringe of potassium chloride were administered.¹⁵⁷

Sometime after the administration of the second and third drugs began, Lockett regained consciousness. The ODOC Director at the time, Robert Patton, was observing the execution from the witness room and gave the following description:

[Y]ou can see him start moving, start straining against the restraints, heard at least two utterances from him. I did hear the word “man,” although many have reported they heard other words, I can’t testify he did. I believe I heard him say the word “man,” he did strain, he did—I guess a good word is to kinda bear [sic] his teeth a little bit. He had appeared, and by no means am I a medical professional, but it did appear that he was at least [having] tremors. I’m not sure it was convulsions, but there were—he was having tremors in his legs, mainly. You know, the reaction from the witnesses was pretty intense.¹⁵⁸

The physician lifted the sheet that had been covering Lockett and recognized that the IV had infiltrated and observed an area of swelling under Lockett’s skin at least the size of a golf ball.¹⁵⁹ Warden Trammell observed clear liquid and blood around Lockett’s groin area.¹⁴⁰

At the direction of Warden Trammell, the blinds of the execution chamber were lowered and the paramedic returned to the execution chamber.¹⁴¹ The physician decided to attempt to set another femoral line in Lockett’s

¹⁵⁰ *Physician Transcript*, *supra* note 121 at 2145.

¹⁵¹ *Id.*

¹⁵² *Id.* at 2146.

¹⁵³ *DPS Executive Summary*, *supra* note 5 at 17.

¹⁵⁴ *Id.* The physician also said that IV lines are normally monitored by watching the flow of the IV line and the area around the insertion point for any signs of infiltration, neither of which occurred during Lockett execution. *Physician Transcript*, *supra* note 121 at 2165–66.

¹⁵⁵ *Id.* at 18.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ Interview Transcript of Director Robert Patton at 1822, The Execution of Clayton D. Lockett, Oklahoma Highway Patrol Investigation # 14-0189SI, June 3, 2014 (on file with author).

¹⁵⁹ *Physician Transcript*, *supra* note 121 at 2167.

¹⁴⁰ Interview Transcript of Warden Anita Trammell at 2915, The Execution of Clayton D. Lockett, Oklahoma Highway Patrol Investigation # 14-0189SI, June 2, 2014 (on file with author).

¹⁴¹ *Id.* at 2907.

left side and pierced the femoral artery, instead of the vein.¹⁴² The physician believed the drugs were being absorbed into the tissue and so efforts to set a second line stopped.¹⁴³ Warden Trammel asked whether it would be possible to resuscitate Lockett, but the physician stated that he would need to go to a hospital.¹⁴⁴ Lockett died 24 minutes after the announcement to call off the execution.¹⁴⁵

2. DPS Investigation

As previously mentioned, Governor Fallin issued an executive order appointing the commissioner of DPS to lead an internal investigation of Lockett's execution.¹⁴⁶ The state announced that it would not carry out executions pending the outcome of the investigation.

On September 30, 2014, DPS issued an executive summary of its investigation, identifying specific errors that occurred during the execution and systemic problems with ODOC's approach to carrying out executions.¹⁴⁷ Although the executive summary "concluded that Oklahoma's execution was fundamentally sound," it identified both specific problems that occurred during Lockett's execution and more general concerns in ODOC's performance of its execution responsibilities.¹⁴⁸

The executive summary also recommended that ODOC make several changes to improve its execution protocol and procedures across 11 categories: observation of IVs; training and maintenance of logs; supplies; contingency planning; formal continuing training for execution team members; formal after-action review; defined execution terminology; appropriate spacing of executions; improved communications; disposition of property; and witness briefing.¹⁴⁹ ODOC announced a revised execution protocol, which purported to address the deficiencies identified in the executive summary.¹⁵⁰

C. The Execution of Charles Warner

1. Warner's Execution

Although the state's execution protocol requires serial administration of three drugs—midazolam, vecuronium bromide, and potassium chloride—it was revealed that, in January 2013, Charles Warner had been executed

¹⁴² *Physician Transcript*, *supra* note 121 at 2168.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2167.

¹⁴⁵ *DPS Executive Summary*, *supra* note 5.

¹⁴⁶ Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825, 832–33 (2013) ("Oklahoma's governor held a press conference as well . . . announcing that she had tapped her public safety commissioner to conduct an 'independent review' of the incident and that she would stay further executions until the review was completed. The Public Safety Commissioner is a member of the governor's cabinet and reports directly to her. He also oversees Oklahoma's prisons, is a former employee of ODOC, and was in the execution chamber when Lockett was executed.").

¹⁴⁷ *DPS Executive Summary*, *supra* note 5.

¹⁴⁸ Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825, 833 (2013).

¹⁴⁹ *DPS Executive Summary*, *supra* note 5 at 26–29. Many of the recommended changes revealed deficiencies in ODOC's practices, e.g., "The IV catheter insertion point(s) should remain visible during all phases of the execution and continuously observed by a person with proper medical training in assessing the ongoing viability of an IV," *id.* at 26; "ODOC should obtain from the selected pharmacist one complete, additional set of each execution drug being utilized for an execution to be used in the event an issue arises with the primary set," *id.* at 27; "ODOC should consult with appropriate medical personnel to determine any and all supplies or equipment necessary including but not limited to" heart monitoring equipment, venous ultrasound equipment, and appropriate needle/catheters for establishing IV access, *id.*; and "ODOC should establish formal and continual training programs for all personnel involved in the execution process" and "should explore successful training procedures used by other correctional institutions and implement accordingly," *id.* at 28.

¹⁵⁰ Procedures for the Execution of Inmates Sentenced to Death, OSP-040301-07, Sept. 30, 2014; *see also Oklahoma Unveils New Procedures after Botched Execution of Clayton Lockett*, GUARDIAN, Sept. 30, 2014, <http://www.theguardian.com/world/2014/oct/01/oklahoma-new-execution-procedures-botched-execution-clayton-lockett>.

through potassium acetate, which the state purchased in lieu of potassium chloride.¹⁵¹ These revelations came to light several months after Warner's execution.¹⁵² Moreover, the state nearly repeated its mistake in the scheduled execution of Richard Glossip, but that execution was stayed by Oklahoma's governor once it became known that potassium acetate—rather than potassium chloride—was to be used in Glossip's execution.¹⁵³

2. Grand Jury Investigation

In October 2015, the Oklahoma Office of the Attorney General filed a request with the OCCA to indefinitely stay executions to provide time to investigate the use of “a drug contrary to protocol,”¹⁵⁴ an investigation undertaken by a multicounty grand jury.¹⁵⁵ The grand jury began issuing subpoenas that same month¹⁵⁶ and received evidence in sessions held monthly from October 2015 to May 2016.¹⁵⁷ In May 2016, it issued its 105-page report—which identified systemic problems and numerous failures on the part of individuals involved in the execution process—but returned no indictments.¹⁵⁸

The grand jury determined that the use and attempted use of potassium acetate occurred primarily for two reasons: First, the execution protocol “lacked controls to ensure that the proper execution drugs were obtained and administered.”¹⁵⁹ Second, “there was an inexcusable failure to act on the part of a few individuals.”¹⁶⁰ The grand jury identified the following failures in its report:

1. The ODOC director orally modified the execution protocol without authority;
2. The pharmacist ordered the wrong execution drugs;¹⁶¹
3. General counsel to ODOC failed to inventory the execution drugs as mandated by state purchasing requirements;

¹⁵¹ Eyder Peralta, *Oklahoma Used the Wrong Drug to Execute Charles Warner*, NPR (Oct. 8, 2015), <http://www.npr.org/sections/thetwo-way/2015/10/08/446862121/oklahoma-used-the-wrong-drug-to-execute-charles-warner>.

¹⁵² Mahita Gajanan, *Oklahoma Used Wrong Drug in Charles Warner's Execution, Autopsy Report Says*, GUARDIAN, Oct. 8, 2015, <http://www.theguardian.com/us-news/2015/oct/08/oklahoma-wrong-drug-execution-charles-warner>.

¹⁵³ Mark Berman, *Oklahoma Governor Halts Execution of Richard Glossip Due to 'Last Minute Questions' about the Drugs Involved*, WASH. POST, Sept. 30, 2015, <https://www.washingtonpost.com/news/post-nation/wp/2015/09/30/oklahoma-inmate-richard-glossip-asks-the-supreme-court-to-stay-his-execution-again>.

¹⁵⁴ *Notice and Request for Stay of Execution*, Filed October 1, 2015.

¹⁵⁵ Nolan Clay & Rick Green, *Oklahoma Grand Jury Testimony Begins Over Execution Drug Mix-up*, OKLAHOMAN, Oct. 20, 2015, at <http://newsok.com/article/3454735>.

¹⁵⁶ *Grand Jury Report*, *supra* note 5 at 75.

¹⁵⁷ *Id.* at 1.

¹⁵⁸ The Multicounty Grand Jury Report does not indicate that the Attorney General asked for any indictments in this matter. *Id.*

¹⁵⁹ *Id.* at 75. The grand jury found that the execution protocol required no verification of the drugs and that this failure manifested itself in several ways. *Id.* at 81. The execution protocol did not identify a specific individuals responsible for verifying the proper execution drugs were ordered. The May 2014 version of the Oklahoma execution protocol included provisions to ensure the receipt and labeling of the correct execution drugs by assigning this task to the Special Operations Team Leader, but for unknown reasons this provision was removed from future versions. *Id.* The director's unilateral change tasking ODOC general counsel with procuring the drugs—instead of the H Unit Section Chief—led to an “overall lack of accountability.” *Id.* at 83. Further, “confusion was rife among execution team members regarding who was responsible for verifying receipt of the drugs.” *Id.* The chain of custody form was insufficient because it did not list the name of drugs, as had been required by previous versions of the protocol. *Id.* at 85. “In short, the failure to include provisions requiring specific individuals to verify that the proper drugs were received led directly to the use of potassium acetate in the Warner execution and receipt of potassium acetate for the scheduled Glossip execution.” *Id.* at 84.

¹⁶⁰ *Id.* at 75.

¹⁶¹ The pharmacist testified that he received the three drugs required for Warner's execution—midazolam, rocuronium, and potassium chloride—on November 20, 2014, but realized that the potassium chloride had been ordered for another customer, a mix-up that required a subsequent order for ODOC. *Id.* at 25. When placing this order, the pharmacist erroneously ordered potassium acetate instead of potassium chloride; he could not explain the mistake. *Id.* at 25–26. Prior to the scheduled Glossip execution, on June 30, 2015, the pharmacist reordered potassium acetate and failed to verify the selections in the ordering system because he erroneously believed the November 2014 order to be correct. *Id.* at 26. The pharmacist testified that did not intentionally order the incorrect drug, but instead “did not look close enough” and learned that he had ordered the wrong drug nine months after Warner's execution and thirty minutes before Glossip's scheduled execution. *Id.* at 21.

4. An agent with ODOC's Office of Inspector General failed to inspect the execution drugs while transporting them into the Oklahoma State Penitentiary;
5. The warden failed to notify anyone in ODOC that potassium acetate (and not potassium chloride) had been received;
6. Multiple officials (e.g., a unit section chief, the IV team) failed to observe that ODOC had received the wrong execution drugs;
7. ODOC protocol failed to define important terms and lacked controls to ensure that proper execution drugs were obtained and administered; and
8. General counsel to the governor advocated that ODOC proceed with the Glossip execution using an incorrect third drug.¹⁶²

The grand jury's investigation uncovered that, prior to Glossip's scheduled execution in September 2015, a deputy attorney general explicitly had informed the governor's general counsel that potassium acetate had been used in Warner's execution in January; that potassium acetate also would have to be used in Glossip's execution, because potassium chloride remained unavailable; and that, as a factual matter, the two substances were not interchangeable.¹⁶³ In response, the governor's general counsel disputed the deputy attorney general's accurate characterization of potassium acetate, told the deputy attorney general to "Google it," and stated that a motion to stay Glossip's execution would "look bad for the State of Oklahoma because potassium acetate had already been used in the Warner execution."¹⁶⁴ Ultimately, the governor agreed with the legal opinion of the Office of the Attorney General—namely, that it would violate ODOC's execution protocol to use potassium acetate—and stayed Glossip's execution.¹⁶⁵

In addition to these findings, the grand jury found multiple deficiencies in the process by which ODOC procured execution drugs.¹⁶⁶ To legally obtain and store the drugs called for in the execution protocol, ODOC must register with the U.S. Drug Enforcement Agency (DEA) and the Oklahoma Bureau of Narcotics and Dangerous Drugs (OBNDD).¹⁶⁷ Despite numerous conversations with OBNDD's attorneys regarding methods of legally obtaining and storing execution drugs, the "Department never obtained OBNDD or DEA registration allowing it to possess and/or store execution-related drugs prior to the Warner execution or scheduled Glossip execution."¹⁶⁸

Moreover, ODOC's general counsel paid approximately \$870 in cash for the drugs used in Warner's execution, a request made in "an undated, unsigned, handwritten note, presumably from the [ODOC]'s General Counsel."¹⁶⁹ The grand jury concluded that ODOC had failed to follow state purchasing requirements and this failure contributed to the use and near use of potassium acetate.¹⁷⁰

¹⁶² *Grand Jury Report*, *supra* note 5 at 1–2; *see also id.* at 31–38, 58–59, 66–71, 95, 96–98.

¹⁶³ *Id.* at 66–67.

¹⁶⁴ *Id.* at 68.

¹⁶⁵ *Id.* at 70–71. The grand jury also determined that the Governor's general counsel had "flippantly and recklessly disregard[ed] the written Protocol and the rights of Richard Glossip" in arguing for the use of potassium acetate. *Id.* at 100.

¹⁶⁶ *Id.* 18–71.

¹⁶⁷ *Id.* at 18.

¹⁶⁸ *Id.* at 19–21. OBNDD's General Counsel testified before the grand jury that he had no idea how ODOC had properly obtained the drugs for Warner's execution and the scheduled execution of Glossip. *Id.* However, during the course of the grand jury's investigation, the Oklahoma legislature passed—and the Governor signed—a bill allowing ODOC to register as a hospital with OBNDD without first meeting the Oklahoma State Health Department's hospital licensure requirements. *Id.* at 21. Consequently, ODOC may now store execution drugs on-site without the previously-mandatory license. *Id.*

¹⁶⁹ *Id.* at 28–29. A typed and dated receipt signed by the general counsel acknowledged receipt of funds from ODOC's chief financial officer. *Id.*

¹⁷⁰ *Id.* at 84. Oklahoma law also requires agencies to use written contracts or purchase orders when purchasing property, services, or labor, a requirement not met in ODOC's purchase of execution drugs. *Id.* The grand jury concluded that ODOC's general counsel did not satisfy these requirements out of concerns for confidentiality (on the belief that Section 1015(B) of Title 22 mandates secrecy and thereby abrogates state purchasing requirements). *Id.* at 89; *see also id.* at 89–91.

The grand jury found that the execution protocol lacked controls to ensure the proper execution drugs were obtained and administered.¹⁷¹ The grand jury further found the execution protocol to be vague, poorly drafted and subject to multiple interpretations.¹⁷² For example, the protocol did not include a definition of “execution inventory” and therefore could not guarantee an accounting of the drugs.¹⁷³ Further, ODOC’s post-execution review proved inadequate to detect that potassium acetate had erroneously been used in Warner’s execution.¹⁷⁴ The grand jury found that the review lacked substance and “amounted to little more than a cursory review in a process requiring greater oversight.”¹⁷⁵

The grand jury also found that critical members of the execution team were inadequately trained.¹⁷⁶ Ultimately, the grand jury concluded that Warner’s death was humane but not performed in compliance with the protocol.¹⁷⁷ It also found that, as Warner had not been notified that potassium acetate would be used in his execution, he was prevented from challenging the procedure prior to his death.¹⁷⁸

Pursuant to its findings, the grand jury made the following recommendations:¹⁷⁹

¹⁷¹ *Id.* at 77.

¹⁷² *Id.* at 77, 79.

¹⁷³ *Id.* at 80.

¹⁷⁴ *Id.* at 49.

¹⁷⁵ *Id.* at 93. The ODOC’s general counsel refused to release documents identifying any execution team members, which hindered the reviewer’s ability to review the necessary execution-related documentation. *Id.* at 30. The grand jury also noted that, while numerous ODOC employees, members of the Board of Corrections, officials in the governor’s office, and officials in the Office of the Attorney General had received documents detailing the execution—including the autopsy report with references to potassium acetate—no one noticed that potassium acetate had been used instead of potassium chloride. *Id.* at 51. Attorneys with the federal public defender’s office also received Warner’s autopsy report but failed to observe that the wrong drug had been used. *Id.* at 33.

¹⁷⁶ *Id.* at 11–16. For example, the Report found that, prior to Warner’s execution, the director and general counsel never provided the IV team leader a written copy of the execution protocol and that training sessions “lacked key components” and were, by and large, not attended by members of the IV team. *Id.* at 12–13.

¹⁷⁷ *Id.* at 73.

¹⁷⁸ *Id.* at 74.

¹⁷⁹ Note that the recommendations are not listed in this exact order in the Grand Jury Report.

- 1) The execution protocol should be revised again to clearly define terms and duties.¹⁸⁰
- 2) ODOC should consider adding potassium acetate to the protocol.¹⁸¹
- 3) The protocol should require verification of execution drugs at every step.¹⁸² Passage of Senate Bill 884 will put ODOC in a position to register with the OBND and store execution related drugs on-site.¹⁸³ ODOC should require the drugs be ordered in writing and specifically forbid drug substitution.¹⁸⁴ Recognizing ODOC's confidentiality interests, the grand jury recommended "[i]f necessary, legislation should be sought exempting from disclosure the order form and related documents that could be used to identify the pharmacist, wholesaler, and/or physician taking part in the acquisition of execution drugs."¹⁸⁵
- 4) Administrators should not serve in dual roles.¹⁸⁶ For example, the warden should not have both administrative contact with condemned prisoners in the thirty-five days leading up to the execution, as required by the protocol, and later take an active role in the execution.¹⁸⁷ ODOC should follow state laws requiring the documentation of purchases and inventories while safeguarding the privacy of those participating in execution of the death penalty.¹⁸⁸
- 5) An independent third party, bound by confidentiality, should be responsible for conducting the post execution Quality Assurance Review.¹⁸⁹ Individuals involved in the execution process must be thoroughly trained on the execution protocol.¹⁹⁰ Individuals must be free to "question anything that appears out of the ordinary" and "anything they observe that does not seem right."¹⁹¹ To increase accountability, ODOC should consider appointing an ombudsman to be on-site during executions and available to execution team members who need anonymity to feel comfortable raising concerns.¹⁹²

IV. Recent Developments Regarding Alternative Methods of Execution

In the face of the declining administration of the death penalty, due in large part to de facto moratoriums resulting from problems with executions and lethal injection litigation, several states—including Oklahoma, Utah, and Tennessee—have passed legislation authorizing the use of other methods of execution, both old and new. In March 2013, Utah brought back the firing squad.¹⁹³ In September 2014, Tennessee passed legislation making use of the electric chair compulsory if drugs used for the state's lethal injection protocol could not be

¹⁸⁰ *Id.* at 101.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 102.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 104.

¹⁹⁰ *Id.* at 105.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Brady McCombs, *Utah Brings Back the Firing Squad, so How Does It Work?*, ASSOCIATED PRESS, Mar. 24, 2013, <https://www.yahoo.com/news/utahs-firing-squad-does-071056815.html>.

obtained.¹⁹⁴ In Oklahoma, State Question 776—a voter referendum on the November 2016 ballot—passed overwhelmingly.¹⁹⁵ The measure allows for the state to designate any method of execution if the current method is found unconstitutional.¹⁹⁶

These measures, however, may be largely symbolic. Whether electrocution, lethal gas, or death by firing squad offers states alternatives that are viable or sustainable for the practical administration of the death penalty is being debated across the country. States switched to lethal injection from the electric chair or the gas chamber in large part because it was significantly less expensive, but states also moved away from those methods because they were prone to gruesome spectacle.¹⁹⁷

Since 2006, only seven out of 444 executions in the U.S. used methods other than lethal injection—six by electrocution and one by firing squad.¹⁹⁸ Between 2006 and 2013, Virginia electrocuted four individuals—all of whom chose the method over lethal injection—and South Carolina and Tennessee performed one execution each by electrocution.¹⁹⁹ Utah is the only state that has performed executions by firing squad. It has used the method three times in its history, most recently in 2010.²⁰⁰

In April 2015, Oklahoma's governor signed legislation authorizing execution by nitrogen gas as a backup method in the event that lethal injection drugs cannot be obtained or lethal injection is declared unconstitutional. Electrocution would be authorized if nitrogen gas were disallowed. The legislation also allows for execution by firing squad as a method of last resort if all other methods are barred.²⁰¹

A member of the Oklahoma House of Representatives arranged for several researchers from East Central University to research the question of whether nitrogen hypoxia could serve as an “effective and humane alternative” to the methods of execution currently authorized by Oklahoma law.²⁰² The researchers found that executions by nitrogen hypoxia would be humane, not require the assistance of medical professionals, be simple to administer, and not depend on the cooperation of the prisoner. They also found that nitrogen is readily available for purchase and availability would not be a problem. Based on these findings, the study recommended that “inhalation of nitrogen be offered as an alternative method of administering capital punishment in the state

¹⁹⁴ Ed Payne & Mariano Castillo, Tennessee to Use Electric Chair When Lethal Drugs Unavailable, CNN (Sept. 8, 2014), <http://www.cnn.com/2014/05/22/us/tennessee-executions>.

¹⁹⁵ 66.56% of voters supported State Question 776, while 33.64% voted against the measure. See Oklahoma Election Results, Oklahoma Board of Elections, https://www.ok.gov/elections/support/20161108_seb.pdf at p.29 (2016).

¹⁹⁶ *State Question that Protects the Death Penalty in Oklahoma Passes Overwhelmingly*, KFOR-TV (Nov.8, 2016), <http://kfor.com/2016/11/08/state-question-that-protects-the-death-penalty-in-oklahoma-passes-overwhelmingly/>.

¹⁹⁷ STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002).

¹⁹⁸ See *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/views-executions> (under “Year” filter by “2006” through “2017”) (last visited Mar. 8, 2017).

¹⁹⁹ See *id.* (under “Year” filter by “2006” through “2013” and under “Method” filter by “Electrocution” and “Firing Squad”) (last visited Mar. 8, 2017).

²⁰⁰ *Descriptions of Execution Methods: Firing Squad*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/descriptions-execution-methods?scid=8&did=479#firing> (last visited Mar. 8, 2017).

²⁰¹ See Sandra Davidson & Michael Barajas, *Masking the Executioner and the Source of Execution Drugs*, 39 ST. LOUIS L.J. 45, 88 (2014) (“Oklahoma law says that firing squads will only be used if both lethal injection and electrocution are declared constitutionally infirm.”); Austin Sarat, *The Trouble with Oklahoma’s New Execution Technique*, POLITICO, Apr. 4, 2015, <http://www.politico.com/magazine/story/2015/04/oklahoma-death-penalty-gas-chamber-117136>; *Methods of Execution*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/methods-execution?scid=8&did=243#ok> (last visited Mar. 6, 2017).

²⁰² Michael P. Copeland et al. *Nitrogen Induced Hypoxia as a Form of Capital Punishment* at 2, <https://localtvkfor.files.wordpress.com/2015/05/nitrogen-hypoxia.pdf> [hereinafter *Nitrogen Induced Hypoxia*]. State Rep. Mike Christian, who introduced the bill, told *The Huffington Post* that death by nitrogen asphyxiation was “revolutionary” and that “it’s cheaper than lethal injection, which he estimates costs around \$500 per execution.” See Jake Godin, *Nitrogen Backup Plan Is Another Okla. Execution First*, NEWSY, Apr. 18, 2015, at <http://www.newsy.com/videos/nitrogen-backup-plan-is-another-okla-execution-first>. The investigation into nitrogen gas is the first known instance of a state official in Oklahoma seeking scientific and medical research into a method of execution prior to selecting that method.

of Oklahoma.”²⁰³ However, ODOC has not promulgated a protocol for execution by nitrogen hypoxia.²⁰⁴

V. Conclusion and Recommendations

Recent problems with executions—in both Oklahoma and other death-penalty jurisdictions—have resulted in greater public scrutiny of execution protocols. Absent implementation of the following recommended measures or similar reforms, the efficacy, transparency, and humaneness of Oklahoma’s execution procedures will likely remain in question, and, thus, arguably constitutionally infirm. The Commission’s recommendations fall under two broad categories: first, the established execution protocol; and second, transparency and accountability in adherence to that protocol.

Recommendation 1:

Oklahoma should adopt the most humane and effective method of execution possible, which currently appears to be the one-drug (barbiturate) lethal injection protocol. Oklahoma should develop a process for continuous review of its execution protocol to ensure that the state is using the most humane and effective method possible.

Because variations on the three-drug protocol—in Oklahoma and elsewhere—have failed to provide a reliable, humane, and effective method of execution, and because one-drug protocols have not demonstrated comparable failings and appear to present fewer problems, Oklahoma policymakers should strongly consider replacing Oklahoma’s present three-drug protocol with a one-drug protocol. Currently, the one-drug protocol appears to be the “best practice.” Oklahoma policymakers should continue to investigate humane and effective means for carrying out executions, particularly with respect to lethal injection.

Recommendation 2:

The Oklahoma Department of Corrections should revise its execution protocol to provide clear direction to department personnel involved in preparing for and carrying out executions. These revisions should, at minimum, provide comprehensible definitions for potentially ambiguous terms within the protocol and specify who within the department’s chain of command has the authority and responsibility to perform critical steps in the execution process.

This recommendation echoes the first recommendation of the May 2016 report of the multicounty grand jury (*Grand Jury Report*), which was convened in October 2015 to study the Oklahoma Department of Corrections (ODOC) execution protocol. In its 105-page report, the grand jury ultimately recommended that the execution protocol be revised again. In identifying systemic problems with executions in Oklahoma, the *Grand Jury Report* noted that ODOC’s execution protocol “in place for the [Charles] Warner execution and the scheduled [Richard] Glossip execution failed to define key terms and failed to clearly assign duties in some instances.”²⁰⁵ The Commission understands that ODOC is presently revising its execution protocol and hopes that it will include these suggestions regarding clear definitions and delineation of authority and responsibilities.

²⁰³ However, the authors of the Report acknowledged the lack of scientific literature addressing the effectiveness of nitrogen for the purpose of carrying out executions. The available data was limited to experiments involving human subjects breathing nitrogen until they became unconscious, documented suicides involving nitrogen, and research into high altitude pilot training. *Nitrogen Induced Hypoxia*, *supra* note 202, at 4.

²⁰⁴ A collateral recommendation of the multicounty grand jury convened to review the execution of Charles Warner was that ODOC should retain experts to advise the State on the newly-enacted alternative to lethal injection, nitrogen hypoxia. *Grand Jury Report*, *supra* note 5 at 76. Further, “[i]t is the recommendation of the Multicounty Grand Jury that further research, including a best practices study, be conducted to determine how to carry out the sentence of death by this method.” *Id.* at 77.

²⁰⁵ *Id.* at 101.

Recommendation 3:

With respect to lethal injection as an execution method, the Oklahoma Department of Corrections should amend its written execution protocol to require verification—at the point of acquisition and at all stages of the execution process—that the proper drug(s) for carrying out the execution have been obtained and will be used in any execution. The protocol should prohibit drug substitutions not specified within the protocol itself and should require that all drug purchases be in writing. If necessary to protect the confidentiality of suppliers, the Legislature should amend Oklahoma law to exempt the order form and related documents from disclosure.

This recommendation tracks recommendations in the *Grand Jury Report*. First, the report recommends the new protocol “require verification of execution drugs at every step.”²⁰⁶ Further, the recommendations advise that administrators of the ODOC execution protocol should be “fully focused” on performing their duties, “including any new safeguards put in place to verify that proper drugs are received.”²⁰⁷ The *Grand Jury Report* also recommends that ODOC “should follow laws regarding the documentation of purchases and inventories while still safeguarding the privacy of those participating in execution of the death penalty.”²⁰⁸ The Commission fully supports these recommendations by the grand jury.

To be sure, the Commission believes that pharmacists and those involved in executions may have important confidentiality interests that should be protected. These interests, however, should be balanced against the public interest in governmental accountability, which demands ODOC policies and protocols to be appropriately performed and properly documented.

Recommendation 4:

All government personnel involved in carrying out an execution, as well as those individuals contracted with the government to provide services related thereto, should be thoroughly trained and evaluated on all relevant aspects of the Oklahoma Department of Corrections’ execution protocol.

This recommendation tracks the *Grand Jury Report* recommendation related to training: “Individuals involved in the execution process must be thoroughly trained on the Execution Protocol.”²⁰⁹ As that investigation detailed, “most Department employees profoundly misunderstood the [ODOC Execution] Protocol.”²¹⁰ This recommendation includes the appointment of an independent ombudsman, who would be onsite during executions.²¹¹

²⁰⁶ *Id.* at 101.

²⁰⁷ *Id.* at 103.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 105.

²¹⁰ *Id.*

²¹¹ *Id.* at 105-06.

Recommendation 5:

The director of the Oklahoma Department of Corrections (ODOC) should deliver to the governor, at least 48 hours prior to any scheduled execution, a written, signed certification that the director has confirmed that all aspects of the execution protocol have been followed, including: ensuring that all personnel who will participate in the upcoming execution have been adequately trained and prepared; ensuring that the necessary equipment and facilities that will be used are adequate and satisfy the standards promulgated within ODOC's execution protocol; and ensuring that any drugs that will be used have been obtained pursuant to and are consistent with ODOC's execution protocol.

In addition to the post-execution review recommended in the *Grand Jury Report*, this Commission believes a *pre-execution* review—before an irreversible error can occur—should be conducted. During that review, the ODOC director should ensure and certify in writing to the governor that all individuals involved in the ODOC execution protocol are adequately trained and prepared. The *Grand Jury Report* emphasizes such training should be “something more than repeated dry-runs and walk-throughs. Each person involved in the IV Team and Special Operations Team should know the Protocol, the drugs to be used, and the order in which they are to be administered. They should also know that no other chemical may be substituted unless specifically authorized in the policy and protocol (and with proper advance notice to the offender).”²¹² We agree and believe similar principles should guide a review *before* an execution is to take place.

Recommendation 6:

In the event that lethal injection will be used to carry out the execution of a condemned inmate, the inmate should be provided written notice as to which drug(s) will be used at least 20 days prior to the scheduled execution.

The Commission believes that a condemned inmate is entitled to know which drugs will be used in their execution. While Oklahoma statute prohibits disclosure of information identifying the source of execution drugs, information should still be provided to the condemned inmate regarding the name, safety, and efficacy of the drugs—e.g., explaining that the drugs are approved by the U.S. Food and Drug Administration or, if compounded, that the drugs have been tested and the results provided to the prisoner—without violating statute, either under seal or through document redaction.

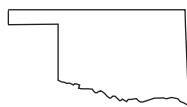
Recommendation 7:

Following any execution, an independent third party should conduct a thorough quality assurance review to determine whether state laws, regulations, and protocols were properly followed before, during, and immediately after the execution. It is important that the independent third party be required to maintain the confidentiality of any sources for information. The independent third party's findings should be communicated in a timely fashion to the Oklahoma Department of Corrections, the Oklahoma Legislature, and the governor's office, while also being made available to the public.

This recommendation is based on the fifth recommendation of the *Grand Jury Report*, which calls for an independent third party to perform a review to ensure that ODOC's execution protocol has been properly performed.²¹³ The independent third party should ensure that the review is robust and not merely cosmetic, and that adherence is safeguarded by independent oversight.

²¹³ *Id.* at 105.

²¹⁵ *Id.* at 104-105.



Appendix 1

Proportionality, Cost, and Accuracy of Capital Punishment in Oklahoma

No matter what their personal views are on the death penalty, Oklahomans share a common interest in securing justice under law for the victims of crime. They also share a common interest in having a justice system that functions fairly and efficiently.

To better understand the strengths and weaknesses of Oklahoma's capital punishment system over the course of its wide-ranging review, the Oklahoma Death Penalty Review Commission (Commission) consulted a variety of resources and heard from Oklahomans who have worked in or been affected by that system.

The Commission also considered the scholarship of independent researchers with experience studying capital punishment in other states and nationwide. One team of professors examined the influence of extraneous factors (such as race and gender) on capital case outcomes in Oklahoma. Their full study may be found in *Appendix IA*.¹ A second group of experts studied the cost of administering capital punishment in the state. That study appears in *Appendix IB*.² Finally, a team of over one hundred pro bono lawyers reviewed the extent to which conviction and death sentences in Oklahoma were reversed due to serious errors at trial or other constitutional infirmities.³ This appendix is intended—by highlighting the main findings of the independent research provided to the Commission—to offer additional context to the important subjects discussed in this report.

I. Disparities in the Administration of the Death Penalty

Questions of fairness arise when the public views the application of the death penalty to be arbitrary. Studies have shown that the race of capital defendants and their victims, income levels of those accused of capital crimes, and geography affect whether death sentences are ultimately imposed and carried out.⁴ This section addresses the extent to which geographic and demographic characteristics play a role in Oklahoma capital cases,

¹ Appendix IA is an early draft of an independent study (current through Nov. 1, 2016), submitted to the Oklahoma Death Penalty Review Commission for its review of Oklahoma's capital punishment system. The final study will be published by the Northwestern University School of Law in the fall of 2017. This report was authored by Glenn L. Pierce, Michael L. Radelet, and Susan Sharp. Radelet is a Professor of Sociology, University of Colorado-Boulder; Pierce is a Principal Research Scientist, School of Criminology & Criminal Justice, Northeastern University, Boston; Sharp is the David Ross Boyd Professor/Presidential Professor Emerita, Department of Sociology, University of Oklahoma. *See infra*, App. IA.

² Appendix IB is an independent study submitted to the Oklahoma Death Penalty Review Commission for its review of Oklahoma's capital punishment system and is current as of Feb. 1, 2017. The report was authored by Peter A. Collins, Matthew J. Hickman, and Robert C. Boruchowitz. Dr. Collins is an Assistant Professor, Criminal Justice Department, Seattle University; Dr. Hickman is an Associate Professor, Criminal Justice Department, Seattle University; Boruchowitz is a Professor from Practice and Director, The Defender Initiative, Seattle University School of Law. *See infra*, App. IB.

³ The law firms of King & Spalding and Norton Rose Fulbright generously offered the Commission pro bono support to conduct this research. The full list of attorneys from those firms who reviewed Oklahoma capital cases may be found in the Acknowledgments, *infra*.

⁴ *See Arbitrariness*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/arbitrariness> (last visited Apr. 15, 2016).

drawing, in part, on independent research conducted by Professors Michael Radelet, Glenn Pierce, and Susan Sharp.⁵ The professors' research—known as a proportionality study—is available in *Appendix IA*.

A. Geographic Disparities

1. Nationwide Disparities in the Application of Capital Punishment

As indicated in the *Overview* chapter, a small minority of counties in the United States—just two percent—are responsible for more than half of the total executions and death sentences nationwide between 1976 and 2013. Additionally, 85 percent of counties nationwide have not executed anyone since the United States Supreme Court permitted the re-imposition of capital punishment in 1976.⁶ The death penalty is, therefore, perhaps better viewed as a local—rather than a statewide or national—phenomenon.⁷

Moreover, just 14 counties in the U.S. accounted for 10 or more executions each between 1976 and 2010. These counties constitute 30 percent of the total number of executions for the same period. Of those 14 counties, nine are in Texas, two are in Oklahoma, two are in Missouri, and one is in Alabama.⁸

The disparate use of capital punishment by a small number of counties raises meaningful questions about the fairness and effectiveness of the death penalty. While state and local jurisdictions spend millions of dollars each year to mount capital cases in a few counties, the burden on taxpayers is felt statewide. The disparate use of capital punishment in these few counties has increasingly been used to support an argument that capital punishment is administered unequally and arbitrarily.

2. Geographic Disparities Within Oklahoma

The population of Oklahoma's death row between 1980 and March 2017 were convicted in 51 of Oklahoma's 77 counties.⁹ Figure 1 depicts the distribution of these sentences statewide:

⁵ See App. IA, *infra*.

⁶ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁷ RICHARD C. DIETER, THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL (2015), <http://www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

⁸ These counties include, in descending order: Harris, TX (115); Dallas, TX (44); Oklahoma, OK (36); Tarrant, TX (34); Bexar, TX (31); St. Louis County, MO (16); Montgomery, TX (14); Brazos, TX (12); Jefferson, TX (12); Tulsa, OK (11); Potter, TX (11); Jefferson, AL (10); St. Louis City, MO (10); and Nueces, TX (10). See Frank R. Baumgartner, *The Geography of the Death Penalty*, UNIV. OF N. C. AT CHAPEL HILL (Oct. 17, 2010), <https://www.unc.edu/~fbaum/Innocence/NC/Baumgartner-geography-of-capital-punishment-oct-17-2010.pdf>.

⁹ This review began by collecting the name and identifying information for each individual listed in the National Association for the Advancement of Colored People, Legal Defense Funds Criminal Justice "Death Row USA" (*DRUSA*) quarterly for Oklahoma between 1980 to March 2017. Each individual named in *DRUSA* was then cross-referenced against the names, races, offenses, convictions, death sentences, case numbers, and counties of conviction in the Oklahoma Department of Corrections' offender database, "Execution Statistic," death row "Monthly Roster" spreadsheets, and information available on the Oklahoma State Courts Network (OSCN). When a case number, conviction, death sentence, and/or county of conviction could not be found in those sources, searches were made of news reports. 323 of 326 individuals named in *DRUSA* for Oklahoma between 1980 and March 2017 were sentenced to death. Three individuals listed in *DRUSA* for Oklahoma between 1980 and March 2017 were not found to have been sentenced to death, and two individuals, who had been sentenced to death in Oklahoma per OSCN, were not listed in *DRUSA*. In total, 325 individuals were sentenced to death in 332 separate trials in 51 Oklahoma counties. Seven individuals were sentenced to death in two separate trials that resulted in a death sentence. The 51 counties are Beckham (1), Blaine (1), Bryan (5), Caddo (5), Canadian (6), Carter (5), Cherokee (1), Cleveland (14), Coal (1), Comanche (15), Craig (1), Creek (8), Custer (1), Delaware (1), Garfield (2), Garvin (5), Grady (15), Greer (1), Hughes (1), Jackson (1), Jefferson (1), Johnston (5), Kay (5), LeFlore (4), Logan (1), Love (1), Mayes (2), McClain (2), McCurtain (2), McIntosh (4), Muskogee (8), Noble (5), Oklahoma (116), Okmulgee (4), Osage (4), Ottawa (5), Payne (5), Pittsburg (9), Pontotoc (5), Pottawatomie (4), Pushmataha (1), Roger Mills (1), Rogers (5), Seminole (4), Sequoyah (5), Stephens (5), Texas (1), Tillman (5), Tulsa (42), Wagoner (1), Washita (2). See *Death Row USA*, NAACP LEGAL DEFENSE FUND, <http://www.naacpldf.org/death-row-usa> and <http://home.heinonline.org/titles/Law-Journal-Library/Death-Row-USA-Reporter/?letter=D> (last visited Mar. 20, 2017); see *Offender Database*, OKLA. DEPT. OF CORRECTIONS, http://docapp063p.doc.state.ok.us/servlet/page?_pageid=595&_dad=portal50&_schema=PORTAL50 (last visited Mar. 22, 2017); see *Execution Statistics*, OKLA. DEPT. OF CORRECTIONS, [HTTPS://WWW.OK.GOV/DOC/OFFENDERS/DEATH_ROW/](https://www.ok.gov/doc/offenders/death_row/) (LAST VISITED MAR. 22, 2017); see *Court Records*, OKLA. STATE COURTS NETWORK, <http://www.oscn.net/dockets/search.aspx> (last visited Mar. 22, 2017).



Two counties from regions with the highest homicide rate (between 2004 and 2010)—Oklahoma and Tulsa counties—accounted for almost half of the death sentences (10) imposed on Oklahoma’s death row population in the same time frame.¹⁷ Inversely, five counties from the Oklahoma regions with the lowest homicide rate imposed an additional third of the total number of capital sentences for the same period.¹⁸

¹⁸ *Id.* Cleveland, Garvin, Grady, McClain, and Seminole Counties are in region six, which had the lowest homicide rate in Oklahoma from 2004 through 2010.

As indicated, Oklahoma County accounts for a notably disproportionate share of death sentences, at least as compared to Oklahoma's total population. The following table illustrates the percentage differential between the top ten counties (by death sentences imposed) compared to their respective percent of the population.¹⁹

Table 1: Comparison of Death Sentences to Population, by County

County	Death Sentences	Percentage of Total (325)	Population	Percentage of Total (3,911,338)	Percentage Differential
Oklahoma	116	35.6%	718,633	18.4%	+17.2%
Tulsa	42	12.9%	603,403	15.4%	-2.5%
Comanche	15	4.6%	124,098	3.2%	+1.4%
Cleveland	14	4.3%	255,755	6.5%	-2.2%
Grady	13	4.0%	52,431	1.3%	+2.7%
Pittsburg	9	2.7%	45,837	1.2%	+1.5%
Creek	8	2.4%	69,967	1.8%	+0.6%
Muskogee	8	2.4%	70,990	1.8%	+0.6%
Canadian	6	1.8%	115,541	3.0%	-1.2%
Kay	5	1.5%	46,562	1.2%	+0.3%
Bryan	5	1.5%	42,416	1.1%	+0.4%
Pontotoc	5	1.5%	37,492	0.01%	+1.49%
Stephens	5	1.5%	45,048	1.2%	+0.3%

As Table 1 demonstrates, the percentage differential between death sentences and population does not vary widely: for 12 out of 13 counties, the differential is within ± 3.0 percent. For Oklahoma County, by contrast, the proportion of death sentences is twice that which one would predict using population: 35.6 percent, as compared to 18.4 percent.

B. Disparities Based on Demographic Characteristics

Approximately 56 percent of those executed in the U.S. since 1977 have been white and 34 percent have been African-American, though African-Americans only comprised between 12 and 14 percent of the population during this time.²⁰ Eight percent of those executed nationwide for the same period were Hispanic.²¹

¹⁹ *Id.*; see *Population of Oklahoma Counties from the U.S. Census data for years 2010 to 2016*, Suburban Stats, <http://suburbanstats.org/population/oklahoma/list-of-counties-and-cities-in-oklahoma> (last visited Mar. 22, 2017).

²⁰ See *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Mar. 15, 2017). According to data from the U.S. Census, dating 1980-2010, in 1980 the black or African American population in the U.S. was 11.52%; See *Population by Race*, CENSUSSCOPE, http://www.censusscope.org/us/chart_race.html (last visited Mar. 22, 2017). In 2000, the U.S. Census of black or African Americans was 12.9%, whereas in 1990 it was 12.1%. See *The Black Population: 2000*, U.S. CENSUS, <https://www.census.gov/prod/2004pubs/c2kbr01-5.pdf> (last visited Mar. 20, 2017). In 2010 the U.S. Census of black or African Americans in the U.S. was 13.6%. See *The Black Population: 2010*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (LAST VISITED MAR. 22, 2017); see also *McCleskey*, 481 U.S. at 287 (summarizing the findings of a statistical study that partly attributed disparate capital case outcomes in Georgia—in which the death penalty was sought far more often in cases involving white victims than in those involving black victims—to broad prosecutorial discretion).

²¹ See *Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last visited Mar. 15, 2017). According to data from the U.S. Census, dating 1980-2010, Hispanics made up 6.43% of the U.S. population in 1980; 8.99 percent in 1990; and 12.53% in 2000. See *Population by Race*, CENSUSSCOPE, http://www.censusscope.org/us/chart_race.html (last visited Mar. 22, 2017). In 2010, Hispanics made up 16.3% of the U.S. population. See *The Hispanic Population: 2010*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (last visited Mar. 20, 2017).

In addition to the race of the accused, studies have also attempted to understand whether the race of the *victim* may have impacted the decision to seek a death sentence. For example, a recent study conducted in Louisiana found that a death sentence was 97 percent more likely if a victim was white instead of black.²² Such a disparity is consistent with similar research regarding death penalty cases nationwide.²³

Since 1990—the first year executions resumed in Oklahoma following *Gregg*—almost 60 percent of the 112 individuals executed in Oklahoma were Caucasian.²⁴ Thirty-one percent of those executed were African-American,²⁵ though African-Americans comprised fewer than eight percent of the state’s population.²⁶ Approximately five percent of those executed in Oklahoma after 1990 were Native-American.²⁷

In contrast to research in other capital jurisdictions,²⁸ few studies have been conducted to explore whether, over the past 40 years, Oklahoma’s administration of capital punishment after *Gregg* has given greater weight to race or gender, whether of the defendant or of the victim.²⁹ To date, only two studies—discussed below—have examined whether Oklahoma’s capital punishment system is arbitrary and thus not limited to the “worst of the worst.”

In 1984, Professors Samuel Gross and Robert Mauro published a study examining cases in Arkansas, Georgia, Florida, Illinois, Mississippi, North Carolina, Virginia, and Oklahoma.³⁰ The researchers used information recorded in Supplementary Homicide Reports filed with the Federal Bureau of Investigation (FBI) by Oklahoma law enforcement agencies from August 1976 through December 1980, along with data maintained by the NAACP Legal Defense and Educational Fund.³¹ In Oklahoma, as in the seven other states examined, Gross and Mauro found disproportionate capital sentencing outcomes in white-victim cases. Moreover, this pattern persisted even after controlling for “the three strongest nonracial predictors of capital sentencing:” felony circumstances, relation of victim to suspect, and number of victims.³² For example, for those homicides accompanied by a separate felony (e.g., kidnapping, rape, robbery), the researchers found that 30.6% (22 out of 72) white-victim cases resulted

²² Pierce & Radelet, *Death Sentencing in East Baton Rouge Parish, 1990–2008*, 71 LA. L. REV. 647, 671 (2011), <http://www.deathpenaltyinfo.org/documents/PierceRadeletStudy.pdf>.

²³ See *id.* (“These results are remarkably consistent with general findings from previous research across a multitude of jurisdictions in the United States over the last 30 years.”)

²⁴ See *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/views-executions> (last visited Mar. 22, 2017).

²⁵ *Id.*

²⁶ See *Oklahoma QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/table/PST045215/40> (last visited Mar. 22, 2017).

²⁷ See *Searchable Execution Database*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/views-executions> (last visited Mar. 22, 2017). Note that the percentages conflict with the Oklahoma Department of Corrections execution statistics, which are 65% Caucasian; 30% Black; 2% Native American; 3% Hispanic; 1% Asian; and 2% Other. See *Execution Statistics*, OKLAHOMA DEPARTMENT OF CORRECTIONS, https://www.ok.gov/doc/Offenders/Death_Row/ (last visited Mar. 22, 2017). However, additional independent research affirmed that the numbers in the text are more accurate with respect to race of those executed. According to U.S. Census data, African Americans made up 74% of the population in Oklahoma in 1990. See *1990 Population – Oklahoma Age & Race by Sex*, UNITED WAY OF OKLAHOMA, <http://www.unitedwayokc.org/research/data-center/demographics/sex/1990-population-oklahoma-age-race-sex> (last visited Mar. 22, 2017). According to U.S. Census data, African Americans made up 75% of the population in Oklahoma in 2000. See *2000 Population – Oklahoma Age & Sex by Race*, UNITED WAY OF CENTRAL OKLAHOMA, <http://www.unitedwayokc.org/research/data-center/demographics/race/2000-population-oklahoma-age-sex-race> (last visited Mar. 22, 2017). According to U.S. Census data, African Americans made up 74% of the population in Oklahoma in 2010. See *2010 Population – Oklahoma Age & Sex by Race*, UNITED WAY OF OKLAHOMA, <http://www.unitedwayokc.org/research/data-center/demographics/race/2010-population-oklahoma-age-sex-race> (last visited Mar. 22, 2017).

²⁸ See U.S. GEN. ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES* app. I (1990) (listing 28 studies examining racial disparities in capital sentencing, none of which focused on Oklahoma).

²⁹ That the death penalty would be more often or less often imposed on the basis of irrelevant demographic characteristics concerned several members of the *Furman* Court (which temporarily imposed a ban on capital punishment because of its then-unconstitutional application). See, e.g., *Furman*, 408 U.S. at 250–51 (Douglas, J., concurring) (noting that a history of Texas’s use of capital punishment from 1924 through 1968 revealed that “most of those executed were poor, young, and [uneducated],” and it further found that, in several cases involving white and black co-defendants, the white defendant had received a life sentence whereas the black defendant had been sentenced to death (quoting Rupert Koeninger, *Capital Punishment in Texas, 1924–1968*, 15 CRIME & DELINQ. 132, 141 (1969))).

³⁰ Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).

³¹ *Id.* at 49–52 (discussing construction of data set).

³² *Id.* at 70. In general, homicides accompanied by a separate felony (e.g., kidnapping, rape, robbery) or in which the assailant and victim are strangers tend to be more aggravated than those without separate felonies or in which the assailant and victim have some acquaintance.

in a death sentence, whereas zero out of 17 comparable black-victim cases led to the same result.³³ When the researchers simultaneously accounted for all three nonracial predictors, they uncovered a similar pattern: of the 49 white-victim cases with two or three of these circumstances, 19 defendants (38.8%) were sentenced to death, whereas, of the eight black-victim cases with two or three of these circumstances, zero defendants were sentenced to death.³⁴

Gross and Mauro also used statistical tools to estimate the influence of race-based and legitimate variables on the probability that an Oklahoma defendant would receive a death sentence.³⁵ They found that “the race of the victim had sizable and statistically significant effects on the likelihood that a defendant would receive the death penalty in Oklahoma”³⁶

The second review—independently conducted by Professors Michael Radelet, Glenn Pierce, and Susan Sharp in 2016 at the request of the Commission—uncovered similar race-of-the-victim effects in the 24-year period from 1990 through 2013.³⁷ Like the 1984 study conducted by Gross and Mauro, this study analyzed the data after controlling for the “legally relevant” variables of felony circumstances and multiple victims.³⁸

The 2016 study made a number of findings related to race and gender of homicide victims in Oklahoma.³⁹ First, the probability of a death sentence is over two times higher for those suspected of killing a white victim than a nonwhite victim.⁴⁰ Second, for the time period examined, a murder suspect was 9.59 times more likely to get a death sentence if the victim was a white female than if the victim was a minority male.⁴¹ Finally, as compared to those suspected of killing a minority male victim, a suspect was 8.68 times more likely to get a death sentence if the victim was a minority female, and 3.22 times more likely to get a death sentence if the victim was a white male.⁴² Thus, controlling for other factors—such as the presence of multiple victims and additional felony circumstances—the study found that cases involving female victims (regardless of race) and white male victims were more likely to result in a death sentence than cases involving nonwhite male victims.⁴³

In their study, Professors Radelet, Pierce, and Sharp noted the difficulty in obtaining data in order to assess whether the death penalty is applied in a proportionate and fair manner in Oklahoma. The researchers stated, “Unfortunately, there is no state agency, organization, or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the ‘Death Row Data Set.’”⁴⁴ The researchers relied on the FBI Supplemental Homicide Reports, other publicly available resources, and their own independent research to locate information about cases in their data set.

³³ *Id.* at 94 tbl.50. For those cases in which a homicide was not accompanied by a separate felony, the disparity between white- and black-victim cases was far smaller: 18 out of 482 (3.7%) white-victim cases resulted in a death sentence, whereas three out of 221 (1.4%) comparable black-victim cases led to the same result. *Id.*

³⁴ *Id.* at 95 tbl.51. A similar pattern emerged in cases with lower levels of aggravation, but the discrepancies were not found to be statistically significant. For those cases with the highest levels of aggravation, however, the *p*-value was 0.03. In statistics, a *p*-value is the probability of obtaining a result equal to or more extreme than what was actually observed, when the null hypothesis is true. Small *p*-values—those equal to or less than 0.05—indicate strong evidence against the null hypothesis.

³⁵ *Id.* at 76–77.

³⁶ *Id.* at 95.

³⁷ The full study is appended to this report. *See* App. 1A.

³⁸ *Id.* at 12–13.

³⁹ *Id.* The researchers also examined whether the race of the defendant had played a role in the outcome of his or her case, but, in contrast to the race-of-the-victim effects, the results were not statistically significant. *Id.* at 15.

⁴⁰ *Id.* at 12.

⁴¹ *Id.* at 14.

⁴² *Id.*

⁴³ *Id.* at 15.

⁴⁴ *Id.*

II. The Costs of Capital Punishment

In the seven states that have repealed the death penalty in the past 10 years, both Republican and Democratic officials have referenced the cost of the death penalty as a significant motivation.⁴⁵ The governors of Washington, Oregon, Colorado, and Pennsylvania—all of whom enacted moratoriums on the death penalty pending review—have likewise identified capital punishment’s costs as a rationale for their decisions. These costs include both monetary costs and intangible costs, such as the impact on society when it is later discovered that a defendant has been wrongfully convicted. One recent article notes, “Even in states that retain the punishment, cost has played a central role in the conversion narratives of conservative lawmakers, public officials, and others who question the death penalty as a waste of taxpayer dollars.”⁴⁶

In their independent analysis of the costs of Oklahoma’s capital punishment system—in *Appendix IB*—Professors Peter Collins, Matthew Hickman, and Robert Boruchowitz provide an overview of several economic studies that have been conducted in other jurisdictions in the past 15 years. The studies reflect an increasing societal interest in the financial burdens of the death penalty.⁴⁷ The researchers conclude: “What all of these studies have found, each to a varying degree, is that seeking and imposing the death penalty is more expensive than life in prison. It is a simple fact that seeking the death penalty is more expensive.”⁴⁸

Table 2, below, demonstrates the *difference in cost* between a capital and non-capital case—with capital cases more expensive in every study—in other states:

Table 2: Average Differential Between Cost of Capital and Non-Capital Case

Year	Author/Organization	State	2017 Dollars
2001	Williams Inst.	Arizona	\$136,003
2003	State of CT Commission	Connecticut	\$346,540
2004	State of Tenn.	Tennessee	\$926,239
2008	ACLU	California	\$1,277,452
2008	Roman et al.	Maryland	\$1,972,680
2009	Cook	North Carolina	\$359,936
2010	Sen. Boots	Indiana	\$380,904
2012	Miethe	Nevada	\$246,013
2013	Marceau & Whitson	Colorado	\$135,778
2014	State of Nevada	Nevada	\$579,365
2014	Death Penalty Ad Comm.	Kansas	\$439,916
2014	OPE; Idaho Leg.	Idaho	\$159,710
2015	Collins et al.	Washington	\$1,214,127
2016	Goss et al.	Nebraska	\$1,520,644
2016	Kaplan et al.	Oregon	\$935,597
		avg. per case:	\$708,727

⁴⁵ Those seven states are Delaware (2016); Connecticut (2012); Maryland (2013); Illinois (2011); New Mexico (2009); New York (2007); New Jersey (2007). See *State With and Without the Death Penalty*, DPIC, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Feb. 17, 2017).

⁴⁶ MAURICE CHAMMAH, THE MARSHALL PROJECT, THE SLOW DEATH OF THE DEATH PENALTY (2014), <https://www.themarshallproject.org/2014/12/17/the-slow-death-of-the-death-penalty#CXfZCOrDP> (last visited Mar. 22, 2017).

⁴⁷ See App. IB.

⁴⁸ *Id.* at 5.

This section explores the cost of Oklahoma's capital punishment system, focusing first on costs stemming from the state's history of wrongful capital convictions and, thereafter, on major findings of the Oklahoma cost study by Professors Collins, Hickman, and Boruchowitz.

A. Oklahoma's Experience with Wrongful Capital Convictions

Researchers recently concluded that, nationwide, about four percent of criminal defendants who are sentenced to death are wrongfully convicted.⁴⁹ Indeed, wrongful convictions are at the heart of many concerns about the death penalty, raised by individuals across the political spectrum. These concerns have been amplified in the past 16 years by exonerations.⁵⁰ While the wrongfully convicted sometimes receive financial compensation for the injustice they suffered, the non-monetary costs of a wrongful conviction—including the impact on exonerees and their families, as well as on the lives of victims and their loved ones—also are substantial.⁵¹ Wrongful convictions also present a serious public safety challenge: when the innocent are convicted, a guilty perpetrator may remain free. Public awareness of wrongful convictions also undermines confidence in the criminal justice system.⁵²

As of February 2017, 137 death row inmates have been exonerated nationwide, including 10 in the state of Oklahoma.⁵³ Although the physical, financial, and psychological costs borne by exonerees are impossible to calculate, Oklahoma taxpayers have paid some price for these miscarriages of justice. For example, in 2006, the city of Tulsa was ordered to pay \$12.5 million to Arvin McGee, Jr., who spent 14 years in prison for a kidnapping and rape he did not commit. It is the largest settlement to date for wrongful conviction in Oklahoma's history.⁵⁴ McGee's case, however, is an outlier in the state. As detailed in the *Innocence Protection* chapter, only two out of 10 Oklahoma death row exonerees—Ronald Williamson and Greg Wilhoit—have been financially compensated.⁵⁵

B. Economic Costs of Oklahoma's Capital Punishment System

When the Commission began its work, to its knowledge, no government actor or private researcher had studied

⁴⁹ Dina Fine Maron, *Many Prisoners on Death Row Are Wrongfully Convicted*, SCI. AM. (Apr. 28, 2014), <http://www.scientificamerican.com/article/many-prisoners-on-death-row-are-wrongfully-convicted>.

⁵⁰ This period is generally considered to have begun when, in 2000, Illinois Governor George Ryan, a Republican and formerly a death penalty supporter, enacted a moratorium over concerns that innocent people were at risk of execution. Prior to the moratorium, the state of Illinois had released 15 condemned inmates from death row. See *Report of the Governor's Commission on Capital Punishment: Timeline*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/timeline.pdf> (last visited Jan. 23, 2017).

⁵¹ For example, when Connecticut Governor Daniel Malloy signed 2012 legislation repealing the death penalty, he noted, "[T]he people of this state pay for appeal after appeal, and then watch time and again as defendants are marched in front of the cameras, giving them a platform of public attention they don't deserve." See David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN, Apr. 25, 2012, <http://www.cnn.com/2012/04/25/justice/connecticut-death-penalty-law-repealed>.

⁵² Richard A. Leo & Jon B. Gould, *Studying Wrongful Convictions: Learning from Social Science*, 7 OHIO ST. J. CRIM. L. 7, 8 (2009) ("In American society, the arrival of DNA testing and the jump in factually indisputable exonerations has put the problem of wrongful conviction on the national agenda and led to a drop in public confidence about the criminal justice system.").

⁵³ 137 individuals have been exonerated from death row as of February 2, 2017, including 10 in the state of Oklahoma. See *Innocence and the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/innocence-and-death-penalty#inn-st> (last visited Mar. 22, 2017). Ten individuals who have been exonerated from Oklahoma's death row: Charles Giddens (1981); Clifford Bowen (1986); Richard Neal Jones (1988); Adolph Munson (1995); Curtis McCarthy (2007); Gregory Wilhoit (1995); Robert Lee Miller (1998); Ronald Williamson (1999); Yancy Douglas (2009); and Paris Powell (2009). Giddens, Bowen, and Jones are not listed on the National Registry of Exonerations (NRE), but are listed on the Death Penalty Information Center Innocence List, because the NRE catalogs exonerations from 1989 forward. Giddens (1981) Bowens, (1986), and Jones (1988) predate the NRE registry.

⁵⁴ David Harper, *McGee Case: City to Pay: Lawsuit is Settled for \$12.25 Million*, TULSA WORLD (June 3, 2006), http://www.tulsaworld.com/archives/mcgee-case-city-to-pay-lawsuit-is-settled-for-million/article_a598cb8a-0ec5-52d2-9daf-51fb19c0bd87.html. Although compensation to victims of wrongful conviction has increased nationwide, many of those exonerated in Oklahoma have not received restitution. Ziva Branstetter, *Few Exonerees Receive Payment for Wrongful Convictions*, TULSA WORLD (Nov. 23, 2014), http://www.tulsaworld.com/newshomepage1/few-exonerees-receive-payment-for-wrongful-convictions/article_0f8f4e61-ca52-57bf-a8c5-ad5014fe4005.html. Only two of Oklahoma's 10 death-row exonerations—Ronald Williamson and Gregory Wilhoit—have received compensation for their being wrongfully sentenced to death. See *id.*

⁵⁵ According to data available from the National Registry of Exonerations, Death Penalty Information Center, and the Innocence Project, 10 individuals have been exonerated from death row in Oklahoma. Details regarding any settlement amount from lawsuits filed by Oklahoma's death row exonerees in state or federal court are sealed or confidential. Based on public reporting, independent research, and interviews, it was determined that only Ron Williamson and Greg Wilhoit received compensation for their wrongful convictions.

the financial costs of Oklahoma's capital punishment system. The study by Professors Collins, Hickman, and Boruchowitz, therefore, sheds some light on an important piece of the state's death penalty. The researchers conducted interviews with dozens of officials and collected data from 25 major entities in Oklahoma—including law enforcement, defense counsel, prosecutors, and the courts—to support their findings. The full report, with a detailed description of the study methodology, may be found in *Appendix IB*.

The main finding was that Oklahoma capital cases are more expensive to prosecute than first-degree murder cases in which the death penalty is not sought. This result is consistent with all other cost studies conducted nationwide.⁵⁶ This is true across the system, regardless of whether one looks only at pretrial and trial-level prosecutions and defense costs, jail costs to house a defendant before and during trial, post-conviction litigation costs, or the annual costs to incarcerate an inmate in the Oklahoma Department of Corrections (ODOC).

In particular, the researchers estimated that, in Oklahoma County, defendants in first-degree murder cases in which death is sought (i.e., a bill of particulars is filed by the prosecution) spend 880 days in jail, on average, as compared to 556 days for their non-capital counterparts. The average cost to house capital defendants at the jail was approximately \$45,000 total; for non-capital defendants, the figure was just over \$28,000 total.⁵⁷

District attorneys and defense counsel, as institutional actors, do not typically track the hours spent working on cases, making it difficult to calculate trial costs. However, with data provided, the researchers were able to conservatively estimate that costs to the prosecution are three times more when a decision to seek the death penalty is made: \$26,577 versus \$8,848.⁵⁸ Capital-case defense services also significantly exceed non-capital defense services: \$59,155 versus \$12,729.⁵⁹ Similar results were obtained outside of Oklahoma County, from the Oklahoma Indigent Defense System (OIDS), which averaged an amount of \$73,568 on capital cases, versus \$11,744 on first-degree murder cases in which the maximum available sentence was life without the possibility of parole.⁶⁰

In sum—as depicted in Table 3—the study finds that a death penalty case, on average, costs \$110,257 more than a first-degree murder case in which the death penalty is not sought.⁶¹

Table 3: Average Costs Per Case: Main Cost Estimate Categories (2017 USD).

	Jail	Defense	Prosecutors	OIDS	Total All
Non-BOP	\$28,320	\$3,730	\$8,848	\$9,770	\$50,668
BOP	\$44,861	\$36,467	\$26,577	\$53,020	\$160,925
Diff (ratio)	\$16,541 (1.58)	\$32,737 (9.78)	\$17,729 (3.00)	\$43,250 (5.43)	\$110,257 (3.18)

Notes: OIDS= Oklahoma Indigent Defense System (direct and post-conviction appeals). Diff= Difference BOP minus non-BOP. Ratio= BOP/non-BOP. Conflict defense¹ average cost per BOP case = \$49,323.

⁵⁶ See *infra*, App. IB.

⁵⁷ *Id.* at 2-3. Costs were calculated using 2017 U.S. dollars. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ This cost is inclusive of jail costs and trial costs.

The costs to ODOC for post-conviction incarceration—shown in Table II of *Appendix 1B*—were discussed separately from the pretrial and trial costs above.⁶² The study indicates that it costs about twice as much to maintain offenders on death row than off of death row.

Importantly, these greater costs are not just expected, but unavoidable. As the researchers note in the study's section on capital defense spending:

Defending persons facing a possible death penalty is complex, requires a sophisticated understanding of substantive and procedural law and significant trial and sentencing practice experience. A team of lawyers, an investigator, and a mitigation specialist is required. Cases can last more than a year and require comprehensive investigation both into the facts of the alleged crime and into the life history of the defendant, including importantly his or her mental health history.⁶³

Oklahoma district attorneys and chief defenders agree that present funding for capital cases remains inadequate. In addition to statements from Oklahoma defense attorneys regarding chronic underfunding, the Commission was particularly struck by statements from both David Prater (Oklahoma County District Attorney) and Steve Kunzweiler (Tulsa County District Attorney). Both district attorneys spoke with Commission members and emphasized the critical need for funding of the OIDS and the public defenders offices for Tulsa and Oklahoma counties.⁶⁴ The district attorneys expressed serious concerns regarding the underfunding of public defense in Oklahoma, indicating that defense attorneys are managing far too many cases than is acceptable and it is taking a toll on their colleagues. The prosecutors indicated a desire to be in the courtroom with defense counsel who are adequately funded, properly staffed, and fully competent.

Relatively low funding on the front end of a case often requires substantially more resources on the back end. The study emphasizes that the “true cost of representing people accused of capital crimes in Oklahoma is greater than the data we received indicates.” The study further explains:

State defenders often do not have the time and the resources to provide representation that complies with the standards outlined in the ABA Guidelines and expected by the appellate courts. Many issues are not adequately raised until they are represented by federal defenders in federal habeas review. Had the cases been fully prepared and litigated in the state courts, it is likely that fewer cases would go to federal habeas review. The inability of trial court defenders to provide fully effective representation in all their cases has contributed to a significant number of reversals and even exonerations of innocent people in Oklahoma.⁶⁵

Finally, cases in which the death penalty is sought also require more work by court personnel and, in that respect, impose still greater costs on the system. For example, at the pretrial stage, death-sought cases necessitate more in-court appearances by counsel (an average of 13.2 appearances versus 5.6); more court orders or bench rulings (an average of 38.6 versus 17.1); and more legal filings (an average of 137.4 versus 25.9).⁶⁶

One unforeseen outcome of the cost study has been the Commission's understanding of the importance of

⁶² The study emphasizes that the Oklahoma DOC costs are more likely to fluctuate due to a number of variables. The study states, “DOC data is based on projections of future costs (i.e., prospective data) . . . actual costs [] could vary from the estimates due to unpredictable factors [such as] exonerations, commutations, or reversals by appellate courts. Moreover, we do not know the costs incurred by DOC related to carrying out an execution.” *Id.* at 3–4.

⁶³ *Id.* at 20.

⁶⁴ Commission Discussion with David Prater, District Attorney for Oklahoma County (notes on file with the author).

⁶⁵ See *infra*, App. 1B.

⁶⁶ See *id.*

access to meaningful data about Oklahoma’s capital punishment system. Despite the efforts of hardworking individuals at state and local entities—such as law enforcement agencies, ODOC, and the courts—to provide researchers with data, outdated systems-management tools prevented many of those entities from providing the researchers with comprehensive cost information. The researchers noted that “a great deal of unaccounted effort of some form is occurring regularly in every agency included in our analysis . . . [and] just about every agency or organization is far behind in the employment of a modern information management system.”⁶⁷

III. Rates of Error in Oklahoma Capital Cases

Closely associated with cost concerns is the rate of error in Oklahoma capital trials, which result in an appellate reversal of the death sentence or conviction. Reversals can occur either by way of state court or federal court, and the typical bases for setting aside a conviction or death sentence are egregious constitutional violations that deprived the defendant of a fair trial.⁶⁸

In a statistical study published in 2000, researchers examined 4,578 capital appeals nationwide from 1973 through 1995 and found that “the overall rate of prejudicial error in the American capital punishment system was 68%” and that the most common errors traced back to ineffective defense counsel and police and prosecutors who failed to disclose exculpatory evidence.⁶⁹ Although the study’s estimate of constitutional error necessarily was greater than the overall reversal rate—because procedural bars (e.g., a failure to timely file a petition for relief) may prevent a defendant from prevailing on the merits—a reversal rate even half as much as this would entail significant costs and raise serious concerns as to the fairness of a jurisdiction’s capital punishment system.

Because no such study has been conducted with a focus on Oklahoma, the Commission sought an independent analysis of rates of error in Oklahoma capital cases. Over 100 licensed attorneys from two major law firms conducted an independent review of Oklahoma capital cases from 1976 through 2014. This review revealed that, of the 321 people sentenced to death in the state during that time, 172 experienced a reversal of their death sentence or conviction—an error rate of over 53 percent.⁷⁰

Fifty-three percent of all death-sentenced inmates faced retrial—whether as to their guilt or innocence or only as to the appropriate punishment they should receive for having committed a capital offense—or received a modification of sentence on appeal. And, in a few cases, error upon retrial once again necessitated reversal.⁷¹ Some of those whose cases experienced a reversal had their original death sentence reinstated, were ultimately resentenced to death and later executed, or remain on death row. However, 163 of the 321 individuals sentenced to death between 1976 and 2014 were removed from death row for reasons other than execution.⁷² Such explanations include: exoneration, plea agreement after reversal to a sentence less than death, conviction at

⁶⁷ *Id.*

⁶⁸ *See, e.g.,* Strickland v. Washington, 466 U.S. 668 (1984) (holding that prejudice must be established before a defendant will be granted relief on a claim of ineffective assistance of counsel); Brady v. Maryland, 375 U.S. 83 (1965) (holding that materiality must be established before a defendant will be granted relief on a claim that the State withheld exculpatory evidence from him).

⁶⁹ James S. Liebman et al., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at ii (2000), http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf.

⁷⁰ 81 individuals had both the conviction and death sentence reversed; 84 individuals had a death sentence reversed. Note that these numbers may differ from the cost study in App. IB, which examined a different time period.

⁷¹ *See, e.g.,* Rojem v. Gibson, 245 F.3d 1150 (10th Cir. 2001) (first reversal in the case against Richard Norman Rojem); Rojem v. State, 130 P.3d 287 (Okla. Crim. App. 2006) (second reversal in the case against Rojem); Miller v. State, 98 P.3d 738 (Okla. Crim. App. 2004) (first reversal in the case against Victor Cornell Miller); Miller v. State, 315 P.3d 954 (Okla. Crim. App. 2015) (second reversal in the case against Miller).

⁷² *See* NAACP LEGAL DEFENSE FUND, DEATH ROW USA WINTER 2104 (2014), http://www.deathpenaltyinfo.org/documents/DRUSA_Winter_2014.pdf; *see also* NAACP LEGAL DEFENSE FUND, DEATH ROW USA WINTER 2015 (2015), <http://www.deathpenaltyinfo.org/documents/DRUSAWinter2015.pdf> (both reporting the number of those remaining on death row at the end of 2014 and 2015 respectively); *see also* Searchable Execution Database, DEATH PENALTY INFO. CTR., (last visited Mar. 22, 2017) (combining NAACP LDS numbers with all of those executed between 1976 and 2014 in OK (11)).

retrial of a non-capital offense, resentencing, or a non-execution death while on death row. Thus, a substantial number of those sentenced to death in Oklahoma never face execution.

Of the 172 people whose cases a court reversed the death sentence and/or conviction:

- 121 were reversed on direct appeal by the OCCA;
- 4 were reversed after direct appeal upon a grant of certiorari by the U.S. Supreme Court;
- 19 were reversed by the OCCA during state post-conviction review; and
- 46 were reversed by the federal courts during habeas corpus (or related) proceedings.⁷⁵

Importantly, procedural limitations require, among other things, that the federal courts provide extraordinary deference to state court findings of fact and conclusions of law, along with requiring that a death row petitioner exhaust state remedies before proceeding in federal court.⁷⁴ Notwithstanding these procedural hurdles, the federal courts reversed death sentences or convictions in multiple instances when the state courts had previously found no error.

IV. Data Accessibility and Management

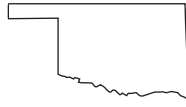
A common thread through all three studies presented in this chapter has been the effort required to collect and organize data from Oklahoma agencies—be they county-based or statewide. The data collection process for gathering basic information regarding capital cases revealed deficiencies in state and local governments' data management systems.⁷⁵ This is not a criticism of the diligent and responsive individuals working in the system—rather, it is an acknowledgment that they lack the resources and funding necessary to track this important data.

Government accountability depends on transparency. Oklahomans and state policymakers should have the capability of accessing data concerning the criminal justice system. If not, they cannot draw informed conclusions about or make rational decisions regarding that system, including whether maintaining capital punishment is in the long-term fiscal interests of the people of the state. It is imperative for the state to improve Oklahoma's systems for gathering, sharing, and managing data relevant to the criminal justice system. Updating these systems would allow agency personnel to more effectively serve Oklahomans. Moreover, it also would improve transparency and accountability by enabling public and private researchers to study the system's outcomes, costs, and efficacy.

⁷⁵ Note that the sum of these three categories of review adds up to more than our benchmark of 172 individuals who had reversals because some were resentenced and then had the death sentence or conviction *again* overturned at a subsequent stage of review.

⁷⁴ See 28 U.S.C. § 2254 (2012).

⁷⁵ See generally description of cost study methodology and data gathering, *infra*, App. IB.



Appendix IA¹

Race and Death Sentencing for Oklahoma Homicides, 1990-2012²

I. Introduction

In the first 15 years of the 21st century, we have seen several indicators that the use of the death penalty is in sharp decline in the United States. According to the Death Penalty Information Center, between 1996 and 2000 an annual average of 275 new prisoners arrived on America's death rows, but by 2015 this figure had precipitously decreased to 49.³ The average number of executions per year has fallen nearly fifty percent since the last five years of the twentieth century, from 74 between 1996 and 2000 to 376 in the years 2011-2015.⁴ In just the past 10 years, seven states have abolished the death penalty,⁵ the Delaware Supreme Court invalidated that state's statute in August 2016,⁶ and four more states – Washington, Oregon, Colorado and Pennsylvania – have seen their governors impose moratoria on executions. A September 2016 poll by the Pew Research Center found that slightly less than half of Americans (49 percent) supported the death penalty,⁷ the lowest level of support in more than 40 years. A 2015 poll by Quinnipiac indicates that more Americans (48%) now prefer a sentence of Life Imprisonment without Parole (which is available in all death penalty jurisdictions) to a death sentence (45%).⁸ Even in Oklahoma, a November 2015 poll found that the majority of the population (52 percent) would prefer a sentence of life plus restitution rather than the alternative of the death penalty.⁹ A second poll taken in July 2016 found that 53 percent of the “likely voters” in the state would prefer life

¹ This report is an early draft of an independent study (current through November 1, 2016), submitted to the Oklahoma Death Penalty Review Commission for its review of Oklahoma's capital punishment system. The final study will be published by the Northwestern University School of Law in the fall of 2017. See Glenn L. Pierce, Michael L. Radelet, & Susan Sharp, *Race and Death Sentencing for Oklahoma Homicides, 1990-2012*, 107 Nw. U. J. Crim. L. & Criminology. The Commission is grateful to the authors for providing this study for its consideration during its review of Oklahoma's death penalty. **Please note: the Commission did not edit this draft report and any errors should be attributed the authors. Moreover, the views reflected by the authors do not necessarily reflect those of the Commission.** This study is included in the Commission's report as a reference for Appendix I.

² This report was authored by Glenn L. Pierce, Michael L. Radelet, and Susan Sharp. Radelet is a Professor of Sociology, University of Colorado-Boulder; Pierce is a Principal Research Scientist, School of Criminology & Criminal Justice, Northeastern University, Boston; Sharp is the David Ross Boyd Professor/Presidential Professor Emerita, Department of Sociology, University of Oklahoma. The three authors are listed alphabetically; each made equal contributions to this project. The authors wish to thank Melissa S. Jones and Amy D. Miller for their assistance in helping to build the Oklahoma death row data set.

³ *Death Sentences in the United States From 1977 by State and by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/death-sentences-unit-ed-states-1977-2008>.

⁴ *Executions by Year*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-year>.

⁵ New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2013).

⁶ Eric Eckholm, *Ruling by Delaware Justices Could Deal Capital Punishment in the State a Final Blow*, NEW YORK TIMES, Aug. 2, 2016, at A11.

⁷ Baxter Oliphant, *Support for Death Penalty Lowest in More than Four Decades* (Sept. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/09/29/support-for-death-penalty-lowest-in-more-than-four-decades/>.

⁸ *Quinnipiac University Poll Release Detail*, <http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=2229> (June 1, 2015).

⁹ *News9/News6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONER POLL, <http://soonerpoll.com/news9news6-more-oklahomans-oppose-death-penalty-if-given-alternative> (Nov. 19, 2015); *News9/News6: More Oklahomans Oppose Death Penalty If Given Alternative*, SOONER POLL, <http://soonerpoll.com/news9news6-more-oklahomans-oppose-death-penalty-if-given-alternative> (Nov. 19, 2015); Graham Lee Brewer, *New Poll Shows Over Half of Oklahomans Support Life Sentences Over the Death Penalty*, NEWSOK, <http://newsok.com/article/3461486>.

sentences without parole and mandatory restitution instead of the death penalty.¹⁰ These results document a changing climate around death penalty debates: apparently more Americans now prefer long prison terms rather than the death penalty.

One reason for the decline in support for and the use of the death penalty is growing concerns that the penalty is not reserved for “the worst of the worst.” In a nationwide Gallup Poll taken in October 2013, 41 percent of the respondents expressed the belief that the death penalty was being applied unfairly, and a 2009 Gallup Poll found that 59 percent of the respondents believed that an innocent person had been executed in the preceding five years.¹¹ This concern is undoubtedly on the minds of many Oklahomans, since ten inmates have been released from its death row since 1972 because of doubts about guilt.¹²

In this article, we examine another question that is related to the contention that the death penalty is reserved for the worst of the worst: the possibility that the race of the defendant and/or victim affects who ends up on death row. To do so, we will study all homicides that occurred in Oklahoma from January 1, 1990 through December 31, 2012, and compare those cases with the subset that resulted in the imposition of a death sentence.

Oklahoma is home to some 3.75 million citizens, of whom 75 percent are white, with the black, Native American, and Hispanic population each constituting about eight percent of the population.¹³ Racial and ethnic minorities are over-represented among those on death row, which housed 46 men and one woman as of July 1, 2016 (23 white, 20 black, 3 Native American, 2 Latino).¹⁴ Between 1972 and October 31, 2016, Oklahoma conducted 112 executions (with the first occurring in 1990), which ranks second among U.S. states behind Texas and gives Oklahoma the highest per capita execution rate in the U.S.¹⁵

Of the 112 executed inmates, 67 were white (60 percent), 35 black, 6 Native American, 2 Asian, 1 Latino, and 1 whose race was classified as “Other.”¹⁶ The races of the homicide victims in the death penalty cases are also predominately white, with 83 of the 112 executed inmates convicted of killing at least one white victim (74.1 percent), 19 at least one black victim, 7 at least one Asian victim, 5 at least one Latino victim, 1 at least one Native American victim, and 1 who killed two people whose races are classified as “Other” (both the assailant and his two victims were Iraqi).¹⁷

¹⁰ Silas Allen, *Majority of Oklahomans Support Replacing Death Penalty with Life Sentences, Poll Shows*, THE OKLAHOMAN, Aug. 6, 2016, <http://newsok.com/majority-of-oklahomans-support-replacing-death-penalty-with-life-sentences-poll-shows/article/5512693>.

¹¹ *Gallup Poll Topic: Death Penalty*, GALLUP, <http://www.gallup.com/poll/1606/death-penalty.aspx>.

¹² These former death row inmates include Charles Ray Giddens (released in 1981), Clifford Bowen (1986), Richard Jones (1987), Greg Wilhoit (1995), Adolph Munson (1995), Robert Miller (1998), Ronald Williamson (1999), Curtis McCarty (2007), Yancy Douglas (2009), and Paris Powell (2009). See Death Penalty Information Center, *List of Exonerees Since 1973*, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty>.

¹³ <https://suburbanstats.org/population/how-many-people-live-in-oklahoma>

¹⁴ DEATH ROW USA, Summer 2016, http://www.naacpldf.org/files/publications/DRUSA_Summer_2016.pdf (current as of July 1, 2016).

¹⁵ <http://www.deathpenaltyinfo.org/state-execution-rates>. Among the executed are two juveniles (one of whom was just 16 at the time of his crime), three women, and seven inmates who dropped their appeals and asked to be executed. See also *Executions Statistics* available from the Oklahoma Department of Corrections, https://www.ok.gov/doc/Offenders/Death_Row/. There have also been four death sentences commuted to prison terms by Oklahoma governors since 1972: Phillip Smith (2001), Osvaldo Torres (2004), Kevin Young (2008), and Richard Smith (2010). See Michael L. Radelet, *Commutations in Capital Cases on Humanitarian Grounds*, available at <http://www.deathpenaltyinfo.org/clemency#List>.

¹⁶ This does not include Timothy McVeigh, executed under federal authority in June 2001 for murdering 168 people in the explosion of the Alfred P. Murrah Federal Building in Oklahoma City in April 1995.

¹⁷ These tallies were calculated from data provided by Death Penalty Information Center, *Searchable Execution Database*, available at <http://www.deathpenaltyinfo.org/views-executions>. Because four executed inmates were convicted of killing multiple victims who had different races, one execution can fit two or more of these criteria, giving us a total for these calculations of 116.

II. Previous Research

Concerns about the impact of the defendant's and/or victim's race on death penalty decisions have a long history in the U.S. Soon after the 1976 decision in *Gregg v. Georgia* that breathed new life into death penalty statutes,¹⁸ researchers led by the late University of Iowa legal scholar David Baldus began to study the possible relationships, with the most comprehensive study by Baldus and his team focusing on Georgia.¹⁹ Those race studies conducted prior to 1990 were reviewed by the U.S. government's General Accounting Office in 1990, which produced a report concluding that in 82 percent of the 28 studies reviewed, "race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty."²⁰

In 2003, Baldus and George Woodworth in effect updated and expanded the GAO Report, reviewing 18 race studies that had been published or released after 1990.²¹ Their conclusions are worthy of a lengthy quote:

Overall, their results indicate that the patterns documented in the GAO study persist. Specifically, on the issue of race-of-victim discrimination, there is a consistent pattern of white-victim disparities across the systems for which we have data. However, they are not apparent in all jurisdictions nor at all stages of the charging and sentencing processes in which they do occur. On the issue of race-of-defendant discrimination in the system, with few exceptions the pre-1990 pattern of minimal minority-defendant disparities persists, although in some states black defendants in white-victim cases are at higher risk of being charged capitally and sentenced to death than are all other cases with different defendant/victim racial combinations.²²

Overall, Baldus and Woodworth concluded that the studies displayed four clear patterns: 1) with few exceptions, the defendant's race is not a significant correlate of death sentencing, 2) primarily because of prosecutorial charging decisions, those who kill whites are significantly more likely than those who kill blacks to be sentenced to death, 3) black defendants with white victims are especially likely to be treated more punitively, and 4) counties with large numbers of cases with black defendants or white victims show especially strong impacts on black defendants or on those with white victims.²³

Professor Baldus passed away in 2011, but one of his students, Catherine Grosso, has taken the reigns and assembled a team that has continued Baldus's work. Among their publications is one that recently updated the Baldus literature review.²⁴ Published in 2014, the researchers had by then identified 36 studies that had been completed after the 1990 GAO Report. Their review identified four patterns:

¹⁸ *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁹ DAVID C. BALDUS, GEORGE G. WOODWORTH, & CHARLES A. PULASKI, JR. *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

²⁰ See GENERAL ACCOUNTING OFFICE, *DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES*, GAO/GGD90-57 (1990), at 5.

²¹ David C. Baldus & George Woodworth, G., *Race Discrimination in the Administration of the Death Penalty: An Overview of the Empirical Evidence with Special Emphasis on the Post-1990 Research*, 39 CRIMINAL LAW BULLETIN 194 (2003).

²² *Id.*, at 202.

²³ *Id.*, at 214-15.

²⁴ Catherine M. Grosso, Barbara O'Brien, Abijah Taylor, & George Woodworth, *Race Discrimination and the Death Penalty: An Empirical and Legal Overview*, in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT, 3rd ed. (J. R. Acker, R. M. Bohm, & C. S. Lanier, eds. 2014), 523-76.

- Four of the studies did not discover any race effects.
- Four found independent effects of the race of the defendant (that is, effects that remained after statistically controlling for other relevant variables).
- Twenty-four studies in 13 jurisdictions found significant race-of-victim effects.
- Nine found that black defendants with white victims were more harshly treated than other homicide defendants.²⁵

Unfortunately, none of these post-1990 studies focused on Oklahoma, and only one credible study has explored the possibility of racial disparities in Oklahoma in the post-*Furman* years.²⁶ In that study, first published in *Stanford Law Review*,²⁷ Samuel Gross and Robert Mauro studied all homicides and death sentences in Oklahoma during the 53-month period, August 1976 through December 1980.²⁸ Thus, these data are almost forty years old. Included were 43 death sentences imposed in 898 cases.²⁹ Initially the researchers found that death sentences were imposed in 16.7 percent of the cases in which a black was suspected of killing a white (B-W), 6.6 percent of the cases where a white was suspected of killing a white (W-W), and 1.3 percent of the black on black (B-B) cases.³⁰

If the homicide was accompanied by other felony circumstances, no cases with black victims resulted in a death sentence, compared to 30.6 percent of the white victim cases. If the victim and defendant were strangers, 21.8 percent of the white Victim cases resulted in a death sentence, compared to 3.4 percent of such cases with black victims.³¹

In 2016 a second study of death sentencing in Oklahoma was published.³² The paper attempted to look at death sentencing in Oklahoma in a sample of 3,393 homicide cases over a 38-year time span, 1973-2010. Unfortunately, some of the data presented by the authors in that paper is incorrect, so the paper is not useful. For example, in Appendix B we are told that 8 percent of the white-white homicides contained “capital” or “first-degree” (as opposed to “second-degree” murder charges) (137/1,696), compared to 53 percent of the black-black cases (348/659).³³ We are also told that the data set includes 1,030 cases “charged capital” in which whites were accused of killing Native Americans, although the authors also report that there were only 42 white-Native American cases in their sample. In an email to Radelet dated August 18, 2016, lead author David Keys acknowledged that they undoubtedly received bad data from the State of Oklahoma.³⁴

²⁵ *Id.*, at 538-39. Because some of the studies reached more than one of these conclusions, the sum of these findings (41) is greater than the total number of studies (36).

²⁶ SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 88-94 (1989).

²⁷ Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STANFORD LAW REVIEW 27 (1984).

²⁸ GROSS & MAURO, *supra* note 26, at 233.

²⁹ *Id.*, at 233.

³⁰ *Id.*

³¹ *Id.*, at 236.

³² David P. Keys & John F. Galliher, *Nothing Succeeds Like Failure: Race, Decisionmaking, and Proportionality in Oklahoma Homicide Trials, 1973-2010*, in RACE AND THE DEATH PENALTY: THE LEGACY OF MCCLESKEY V. KEMP 123 (David P. Keys & R. J. Maratea eds. 2016). We mention this study only to show our awareness of it and to alert future students of the death penalty in Oklahoma that its data is fundamentally flawed, from which no conclusions are possible.

³³ *Id.*, at 142.

³⁴ Email exchange available with the author (Radelet).

III. Methodology

We examined all cases in which the death penalty was imposed for Oklahoma homicides that occurred between January 1, 1990, and December 31, 2012. Using 23 years of homicide data allowed us to use a sample with enough cases in it to detect patterns. We ended with cases in 2012 because we found only one death penalty case for a 2013 murder, and any homicides that occurred in 2013 or later might still be awaiting final disposition. During those 23 years, the state recorded some 5,090 homicides, for an annual average of 221.³⁵

A. Homicide Data Set

To begin, we assembled a data set on all Oklahoma homicides with an identified perpetrator over a 23 year period from 1990 to 2012.³⁶ We obtained these data from the FBI's "Supplemental Homicide Reports," or SHR. Supplemental Homicide Reports are compiled from data supplied by local law enforcement agencies throughout the United States, who report data on homicides to a central state agency, which in turn reports them to the FBI in Washington for inclusion in its Uniform Crime Reports.³⁷ While the Reports do not list the suspects' or victims' names (and only the month and year of the offense – not the specific date), they do include the following information: the month, year, and county of the homicide; the age, gender, race,³⁸ and ethnicity of the suspects and victims; the number of victims; the victim-suspect relationship; weapon used; and information on whether the homicide was accompanied by additional felonies (e.g., robbery or rape).³⁹ Local law enforcement agencies usually report these data long before the defendant has been convicted, so offender data are for "suspects," not convicted offenders.⁴⁰

The SHRs include information on all murders and non-negligent manslaughters, but they do not differentiate between the two types of homicides. They define murders and non-negligent manslaughters as "the willful (nonnegligent) killing of one human being by another. Deaths caused by negligence, attempts to kill, assaults to kill, suicides, and accidental deaths are excluded."⁴¹

In addition, the SHRs have a separate classification for justifiable homicides, which are defined as "(1) the killing of a felon by a law enforcement officer in the line of duty; or (2) the killing of a felon, during the commission of a felony, by a private citizen."⁴² Because the data come from police agencies, not all the identified suspects are eventually convicted of the homicide.

³⁵ Oklahoma Crime Rates 1960-2015, available at <http://www.disastercenter.com/crime/okcrimn.htm>.

³⁶ This is similar to the methodology used in other studies that Pierce and Radelet have conducted using information from the Supplemental Homicide Reports. See Glenn L. Pierce & Michael L. Radelet, *Death Sentencing in East Baton Rouge Parish, 1990-2008*, 71 LOUISIANA LAW REVIEW 647 (2011); Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1 (2005); Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLORIDA LAW REVIEW 1 (1991); Michael L. Radelet & Glenn L. Pierce, *Race and Death Sentencing in North Carolina: 1980-2007*, 89 NORTH CAROLINA LAW REVIEW 2119 (2011). The methodology was developed and first used by GROSS & MAURO, *supra* note 26, at 35-42.

³⁷ See <http://www.bjs.gov/content/pub/pdf/ntmh.pdf> (last visited August 1, 2016). We have used SHR data in other research projects, and an earlier version of this paragraph was included in Glenn L. Pierce & Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-99*, 46 SANTA CLARA LAW REVIEW 1, 15 (2005).

³⁸ The racial designations used in the UCR are defined as follows: (1) white. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East. (2) black. A person having origins in any of the black racial groups of Africa. (3) American Indian or Alaskan Native. A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition. (4) Asian or Pacific Islander. A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent. (5) Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa. (6) Unknown). Federal Bureau of Investigation, UNIFORM CRIME REPORTING HANDBOOK 97, 106 (2004).

³⁹ See *id.*, NAT'L ARCHIVE OF CRIM. JUSTICE DATA.

⁴⁰ *Id.*

⁴¹ See FEDERAL BUREAU OF INVESTIGATION, *Uniform Crime Reporting Statistics, UCR Offense Definitions*, <http://www.ucrdatatool.gov/offenses.cfm> (last visited August 1, 2016).

⁴² *Id.*

For our project, a total of 4,813 homicide suspects were identified from Oklahoma SHR's for homicides committed during the period 1990 through 2012. Only those SHR cases that recorded the gender of the homicide suspect were included in the sample, effectively eliminating those cases in which no suspect was identified. In other words, for SHR homicide cases where no suspect gender information was recorded, we assumed that the police had not been able to identify a suspect for that particular homicide incident, rendering sentencing decisions irrelevant.

Finally, we constructed one new SHR case and added it to our data when we found a death penalty case with no corresponding case in the existing SHR data. To better pinpoint the race differences, we also dropped 82 cases in which there were multiple victims who were not all the same races, and an additional 64 cases where either the victim or offender was Asian. This resulted in a reduction of 146 homicide cases (three percent of the original sample of 4,813 homicide cases) and one addition, resulting in a final sample size of 4,668 cases.

In addition to the race of the victim, the SHR data include information on the number of homicide victims in each case, and on what additional felonies, if any, occurred at the same time as the homicide. These variables are key to the analysis reported below.

B. Death Row Data Set

Unfortunately, there is no state agency, organization, or individual who maintains a data set on all Oklahoma death penalty cases. We thus had to start from scratch in constructing what we call the "Death Row Data Set."

To do this, we used data compiled by the NAACP Legal Defense and Educational Fund, Inc., and issued in a (usually) quarterly publication called "Death Row USA."⁴³ This highly-respected source lists (by state) the name, race and gender of every person on America's death rows. Unfortunately, it contains no other information about the defendant (e.g., age), victim (e.g., name, age, race), or crime (e.g., date, location, or circumstances).

Copies of most back issues of Death Row USA are available online,⁴⁴ and other issues are available in hard copy in many law libraries, including the University of Colorado's. From these sources we made copies of all the Oklahoma inmates listed in the 83 issues of Death Row USA published in the years 1990-2012. From those we identified the *additions* to the lists, since the additions would give us a preliminary list of those sentenced to death for homicides committed on or after January 1, 1990. We were not interested in the names of inmates who were on death row in the first issue we examined since all of those inmates were convicted of murders from the 1970s or 1980s. We were only interested in the additions, and then only those sent to death row for murders committed on or after January 1, 1990.

With that list, we conducted internet searches for information about the crime – specific date, county of offense, name of victim/s (and age, sex, and race), and the like. All those whose crimes occurred in the 1980s or after December 31, 2012 were deleted. We also used a web site maintained by the Oklahoma Department of Corrections to confirm the inmate's race and gender, as well as the county of conviction and the inmate's date of birth.⁴⁵ Because this source provides only the date of the conviction, not the date of the offense, information on the date of offense had to be obtained from other sources (primarily newspaper articles and published appellate decisions in the case).

In the end, we identified 153 death sentences imposed against 151 offenders for homicides committed 1990-2012. Two men, Karl Myers and Darrin Pickens, had two separate death sentences imposed in two separate trials for two separate homicides, so each defendant is counted twice.

⁴³ DEATH ROW USA, <http://www.naacpldf.org/death-row-usa>.

⁴⁴ See *id.*

⁴⁵ OKLAHOMA DEPT OF CORRECTIONS, *Offender Look-Up Database*, <https://okoffender.doc.ok.gov/>.

On multiple victim homicides, we counted the homicides with at least one female victim as homicides with female victims.

IV. Results

A. Frequencies and Cross-Tabulations

Table 1 displays descriptive statistics from our data. There are a total of 4,668 homicides included, of which 2,060 (44.1 percent) involved both white suspects and white victims, and 1,266 (27.1 percent) involved black suspects and black victims. There are 427 cases with a black suspect and white victim (9.1 percent), and 143 cases with a white suspect and a black victim (3.1 percent).

Table 2 shows that overall, 143 (3.06 percent) of the homicides with known suspects resulted in a death sentence. Homicides with white victims are the most likely to result in a death sentence. Here 106/2703 resulted in death (3.92 percent), whereas 37/1963 of the homicides with nonwhite victims resulted in death (1.88 percent).⁴⁶

Table 3 looks at only those homicides with male victims. There are a sufficient number of cases to make conclusions only for cases with either white or black victims.⁴⁷ Of the white male victim cases 2.26 result in a death sentence, but only .77 of the black male cases result in a death sentence. Thus, homicides with white male victims are 2.94 times more likely to result in death than cases with black male victims (2.26 divided by .77).

Table 4 shows that homicides with at least one female victim are 4.6 times more likely to result in a death sentence (7.21 percent) than the homicides with no female victims shown in Table 3 (1.57 percent). There are 1,233 cases in the data with at least one female victim, and again we focus on differences between cases with white victims and black victims, and do not look at the other race/ethnicity categories that have low sample counts. The data show only small differences in death sentencing rates among cases with at least one female victim between white (7.57 percent) and black (6.67 percent) victims. Clearly, race makes less of a difference when women are killed than when men are killed.

Table 5 examines the percentage of cases that resulted in a death sentence by the race of the defendant. There is virtually no difference in the probability of a death sentence by race of defendant, with 3.2 percent of the white offenders sentenced to death and 3 percent of the nonwhite defendants.

Table 1: Oklahoma Homicides by Suspect's and Victim's Race/Ethnicity

	Race/Ethnicity of Victim				
	White Only	Black Only	Hisp. Only	Nat. Am. Only	TOTAL
White Suspect	2060	143	38	99	2340
Black Suspect	427	1266	42	30	1765
Hispanic Suspect	65	21	133	8	227
Nat. Am. Suspect	151	15	12	158	336
TOTAL	2703	1445	225	295	4668

Table 2: Oklahoma Homicides and Death Sentences by Race of Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	2703	106	3.92
Black Victim	1445	27	1.87
Hispanic Victim	225	6	2.67
Native American Victim	295	4	1.36
TOTAL	4668	143	3.06

⁴⁶ These 37 suspects were implicated in 27 cases with black victims, 6 with Hispanic victims, and 4 with Native American victims. The 1,963 victims included 1,445 cases with black (only) victims, 225 with Hispanic victim only, and 295 with Native American victim only.

⁴⁷ That is, there are so few cases with black, Hispanic, or Native American victims that small fluctuations in the number of death sentences will result in large proportional differences.

Table 3: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with No Female Victims

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	1857	42	2.26
Black Victim	1175	9	0.77
Hispanic Victim	189	1	0.53
Native American Victim	212	2	0.94
TOTAL	3433	56	1.57

Table 4: Oklahoma Homicides and Death Sentences by Race of Victim

Cases with At Least One Female Victim

	No. of Suspects	No. of Death Sentences	Percentage Death
White Victim	846	64	7.57
Black Victim	270	18	6.67
Hispanic Victim	36	5	13.89
Native American Victim	83	2	2.41
TOTAL	1235	89	7.21

Table 5: Death Sentences by Race of Defendant

		White	Nonwhite	Total
	No	2266	2259	4523
		.968	.970	
Death Penalty Imposed				
	Yes	74	69	143
		.032	.030	
	Total	2340	2328	4668

Chi Square 1.55; 1 df; NS

Table 6: Death Sentences by Race of Victim

		White	Nonwhite	Total
	No	2597	1928	4525
		.961	.981	
Death Penalty Imposed				
	Yes	106	37	143
		.039	.019	
	Total	2703	1965	4668

Chi Square 15.92; 1 df; p<.001

However, there is much more to this story. Table 6 looks at the percentages of death penalty cases by the race of the victim. Here we see that 1.9 percent of those who were suspected of killing nonwhites were ultimately sentenced to death (37 divided by 1965), whereas 3.9 percent (106 divided by 2703) of those suspected of killing whites ended up on death row. The probability of a death sentence is therefore 2.05 times higher for those who are suspected of killing whites than for those suspected of killing nonwhites.

Table 7 combines both suspect's and victim's races/ethnicities.⁴⁸ The percentages of nonwhite defendant/nonwhite victim and white defendant/nonwhite victim cases ending with death sentences was 1.9 and 1.8 percent death sentence respectively. In sharp contrast, 3.3 percent of the white-on-white homicides resulted in a death sentence, compared to 3.8 percent of the nonwhites suspected of killing white victims. The gender of the victim also makes a very large difference in who ends up on death row. As Table 8 shows, 1.6 percent of the defendants suspected of killing males (no female victims) were sentenced to death, compared to 7.2 percent of those who were suspected of killing one or more women.

Table 7: Death Sentences by Races of Defendant and Victim

Defendant-Victim Race/Ethnicity

(W= White; NW=Nonwhite)

	NW-W	W-W	NW-NW	W-NW	Total
No	606	1991	1653	275	4525
	.942	.967	.981	.982	.969
Death Penalty Imposed					
Yes	37	69	32	5	143
	.058	.033	.019	.018	.031
Total	643	2060	1685	280	4668

Chi Square 25.48; 3 df; $p < .001$

Table 9 (on next page) shows the likelihood of a death sentence by the race and gender of the victim. Among those suspected of killing white males, 2.3 percent are sentenced to death, whereas among those suspected of killing nonwhite males, only .8 percent are sent to death row. On the other hand, 7.6 percent of those suspected of killing white females are sentenced to death, as are 6.4 percent of those suspected of killing nonwhite females.

Finally, Table 10 (on next page) displays the percent of death penalty cases broken down by the presence of zero, one, or two “additional legally relevant factors.” The factors we included are 1) whether the homicide event also included additional felonies, and 2) whether there were multiple victims. All cases had 0, 1, or 2 of these factors present. Table 10 shows what would be expected: 1.7 percent of the cases with no additional legally relevant factors ended with a death sentence, 6.2 percent of the

Table 8: Death Sentences by Gender of Victim (V=Victim)

		No Female V	1+ Female V	Total
	No	3378	1146	4535
		.984	.928	.969
Death Penalty Imposed				
	Yes	54	89	143
		.016	.072	.031
	Total	3433	1235	4668

Chi Square 97.07; 1 df; $p < .001$

⁴⁸ When the analysis examines the potential effect of more than one independent variable the likelihood of a death sentence, we combine the separate racial/ethnic minority categories (i.e., black, Hispanic, and Native American) into a single minority category. Each of these minority subgroups are recognized as groups that are subject to subject to discrimination.

Table 9: Death Sentences by Race/Gender of Victim

(W= white; NW=Nonwhite)

		W-F	W-M	NW-F	NW-M	Total
	No	782	1815	364	1564	4525
		.924	.977	.936	.992	.969
Death Penalty Imposed						
	Yes	64	42	25	12	143
		.076	.023	.064	.008	.031
	Total	846	1857	389	1576	4668

Chi Square 104.69; 3 df; p<.001

Table 10: Death Sentences by Number of Additional Legally Relevant Factors (ALRF)

		No ALRF	1 ALRF	2ALRF	Total
	No	3510	978	37	4525
		.983	.938	.698	.969
Death Penalty Imposed					
	Yes	62	65	16	143
		.017	.062	.302	.031
	Total	3852	1043	53	4668

Chi Square 187.9; 2 df; p<.001

cases with one factor, and 30.2 percent of the cases with two factors.

We now turn our attention to pinpointing the effects of each of our predictor variables.

B. Multiple Logistic Regression Analysis

Table 11 presents the results from a statistical technique called logistic regression.⁴⁹ This is the statistical technique of choice used to predict a dependent variable that has two categories, such as whether or not a death

⁴⁹ In logistic regression, the dependent variable is predicted with a series of independent variables, such as gender, income, etc. The model predicts the dependent variable with a series of independent variables, and the unique predictive utility of each independent variable can be ascertained. As we have explained elsewhere:

Logistic regression models estimate the average effect of each independent variable (predictor) on the odds that a convicted felon would receive a sentence of death. An odds ratio is simply the ratio of the probability of a death sentence to the probability of a sentence other than death. Thus, when one's likelihood of receiving a death sentence is .75 (P), then the probability of receiving a non-death sentence is .25 (1-P). The odds ratio in this example is .75/.25 or 3 to 1. Simply put, the odds of getting the death sentence in this case are 3 to 1. The dependent variable is a natural logarithm of the odds ratio, y, of having received the death penalty. Thus, $y = P / 1-P$ and; $(1) \ln(y) = \hat{\alpha}_0 + \sum \hat{\alpha}_i X_i + \epsilon$ where $\hat{\alpha}_0$ is an intercept, $\hat{\alpha}_i$ are the i coefficients for the i independent variables, X is the matrix of observations on the independent variables, and ϵ is the error term. Results for the logistic model are reported as odds ratios. Recall that when interpreting odds ratios, an odds ratio of one means that someone with that specific characteristic is just as likely to receive a capital sentence as not. Odds ratios of greater than one indicate a higher likelihood of the death penalty for those offenders who have a positive value for that particular independent variable. When the independent variable is continuous, the odds ratio indicates the increase in the odds of receiving the death penalty for each unitary increase in the predictor.

Glenn L. Pierce & Michael L. Radelet, *Race, Region, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 59, 59 (2002).

sentence is imposed.⁵⁰

Table 11 shows that there are five variables in our model that are associated with who is sentenced to death in Oklahoma: 1) having a white female victim, 2) having a white male victim, 3) having a female victim from a minority race of ethnicity, 4) having one additional legally relevant factor (a homicide event with more than one victims OR one in which there were additional felony circumstances present, and 5) having two additional legally relevant factors present (a homicide event with more than one victims AND one in which there were additional felony circumstances present). The reference category for the latter two variables is “no additional factors.” We also included a variable measuring the race of the defendant (white vs. minority), but that factor was not statistically significant.

It is no surprise that having one or both legally relevant factors increases the odds of a death sentence dramatically. Let’s focus on the column labeled Exp β . The Exp β for “one additional aggravator” is 3.439 (rounded to 3.4), which is also the odds ratio. Thus, after controlling for all the other variables in the model, the odds of receiving a death sentence are 3.4 times higher in cases with one additional legally relevant factor (compared to cases with no additional legally relevant factors). When the two additional legally relevant factors are both present, the Exp β tells us that the odds of a death sentence are 12.847 (12.8) times higher than cases where no additional factors are present. This is what would be expected – clearly those cases are highly aggravated.

More interesting are the effects of race and gender. Here the excluded category (the comparison group) includes cases with male victims, minority races (black, Hispanic, or Native American). The Exp β in Table 11 shows that the odds of a death sentence for those with white female victims are 9.59 times higher than in cases with minority male victims. The odds of a death sentence for those with white male victims are 3.22 times higher than the odds of a death sentence with minority male victims. Finally, the odds of a death sentence for those with minority female victims are 8.68 times higher than the odds of a death sentence with minority male victims. And all these race/gender effects are net of our two control variables (multiple murder victims and the presence of additional felony circumstances), and all are statistically significant.

Table 11: Logistic Regression Analysis of Victim’s Race/Gender and Number of Additional Legally Relevant Factors on the Imposition of a Death Sentence (n=4668)

	β	Sig.	Exp β
Independent Variables			
White Female Victim	2.261	.000	9.592
White Male Victim	1.171	.001	3.225
Minority Female Victim	2.161	.000	8.678
One additional aggravator*	1.235	.000	3.439
Two additional aggravators**	2.553	.000	12.847
Defendant’s Race (white vs. minority)	.284	.164	1.328
Constant	5.799	.000	.003

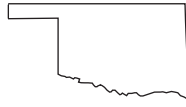
*Either multiple victim homicide or homicide with additional felony circumstances

**Both multiple victim homicide and homicide with additional felony circumstances

⁵⁰ Logistic regression is a statistical method to predict the value of one variable with a series of other variables. The technique is regularly used in studies of race and death sentencing. See, e.g., David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., *Equal Justice And The Death Penalty* 78 n.35 (1990) (explaining how logistic regression models can be used to calculate the odds of a death sentence); Gross & Mauro, *supra* note 15, at 248–52 (using a logistic regression model to help predict the probability of a death sentence); Raymond Paternoster et al., *JUSTICE BY GEOGRAPHY AND RACE: THE ADMINISTRATION OF THE DEATH PENALTY IN MARYLAND, 1978–1999*, 4 *MARGINS* 1, 31–44 (2004) (using logistic regression to address the relationship between victim and offender race).

V. Conclusion

The data show that death sentencing in Oklahoma is not related to the race of the defendant. However, there are rather large disparities in the odds of a death sentence that correlate with the gender and the race/ethnicity of the victim. Controlling for other factors — the presence of additional felony circumstances and the presence of multiple victims — cases with white female victims, cases with white male victims, and cases with minority female victims are significantly more likely to end with a death sentence in Oklahoma than are cases with nonwhite male victims.



Appendix IB¹

An Analysis of the Economic Costs of Capital Punishment in Oklahoma²

EXECUTIVE SUMMARY

I. Introduction

The purpose of this study is to provide empirical evidence to the Oklahoma Death Penalty Review Commission (Commission) regarding the economic costs of seeking and imposing the death penalty in Oklahoma. The main objective of the study is to measure the difference in enumerated costs between first degree murder cases where the prosecutor seeks the death penalty and similar first degree murder cases in which the death penalty is not sought.

The estimation of economic costs associated with seeking and imposing the death penalty and the extrapolation of those trends is complex and described in more detail, *infra*. Despite using the most conservative estimates—in other words, likely underestimating costs³—this study finds that seeking the death penalty in Oklahoma incurs

¹ This report is an independent study submitted to the Oklahoma Death Penalty Review Commission for its review of Oklahoma's capital punishment system. It is current as of February 1, 2017. The Constitution Project provided support to the researchers through data collection and the study was funded by the Wallace Global Fund, which has in no way influenced the outcome of this report. The Commission is grateful to the authors for providing this study during its review of Oklahoma's death penalty. **Please note: the Commission did not edit this draft report and any errors are the responsibility of the authors. The findings and opinions reported here are those of the authors and do not necessarily reflect the positions of Wallace Global Fund, The Constitution Project, The Oklahoma Death Penalty Review Commission, or Seattle University.** This study is included in the Commission's report as a reference for Appendix I.

² The report was authored by Peter A. Collins, Matthew J. Hickman, and Robert C. Boruchowitz, with research support by Alexa D. O'Brien. [Peter A. Collins, Ph.D., Assistant Professor, Criminal Justice Department, Seattle University, 901 12th Avenue Post Office Box 222000, Seattle, Washington 98122-1090, Phone: 206-296-5474, Email: collinsp@seattleu.edu; Matthew J. Hickman, Ph.D., Associate Professor, Criminal Justice Department, Seattle University, 901 12th Avenue Post Office Box 222000, Seattle, Washington 98122-1090, Phone: 206-296-2484, Email: hickmanm@seattleu.edu; Robert C. Boruchowitz, J.D., Professor from Practice and Director, The Defender Initiative, Seattle University School of Law, 901 12th Avenue Post Office Box 222000, Seattle, Washington 98122-1090, Phone: 206-598-4131, Email: boruchor@seattleu.edu]. The authors would like to thank the following people and agencies—in no particular order—for their help with this study (the vast majority of which was conducted on a volunteer basis): The Oklahoma Death Penalty Review Commission, which provided considerable support during the data collection process; The Constitution Project; Oklahoma Department of Corrections Director Joe Allbaugh; Oklahoma County and Tulsa County Court Clerks; Oklahoma County Chief Public Defender Robert Ravitz and District Attorney David Prater; Tulsa County Chief Public Defender Robert Nigh and District Attorney Steve Kunzweiler; Oklahoma Indigent Defense System; Oklahoma State Bureau of Investigation; Tulsa County Sheriff's Office; Oklahoma City Police Department; Tulsa City Police Department; Broken Arrow Police Department; Edmond Police Department; Midwest City Police Department; Mustang Police Department; Nichols Hills Police Department; Sand Springs Police Department; Hon. Clancy Smith (Presiding Judge, Oklahoma Court of Criminal Appeals); Hon. Charles Chapel (Former Judge, Oklahoma Court of Criminal Appeals); Steve Ingraham, Business Analyst, Oklahoma Administrative Office of the Courts; Brandy Manek, Director of Budget and Policy, Oklahoma Office of Management and Enterprise Services; Oklahoma Department of Mental Health and Substance Abuse Services; Patti Palmer Ghezzi, Assistant Federal Defender, Capital Habeas Unit, Federal Public Defender, Western District of Oklahoma; and Melissa Vincent and staff, 9Tribe, LLC. We appreciate your help and please forgive us if we have inadvertently left anyone out.

³ As we explain in detail within the methods section below, we always underestimated costs for the purpose of presenting the most conservative estimates so as to err on the side of caution.

significantly more time, effort, and costs on average, as compared to when the death penalty is not sought in first degree murder cases. These findings are consistent with all previous research on death penalty costs,⁴ which have found that in comparing similar cases, seeking and imposing the death penalty is more expensive than not seeking it.

II. Methodology

A. Case-Level Approach

We studied the period from 2004 through 2010 and began with a case-level approach, where case-specific costs are gathered through matching first degree murder⁵ designated cases to corresponding administrative data. The case-level approach centers on the conversion of cost measures or outcomes into one common unit of measurement (United States Dollars or USD), which enables comparisons between sentences sought. Unless otherwise noted, all cost figures are presented in real 2017 USD.

We first collected all first degree murder cases that occurred from 2004 through 2010 in Oklahoma and Tulsa counties. We then constructed a sample of these cases to use for the cost study, including all cases in which a formal bill of particulars⁶ (BOP) was filed, which indicates that the prosecutor was seeking the death penalty. We then randomly selected a sample of first degree murder cases in which the death penalty was not sought. This resulted in the analysis of 193 defendants and a total of 184 cases.⁷ This list of cases was then shared with criminal justice agencies within Oklahoma and Tulsa counties as well as with some state agencies. We were able to collect data that captured costs incurred at the pre-trial, trial, sentencing, and post-sentencing (appeals and incarceration) stages. These data were collapsed into four main categories, which are jail costs (pre-trial to sentencing incarceration costs), defense costs (costs associated with pre-trial, trial), prosecution costs (costs associated with trial), and some appeals costs (defense only). Post-sentencing costs were also captured, although unlike costs associated with the other stages that are retrospective—or costs that have already occurred—sentencing costs are forecasted.

B. State-Level Approach

In order to provide readers with some additional context regarding the economic costs of seeking the death penalty, we include a systematic review of all death penalty cost studies that were conducted from 2000 through 2016. We also include a national and multi-level econometric analysis of state justice spending over time.

III. Study Highlights

A. Case-Level Findings Summary

As indicated in Table I below, for those cases in which the death penalty is sought (BOP cases), the average total cost per case—using only the data that we were able to collect—is approximately \$161,000, while the average total for non-death penalty sought (non-BOP) cases is nearly \$51,000 per case. Thus, the estimated average

⁴ We detail previous studies under the Literature Review section starting on page 2, below.

⁵ First degree murder is the charge that carries the death penalty in Oklahoma. We use “murder in the first degree” throughout to refer to death penalty eligible cases. *See* OKLA. STAT. tit. 21, § 701.7 (2017).

⁶ A bill of particulars is a formal notice, filed by the state, which serves to notify the defense that the state will be seeking the death penalty. Only first-degree murder cases are eligible for the death penalty.

⁷ We controlled for co-offenders. There are a total of 184 cases and 193 unique defendants. There were a total of 572 individuals involved in the 439 first degree murder cases over the study period. There were a total of 1,435 murders from 2004-2010 in the state of Oklahoma and 866 in Oklahoma and Tulsa counties. *See*: https://www.ok.gov/osbi/Publications/Crime_Statistics.html

per-case difference in total costs when the death penalty is sought is approximately \$110,000.⁸ The Oklahoma Department of Corrections (ODOC) costs for post-conviction incarceration costs are also provided and findings indicate that it costs about twice as much to maintain offenders on death row than off of death row.

In cases in which the death penalty was sought, defendants spent an average of 880 days—the time elapsed between arrest and sentencing (i.e., pretrial incarceration through the end of trial)—in jail. In first degree murder cases in which the death penalty was not sought, defendants spent an average of 556 days in jail. Thus, when a death sentence was sought in a first degree murder case, the defendant spent over one and a half times as many days in jail as cases in which a death sentence was not sought. The average jail costs for BOP defendants was approximately \$44,800 total, while non-BOP cases averaged just over \$28,300 total, for an average difference of approximately \$16,500.

Defense costs during the pre-trial through trial stages show an average difference of just over \$32,700 more in a capital case—in other words, nearly ten times more than when a BOP is not filed.⁹ Prosecution costs during the pre-trial through trial stages show an average difference of about \$17,700 more in a capital case, or about three times more than when a BOP is not filed.

The state capital appeals—the direct and post-conviction appeals—costs incurred by OIDS ran at an average of about \$53,000 per case, or over five times more than the non-capital appeals did. Overall, the average cost for defense in direct and post-conviction appeals in death penalty cases is between five and six times more than in non-death penalty cases.

Although we did not receive enough information from the courts system regarding time and effort expended on a per-case basis to estimate costs at this time, we were able to calculate the average number of significant activities per case, as recorded in the docket. The average number of activities (such as motions and hearings) in each docket category combined were almost three times more depending on whether there was a BOP filed in the case.

Table I. Average Costs Per Case: Main Cost Estimate Categories (2017 USD).

	Jail	Defense	Prosecutors	OIDS	Total All
Non-BOP	\$28,320	\$3,730	\$8,848	\$9,770	\$50,668
BOP	\$44,861	\$36,467	\$26,577	\$53,020	\$160,925
Diff (ratio)	\$16,541 (1.58)	\$32,737 (9.78)	\$17,729 (3.00)	\$43,250 (5.43)	\$110,257 (3.18)

Notes: OIDS= Oklahoma Indigent Defense System (direct and post-conviction appeals). Diff= Difference BOP minus non-BOP. Ratio= BOP/non-BOP. Conflict defense¹ average cost per BOP case = \$49,323.

⁸ This includes some costs for incarceration (jail), defense, and prosecution during pre-trial and trial, some appeals costs from the defense side (Oklahoma Indigent Defense System, OIDS). Many other costs, such as those incurred by the courts and costs associated with prosecution during appeals phases, federal habeas, and execution costs, to name a few, were not included because of a lack of data. Because of the noted lack of data regarding effort and costs, the figures in this report should be interpreted with some caution. Although data from the courts, prosecution, and other categories were not available, we were able to track case-level activities and calculate averages per case; ratios were also calculated and are presented below.

⁹ As outlined below, the costs of defense are distorted because the defense often does not have the resources needed to provide effective representation. This lack of resources has contributed to the high reversal rate in death penalty cases and to wrongful convictions resulting in later exonerations.

Several factors distinguish the ODOC costs from the costs listed above, and so we present those findings separately, in Table II below. First, unlike the other data we obtained, which simply reflects past expenditures (i.e., retrospective data), the ODOC data is based on projections of future costs (i.e., prospective analysis). As a result, the actual costs incurred by the ODOC could vary from the estimates below due to unpredictable factors that may lead to a change in sentence. Such factors may include exonerations, commutations, or reversals by appellate courts. Moreover, we do not know the costs incurred by ODOC related to carrying out an execution.

Second, ODOC costs are largely fixed—if the state had one fewer inmate on death row, it would still need to maintain the infrastructure of death row, so the ODOC would not necessarily realize opportunity cost savings from minor death row population fluctuations.

Therefore, the ODOC data and analysis in Table II should be considered with care because there are costs that simply could not be captured as part of this study. For instance, the ODOC analysis is prospective, we do not know which death sentenced offenders will actually be executed and, for those who are executed, how long they will be on death row before their date of execution. We do know that historically, about half of those sentenced to death have their sentences reduced to life without parole, or, less frequently, are acquitted. With these caveats in mind we provide the following findings.

Table II. Projected ODOC Costs to House a Defendant Sentenced to LWOP or Death.

Years in ODOC	Cost to House Defendant Sentenced to Life	Cost to House Defendant Sentenced to Death	Difference in Costs	*Total Costs for Life Compared to Death at 5-year Increments
15	\$373,551	\$755,957	\$382,406	-\$240,179
20	\$498,068	\$928,633	\$430,565	-\$67,503
25	\$622,585	\$1,101,310	\$478,725	\$105,174
30	\$747,102	\$1,273,987	\$526,885	\$277,851
35	\$871,619	\$1,446,663	\$575,044	\$450,527
40	\$996,136	\$1,626,097	\$629,962	\$629,961

Note: These costs do not include any future movements between, in, or out of facilities, or execution. *A total estimated life sentence is 40 years. The final column compares that cost (\$996,136) to the costs for death sentenced offenders at each five-year increment.

On average, it costs almost twice as much per inmate per day to maintain death row compared to the other inmates in this sample of cases. These cost differentials are immediate and will continue while there is a death row in Oklahoma. Simply, the costs to incarcerate both death row inmates and life sentences offenders do not vary with the presence or absence of one offender. Because ODOC costs are considered marginal costs, the only way to realize savings and shift opportunity costs would be to close or downsize facilities and reduce staffing, which currently represents the greatest portion of expense for the ODOC.

B. State-Level Findings Summary

1. Previous Studies

There have been many state-level studies completed over the years. We systematically reviewed 15 state-level studies that were conducted between 2000 and 2016, some of which are described in more detail, *infra*. These studies have been conducted by academic researchers and practitioners, many on a volunteer basis, some

sponsored or commissioned by state legislatures or legislative sub-committees, and some by partisan and non-partisan organizations. What all of these studies have found, each to a varying degree, is that seeking and imposing the death penalty is more expensive than not seeking it. It is a simple fact that seeking the death penalty is more expensive. *There is not one credible study, to our knowledge, that presents evidence to the contrary.* On average, it costs approximately \$700,000 more in case-level costs to seek the death penalty than to not.

2. Multi-Level Model

The multi-level analysis was conducted in order to provide additional context to the economic costs surrounding the death penalty and to justice-related spending patterns throughout the criminal justice system in Oklahoma. It is important to note that the results of this assessment do not impact the case-level results. Rather, this analysis simply assists the public in understanding how state-level factors, such as population size, demographics, rates of imprisonment, economic inequality, and the death penalty, among others, affect state-level justice spending over time. This assessment lends insight into what factors drive justice spending over time and where economic resource expenditures or shortages may arise in the system. For example, this model helps us understand how the state prison rate affects overall spending. It is important to note that while any state, including Oklahoma, may spend less on the criminal justice system as a proportion of total state gross domestic product (GDP), they may still spend more on capital punishment at the case level on average. Again, all case-level studies, including the present study, have shown that pursuing the death penalty costs more on average than when it is not pursued in similar cases. What this multi-level analysis provides us then, is context to further understand what factors might affect justice-related spending throughout the selected state system, why overlap or gaps in economic spending might appear, and how each state compares to the other and to national averages.

3. Justice Spending¹⁰

Justice spending as a proportion of state GDP should be understood here as a measure of the levels of socio-legal support and due process. Another way to understand this analysis is the larger the proportion of state-level justice spending, the more invested a state is to social support, the rule of law, and to due process. To be clear, we are suggesting smarter spending, not more, as large increases in spending may prove impossible given state budget shortfalls. The patterns and relationships revealed by the multi-level analysis support concerns voiced by many of the policy makers and practitioners to whom we spoke: that there are major gaps in support, especially for public defense, and that these gaps are even more prevalent in regard to capital cases, where people and budgets are stretched thin.

Here, annual state GDP is used to convert spending into a common metric so that states can be compared on the same scale. This technique and research question is much different than the case-level approach, where administrative data are collected as they relate to unique cases and average costs per case are calculated. To compare findings from the case-level approach to the multilevel approach here is not methodologically appropriate. They should be seen as separate analytical frameworks. Rather than searching for a ratio or percentage of spending per case, this technique allows us to develop an understanding of what factors significantly contribute to differences in justice spending at the state level and over time. We provide rankings for all states in the full report, but only provide a comparison between Oklahoma's averages and national averages in this executive summary.

4. Findings

In Table III below, we present seven year averages (2007-2013) in average score and rank on several key state-

¹⁰ Justice spending is defined as annual spending for corrections (including capital outlay), and judicial and legal costs (state and local government totals), United States Census: http://www2.census.gov/govs/pubs/classification/2006_classification_manual.pdf

level variables. The variables included are average justice spending per \$1,000 GDP, the proportion of non-White residents, the average Gini¹¹ score, the average imprisonment rate (per 1,000 population), and the average policy liberalism score.¹² In comparing categories from left to right, Oklahoma spends less on justice than the national average per GDP and is ranked 32nd nationally for this time period. This means that 18 states spent less and 31 states spent more on justice per \$1,000 GDP. Oklahoma ranked 19th in proportion of non-White residents, 18 states had higher proportions of people of color, while 32 states had less. In comparing income inequality, Oklahoma ranked 19th nationally (Gini coefficient: where a higher score [between 0 and 1] indicates higher levels of income inequality). Oklahoma's imprisonment rate was ranked 5th in the nation, with a rate of about seven people per 1,000 incarcerated, on average, during this time period. Last, Oklahoma ranked 40th in policy liberalism, indicating much more conservative policy-making at the state level.

Table III. Seven-Year Average Score & Rank, Selected Variables: (2007-2013).

	Justice Exp. per \$1,000 GDP		Proportion non-White		Gini Coefficient		Imprisonment Rate		Policy Liberalism	
	Avg.	Rank	Avg.	Rank	Avg.	Rank	Avg.	Rank	Avg.	Rank
All states	\$7.16	--	0.218	--	0.608	--	4.36	--	0.06	--
Oklahoma	\$6.45	32	0.257	19	0.616	19	7	5	-1.1	40

Notes: Exp. = Expenditure. See Multilevel section for in-depth explanation of measures.

IV. Conclusions

At the case-level, we found a significant difference in spending patterns when comparing first degree murder cases in which the state sought the death penalty compared to similar cases in which the death penalty was not sought. The estimated average per case difference when the death penalty is sought is about \$110,000. This is an extremely conservative figure, as we purposely underestimated costs where appropriate and this figure lacks many costs incurred by the system, especially by the courts and appeals costs linked to the prosecution.

We systematically reviewed 15 state-level studies that were conducted between 2000 and 2016. On average it cost about \$700,000 more in case-level costs to seek the death penalty than to not. While the Oklahoma estimate fell below this average, we believe the cost patterns and findings reported here are consistent with the findings from other research studies.

We created a national model that focuses on justice spending as a proportion of state GDP, controlling for several state-level variables. This analysis was conducted in an effort to better understand how justice spending in Oklahoma compares nationally as well as how justice spending is shaped by other factors such as race, economic inequality, state prison rates, and the death penalty. Overall, Oklahoma invests less in their justice system compared to the national average and much of that spending is due to higher rates of incarceration.

V. Recommendations

We understand that a focus on the economic costs incurred by the justice system, and ultimately tax-payers, addresses only one facet of discussions about the death penalty. Our focus within this study rests on economic

¹¹ Posey, K. G. (2016). Household Income: 2013. American Community Survey Briefs. United States Census Bureau. Posey, K. (2016, p. 1) explains the Gini coefficient as a: "Summary measure of income inequality. The Gini index varies from 0 to 1, with a 0 indicating perfect equality, where there is a proportional distribution of income. A Gini index of 1 indicates perfect inequality, where one household has all the income and all others have no income."

See also: U.S. State-Level Income Inequality Data, by Mark W. Frank at: http://www.shsu.edu/eco_mwf/inequality.html; and Frank, M. E. Sommeiller, M. Price, & E. Saez. (2015). Frank-Sommeiller-Price Series for Top Income Shares by US States since 1917 http://www.shsu.edu/eco_mwf/usstatesWTID.pdf;

¹² An index relating to the annual policy outputs of state legislatures, higher values indicate more liberal policy outputs: <https://www.ippssr.msu.edu/public-policy/correlates-state-policy>

impacts within an economic and systems context. Additional and extremely important questions related to the purpose, role, and impact of the death penalty (such as Eighth Amendment concerns, proportionality and racial disparity, those surrounding deterrence, the philosophical goals of punishment, and differences in prosecutorial/defense approaches) should also be considered when weighing any significant policy changes and impacts.

It is unclear whether Oklahoma stakeholders are able to implement the recommendations in this study, particularly given the state's budget constraints and the overall economic climate regarding its criminal justice system. We have documented the differential in costs between capital and non-capital first degree murder cases in the state. To calculate these costs, we attempted to capture costs for as many components of our sample cases as possible (e.g. incarceration costs, defense costs, prosecution costs, etc.).

However, it is quite clear that a great deal of unaccounted effort is occurring regularly in every agency included in our analysis. As researchers who have conducted similar cost studies in other states, we know and understand that, for example, prosecutors do not bill their time in a way that makes it easy to track exactly how much time—and therefore, attributable costs—is spent on any particular case. However, it is also clear that just about every agency or organization is far behind in the employment of a modern information management system that may easily allow for critical information to be collected, stored, and tracked. Such information management provides for increased overall efficiency within the system, as well as more public awareness of how the justice system operates. Indeed, these are just some of the many important issues that arose during our efforts to collect information. We believe, however, that tenable solutions currently exist for these issues and that because they are interconnected, progress in one area should also have a positive collateral impact in another. To that end, we provide the following recommendations:¹⁵

Increase accountability, transparency, consistency, and decrease risk through the following efforts:

- 1) Conduct a systematic review of justice system information gathering, sharing, and managing capabilities;
- 2) Leverage partnerships with local and state researchers and practitioners for the distinct purpose of developing and/or adopting best practices;
- 3) Openly share results with stakeholders and the community and form a short and long-term action plan for the improvement of data management, information and data dissemination, and data sharing practices;
- 4) State agencies and officials should work to install systems of accountability and transparency surrounding the death penalty specifically, as there are some very serious gaps. Addressing these gaps will only increase the likelihood of just outcomes for both victims and offenders and will decrease liability to the system; and,
- 5) Provide adequate support and training to counsel that reflects the current standards of the American Bar Association, the National District Attorneys Association, the National Legal Aid and Defender Association, and other professionally recognized resources.

We recognize that these are very broad and far-reaching recommendations. We believe, however, that these general recommendations must be met first, in order to boost the capacity for agencies to focus on any fine-tuned recommendations. For example, how would a defender's or prosecutor's office properly measure expended effort if neither collects any case-level data? Presently, broad strokes are needed to produce a foundation upon which finer details may be applied with confidence.

¹⁵ These recommendations do not necessarily reflect the views of the Oklahoma Death Penalty Review Commission, but are simply provided to supplement the results of this independent cost study.

INTRODUCTION

The purpose of this study is to provide empirical evidence to the Oklahoma Death Penalty Review Commission (Commission) regarding the economic costs of seeking and imposing the death penalty in Oklahoma. The main objective is to create an economic benefits ratio that reflects the difference in enumerated costs between cases where the prosecutor seeks the death penalty and similar first degree murder cases in which the prosecutor does not seek the death penalty. Our primary method for answering this question is what is referred to as a case-level approach, where case-specific costs are gathered through matching first degree murder¹⁴ designated cases to corresponding administrative data. The case-level approach centers on the conversion of cost measures or outcomes into one common unit of measurement (United States Dollars or USD), which enables comparisons between types of sentences sought.

As we describe further below, the case-level process was hindered by a general lack of data and/or resources to produce financial data, and in some cases, unwillingness by agency personnel to record, produce, or share financial data. We did, however, obtain case-level financial data from several sources and we are able to present a case-level analysis, although it is very likely that the figures presented below do not capture all of the costs associated with seeking the death penalty. As with research conducted in other states, this report lacks information pertaining to court costs and a great deal of information regarding costs associated with direct and post-conviction appeals for prosecution, for example. In order to provide some context to the case-level findings, we also include state-level analyses. The state-level approach includes a systematic review of multiple state-level death penalty cost studies that were conducted in a variety of states from 2000 to 2016 and a national and multi-level econometric analysis of state justice spending over time. The review of the past studies appears in the literature review presented below and the multi-level model is described in the methods and analysis sections.

As detailed in previous studies, the estimation of costs associated with seeking and imposing the death penalty and the extrapolation of those trends within an evidence-based framework is complex. Moreover, we recognize that a focus on the economic costs incurred by the justice system and ultimately tax-payers addresses only one facet of discussions about the death penalty. To be clear, our focus within this study rests on economic impacts within an economic and systems context. Additional and extremely important questions related to the purpose, role, and impact of the death penalty (such as the Eighth Amendment, proportionality and racial disparity, deterrence, the philosophical goals of punishment, and differences in prosecutorial/defense approaches) must also be considered when weighing any significant policy changes and impacts. Given this important caveat, we begin with a synthesis of the literature on the economic costs of the death penalty; we then present our methodology for the case-level approach, followed by analyses. We then provide an overview of the state-level approach, followed by a summary, discussion, and some policy recommendations.

In addition to the knowledge that is generated through the case- and state-level analyses, a great deal of insight is gained as a result of asking over 40 state and local agencies to produce financial records and case-level data. Initiated and carried out primarily by The Constitution Project (TCP) staff and researchers, this process began with sending personal emails and form letters requesting data, followed by dozens of in-person and telephone interviews. Through both the data collection and interview processes, we were able to generate information regarding the “state of information management” with respect to the involved agencies. We provide this as a supplemental analysis below.

¹⁴ First degree murder is the charge that carries the death penalty in Oklahoma. We use “murder in the first degree” throughout to refer to death penalty eligible cases. See OKLA. STAT. tit. 21, § 701.7 (2017).

REVIEW OF THE LITERATURE

I. Introduction

Over the past few decades, empirical studies on capital punishment have focused a great deal of attention on Eighth Amendment doctrine, proportionality and racial disparity, evolving standards, innocence and exoneration, public opinion, victimology, and the penological goals of retribution and deterrence. For good reason, these established areas of discourse continue to garner a great deal of interest by the public and by policy makers and researchers. More recently, an additional area of review has increased in popularity: the examination of the increased economic costs that arise as a result of seeking and imposing the death penalty. Although the first noteworthy study on the economic costs associated with the death penalty was conducted in New York in 1982, much of the academic and public discourse surrounding economic costs has occurred in the last fifteen years. The attention to the economic costs of seeking the death penalty has surfaced for several reasons, but the most oft-cited rationale arose during the context of economic crisis in the criminal justice system, and for the nation as a whole, prior to and during the “great recession,” respectively. For many, economic cost analysis became an integral part of criminal justice reform movements, as practice shifted from wasteful business-as-usual policies to an opportunity costs driven evidence-based practice that addressed where and how government can best spend economic resources in order to get the biggest return on investment.¹⁵

Although we do not provide a review on each and every study here, we do cite all of the reports or articles that we have collected as part of this study in the reference section of this study. For the purpose of this report, we present summaries of more recent studies that also satisfy higher levels of empirical rigor.

II. Past Studies

In an effort to expand or build on the limitations noted in previous studies, Roman, Chalfin, and Knight (2009) produced one of the more rigorous death penalty cost studies to date. Using quasi-experimental methods, Roman et al. (2009) studied 457 capital-eligible cases over a period of 22 years in Maryland. They found “a strong, positive association between the filing of a death notice and the cost of processing the case. On average, a death notice adds about \$1,000,000 in costs over the duration of a case” (Roman et al., 2009, p. 570). Their policy recommendations focused on the argument that resources expended in the pursuit of the death penalty have opportunity costs, many of which are expenditures that would be “relatively easy to reallocate,” such as attorney wages. Furthermore, they argue, as the data clearly show, that any fiscal benefits from actual execution – meaning any savings that would be realized through no longer needing to pay for housing and caring for a person serving a life sentence – are absorbed through the case process.

One important limitation that Roman et al. (2009, p. 531) note has to do with case selection bias, where “cases are included in samples based on ex post case outcomes rather than ex ante attributes.” This occurs when sample cases are collected based on case outcome, rather than case attributes, resulting in a biased comparison of death penalty cases to life without parole (LWOP) cases. Other researchers have noted this limitation of prior research as well and have adopted several strategies to ensure the best research design given the context and constraints of the study (Collins, Boruchowitz, Hickman, & Larrañaga, 2016). As we describe in the methods section below regarding the sample of cases used for the current study, we follow a similar strategy as Roman et al. (2009) and Collins et al. (2016) where a random sample of cases is selected from all capital-eligible cases that occurred within a certain timeframe. The cases all begin as capital-eligible, and the selection point enters when the prosecutor files a formal notice that they will seek the death penalty; for Oklahoma, this is called a “bill of particulars” (BOP).

¹⁵ See Washington State Institute for Public Policy: <http://www.wsipp.wa.gov/> as an example of a legislatively directed non-partisan research organization and for leads on evidence-based practices across the criminal justice system.

In the same issue of *American Law and Economics Review*, Cook (2009) conducted an analysis of the estimated costs of seeking the death penalty in North Carolina. Although his methods of estimation differ somewhat from those utilized by other researchers, his results indicated that the potential savings from death penalty abolition would reach \$10.8 million per year (in 2004 dollars) and that this figure did not include other potential savings in reallocation of effort and resources. Cook (2009, p. 51) concludes by stating that “the death penalty is a financial burden on the state and a resource-absorbing burden on the trial courts.”

An economic cost study conducted by Collins et al. (2015, 2016)¹⁶ in the state of Washington was the first to combine the expertise of social scientists and death-penalty qualified legal counsel while also utilizing a highly rigorous quasi-experimental research design. The study provided two sets of cost estimates, one utilizing the total population of eligible aggravated murder cases, while the other uses propensity score matching to control for any extraneous factors or selection bias. Both outcomes showed significant cost differences when the death penalty was sought, with the more conservative estimate showing a difference of \$800,000 and the unmatched figure reaching well over one million dollars more per case. Moreover, in this report, the authors noted another important finding, that of the high post-conviction reversal rate: “in 75 percent of cases involving death sentences, either the conviction and/or the death sentence have been reversed” (Collins et. al., 2016, p. 778).

Last year, Goss, Strain, and Blalock (2016) completed an economic study for the state of Nebraska, and found that seeking the death penalty costs approximately \$1.5 million more per case than when it is not sought. The authors of the Nebraska study estimated costs using a couple of different approaches. They examined U.S. Census data on annual justice spending, including several control variables, which allowed them to estimate the annual estimated expense attributed to having the death penalty, which they figured to be \$14.6 million (2015 US dollars) more than if they did not have the death penalty. In the second, the authors conducted a meta-analysis, a common and well-regarded methodological practice in both the medical and educational fields, as well as social scientific fields. Meta-analysis uses previous studies as the units of analysis, rather than single death penalty cases, and uses regression and effect sizes to estimate, in this example, costs. They found that the estimated cost per death penalty prosecution to be \$1,493,500 more than the average for a life sentence (Goss et al., 2016, pp. 27-28).

In the most recent study to date, Kaplan, Collins, and Mayhew (2016)¹⁷ estimated the average per case cost for seeking the death penalty in the state of Oregon. The authors of this study found that the costs associated with death sentences versus life sentences ranged from \$800,000 to one million more dollars per case. Importantly, the authors found that of the 28 death-sentenced cases that had been legally completed (meaning no more appeals or remedies were available), 79 percent of the sentences were reduced from death to life. Additionally, the authors found evidence of a significant increase in case costs over the last four decades, an interesting finding considering that the state has not executed anyone in over 20 years.

¹⁶ Three (Collins, Boruchowitz, and Hickman) of the four authors on the Washington study are also authors on this study.

¹⁷ Collins was one of the authors and lead researcher for this study.

Table 1. Past Economic Studies Summary of Main Findings (N= 15).

Year	Author/Organization	State	2017 Dollars
2001	Williams Inst.	Arizona	\$136,003
2003	State of CT Commission	Connecticut	\$346,540
2004	State of Tenn.	Tennessee	\$926,239
2008	ACLU	California	\$1,277,452
2008	Roman et al.	Maryland	\$1,972,680
2009	Cook	North Carolina	\$359,936
2010	Sen. Boots	Indiana	\$380,904
2012	Miethe	Nevada	\$246,013
2013	Marceau & Whitson	Colorado	\$135,778
2014	State of Nevada	Nevada	\$579,365
2014	Death Penalty Ad Comm.	Kansas	\$439,916
2014	OPE; Idaho Leg.	Idaho	\$159,710
2015	Collins et al.	Washington	\$1,214,127
2016	Goss et al.	Nebraska	\$1,520,644
2016	Kaplan et al.	Oregon	\$935,597
		avg. per case:	\$708,727

Both the Roman et al. (2009, p. 334) study, as well as the more recent study conducted by Goss et al. (2016, p. 27), provide examinations or deeper syntheses of the death penalty costs literature. They both note that all of the studies showed that seeking the death penalty resulted in more costs, although the findings from each study vary. We too examined the studies that they listed, as well as any additional economic studies that we could find, resulting in a list of 28 total. We systematically reviewed each study, first, for scientific rigor. We further classified reports by year completed (post-2000), geographic scope (county, state, federal), focus (death penalty costs), whether the authors provide a cost ratio figure (implied comparison group), level of analysis – average costs per case or average overall costs, and general study design quality (rigor). After reviewing each study, the studies listed in Table 1 made our initial cut and we therefore included their overall findings in our analysis.

In every case, if the authors provided a range of costs, or for their own reviews, increased calculated costs from those found in the original studies, the smaller of the figures was adopted for our review. For example, the Kaplan et al. (2016) study provided a range of costs so we adopted and adjusted the lower end of their estimates, just to provide the most conservative figure, or in other reports, what we felt was the most accurate figure possible. Other studies, such as one completed by Erickson (1993) and included in both the Roman et al. (2009) and Goss et al. (2016) reviews were not included because they were completed prior to our cut-off year of 2000 and because we felt that their estimates would exert too much upward skew on our overall average estimate in the table. Also note that we included the results from studies from Idaho, Colorado, and Arizona, all of which provide arguably poor and likely significantly under-estimated costs. Again, we include these here to err on the side of caution and present the most conservative estimates possible. As is clearly the case above, even when taking a conservative approach with all of the available findings, the average difference in case-level costs for seeking the death penalty amongst all studies was just over \$700,000.

III. Summary

There have been many state-level studies completed over the years. These studies have been conducted by academic researchers and practitioners, many on a volunteer basis, some sponsored or commissioned by state legislatures or legislative sub-committees, and some by partisan and non-partisan organizations. What all of these studies have found, each to a varying degree, is that seeking and imposing the death penalty is more expensive than life in prison (Roman et al., 2009; Collins et al., 2015). It is a simple fact that seeking the death penalty is more expensive. There is not one credible study, to our knowledge, that presents evidence to the contrary.

Although the economic outcomes differ from study to study and from state to state, the cited reasons for the increase in costs associated with seeking the death penalty have been consistent across all of the studies: the death is different doctrine and the super due process¹⁸ that are in place for death penalty cases are what drive the differences in the costs. To be absolutely clear: these legal guarantees are protected by the United States Constitution, so they cannot, nor should they be diminished.

Our goal here is to provide evidence and an explanation of the costs that are specific to Oklahoma. We therefore turn our attention to the state of Oklahoma, and in particular, cases arising from the two most populous jurisdictions of Tulsa and Oklahoma counties.

METHODS

The methods and analysis sections below are each divided into two basic sections; the first provides information pertaining to the case-level approach and the second integrates the information regarding the state-level approach. As a function of the data collection process for the case-level approach, we also provide agency-by-agency descriptions of what data were requested and delivered, the status of those requests at the time this report was completed, and additional findings related to information management, resources, accountability, and agency needs. We begin with the case-level approach, data descriptions, and case sample descriptives.

IV. Case-Level Approach: Sample

For the case-level approach, case-specific costs are gathered through matching first degree murder-designated cases, which include both death penalty sought and not sought cases, to administrative data. This approach centers on the conversion of cost measures or outcomes into one common unit of measurement (United States Dollars or USD), which enables comparisons between case and sentence types. Again, the main objective here is to create an economic benefits ratio that reflects the difference in enumerated costs between cases where the prosecutor seeks the death penalty compared to similar first degree murder cases in which the prosecutor does not seek the death penalty.

Due to limited resources and time to produce records at the agency level, as well as some methodological issues surrounding case selection (e.g. only past cases and those that have moved through trials and at least some appeals have the full spectrum of costs across the typical life of a case), we made the decision to conduct this analysis using a random sample of cases that occurred in the two largest Oklahoma Counties (Oklahoma and Tulsa Counties) during a seven-year period. First, we collected a list of all first degree murder cases that

¹⁸ See *Gardner v. Florida*, 430 U.S. 349 (1977): “First, five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. *Gregg v. Georgia*, 428 U.S. 433 (1976), 181 188 (opinion of STEWART, POWELL, and STEVENS, JJ); see *id.*, at 251244(MARSHALL, J., dissenting); *Furman v. Georgia*, 408 U.S. (1972) at 286291 (BRENNAN, J., concurring), 506510 (STEWART, J., concurring); see *id.*, at 514571 (MARSHALL, J., concurring). From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the [430 U.S. 349, 358] sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.”

occurred between the beginning of 2004 and end of 2010 from the Oklahoma Administrative Office of the Courts (439 1st degree murder cases; 572 defendants). We then removed all cases where a bill of particulars (BOP) was filed (because all were included) and worked with just those cases where a bill of particulars was not filed (non-BOP). Using just the non-BOP cases, we did our best to filter out duplicate individuals so that each individual is listed only once. We then filtered out duplicate case numbers so that only one unique case number could be represented in the sample frame.¹⁹ This process resulted in a total unique case/individual count of: N= 395 (TULS= 135; OK= 260). Next, we conducted a stratified random sample; (RNG= mersenne twister; random start point) quota was set by county. The quotas were set at 3-times the number of BOP cases per county (OK: $36 \times 3 = 108$ (41.5%); TULS: $13 \times 3 = 39$ (28.8%)) for a total non-BOP N= 147 (37.2%). This resulted in a final sample of 147 non-BOP cases and 49 BOP cases, for a total of N= 196 cases. We later discovered that three cases were incorrect (no data or no record) so they were removed, that there were a handful of codefendants that were selected, and that there were a few incorrectly non-BOP designated cases included in the BOP group resulting in a final sample of 193 (44 BOP/149 non-BOP) individuals selected over 184 cases. We refer to N= 193 as the study sample of individual—each with their own “case” even if they are identified in the system under the same “case number.”

V. Data Sources: Agency-Level Availability of Information

We then combined the sample of selected non-BOP and all BOP cases into a master Microsoft Excel spreadsheet. Each case included common descriptors, including full name, case number, Oklahoma State Courts Network (OSCN) docket case link, county, and information filing date, to name a few. These data were included along with a personalized letter describing our research project and a list of requested data and information, tailored to each agency, which we hoped that the agency could produce and share with us. As noted above, this was the first step in making contact with each agency. Some agency representatives simply ignored our email and request altogether, some informed us as to why they believed they could not produce the data or provided a reason as to why they would not, while other agency personnel either had data and were willing to share it or did not have data but were willing to work with us in order to provide some information. In Tables 2 and 3, below, we provide some basic descriptive information regarding the ease of access to administrative data as well as the current state of administrative data within the identified agencies.²⁰

¹⁹ There are a handful of co-defendants in the sample, we were sure not to double count costs for these cases. We discovered that three cases did not contain any records or were completely inaccurate and were therefore removed from the study. Future studies in Oklahoma should attempt to gather all cases in order to get an even more accurate picture of case development from charge to release/sentence and post-sentence. We controlled for co-offenders there are a total of 184 cases and 193 unique defendants. There were a total of 372 individuals involved in the 439 first degree murder cases over the study period. There were a total of 1,435 murders statewide from 2004-2010 and 866 total for Oklahoma and Tulsa counties; see: https://www.ok.gov/osbi/Publications/Crime_Statistics.html

²⁰ Note: u = unknown; y = yes; n = no; na = not applicable. The main column headers were created for the purpose of maintaining records regarding the vast numbers of requests that were made. They are defined as: 1) Maintain Records (yes/no): does the agency maintain any data regarding clients and effort (time and expense, salary, costs, other financial data) for employees, subcontractors, and/or clients?; 2) Digital Records (yes/no): are these records easily obtainable through a digital database query?; 3) Case-Level (yes/no): are these records processed or maintained at the case-level?; 4) All-Cases (yes/no): was the agency able to match all of the cases included in the main case sample spreadsheet?; 5) Case-Study Estimate (yes/no): if the agency lacked data, was it willing to produce a picture of a typical case or provide a case-study?; 6) Hard to Get (yes/no): were the records hard to get - through lack of ability, knowledge, cooperation, etc.?; and, 7) Interview (yes/no): did an agency representative agree to an interview regarding the data request?

Table 2. Data Status and Descriptive Outcomes by Agency (N= 46).

Agency	Maintain Records	Digital Records	case- level	all- cases	case-study est.	Hard to get	Interview
Dept. of Corrections	y	n	y	y	n	y	y
Pardon and Parole Board	n	n	n	n	n	y	n
State Attorney General	y	n	n	n	n	y	y
Office of Mgmt. & Enterprise Services	y	y	n	n	n	n	n
District Attorneys Council	y	n	n	n	n	y	y
Oklahoma Co. District Attorney	n	n	n	n	n	y	y
Tulsa County District Attorney	n	n	n	n	y	y	y
Oklahoma Co. Public Defender	y	n	y	n	y	n	y
Tulsa County Public Defender	n	n	n	n	y	y	y
Oklahoma Indigent Defense System	y	n	y	y	y	n	y
Dept. Mental Hlth. & Sub. Abuse Serv.	n	n	n	n	n	y	y
Oklahoma Co. District Court	y	y	y	y	n	y	y
Tulsa Co. District Court	y	n	y	y	n	y	n
Oklahoma Court of Criminal Appeals	y	y	y	y	n	y	y
Administrative Office of the Courts	y	y	y	y	n	y	y
Oklahoma County	y	y	n	n	n	y	y
Tulsa County	u	u	n	n	n	y	n
Canadian County	n	u	n	n	n	y	n
Bethany City/Town Executive	n	u	n	n	n	y	n
Broken Arrow City/Town Executive	n	u	n	n	n	y	n
Choctaw City/Town Executive	n	u	n	n	n	y	n
Del City City/Town Executive	u	u	n	n	n	y	n
Edmond City/Town Executive	n	n	n	n	n	n	n
Midwest City City/Town Executive	n	n	n	n	n	y	n
Mustang City/Town Executive	n	u	n	n	n	y	n
Nichols Hills City/Town Executive	u	u	n	n	n	y	n
Oklahoma City City/Town Executive	u	u	n	n	n	y	n
Owasso City/Town Executive	u	u	n	n	n	y	n
Sand Springs City/Town Executive	u	u	n	n	n	y	n
Tulsa City/Town Executive	u	u	n	n	n	y	n
Warr Acres City/Town Executive	u	u	n	n	n	y	n
Bethany Police Department	y	u	y	n	n	y	n
Broken Arrow Police Department	y	u	y	y	y	n	n
Choctaw Police Department	u	u	n	n	n	y	n
Del City Police Department	u	u	n	n	n	y	n
Edmond Police Department	y	u	y	y	y	n	n
Midwest City Police Department	y	u	y	y	y	n	n
Mustang Police Department	y	u	y	y	n	n	n
Nichols Hills Police Department	y	u	y	y	y	n	y

Agency	Maintain Records	Digital Records	case-level	all-cases	case-study est.	Hard to get	Interview
Oklahoma State Bureau of Investigation	y	y	y	y	n	n	y
Oklahoma City Police Department	y	n	y	y	y	n	y
Oklahoma County Sheriff's Office	u	u	n	n	n	y	n
Tulsa County Sheriff's Office	y	u	y	y	n	n	y
Tulsa Police Department	y	y	y	y	y	n	y
Warr Acres Police Department	u	u	n	n	n	y	n
Owasso Police Department	u	u	n	n	n	y	n
Sand Springs Police Department	y	u	y	y	n	y	y

Table 3. Agency Descriptives and Data Request Status Summary (N= 46).

		Frequency	%	Valid %	Cumulative %
Maintain Records	No	12	26.1	35.3	35.3
	Yes	22	47.8	64.7	100
	Total	34	73.9	100	
	Unknown	12	26.1		
Digital Records	No	14	30.4	66.7	66.7
	Yes	7	15.2	33.3	100
	Total	21	45.7	100	
	Unknown	25	54.3		
Case-level	No	28	60.9		
	Yes	18	39.1		
All-cases	No	30	65.2		
	Yes	16	34.8		
Case-study est.	No	36	78.3		
	Yes	10	21.7		
Hard to get	No	13	28.3		
	Yes	33	71.7		
Interview	No	27	58.7		
	Yes	19	41.3		

Note: Unknown category usually means that particular agency did not respond to our requests for data or information.

In Table 3, above, we provide a summary of the information contained in the Data Status and Descriptive Outcomes by Agency table. As one might assume, a few notable patterns emerged when simply looking at the inability of Oklahoma criminal justice agencies to produce valid and reliable data for both case management (case-level data) and human resources management (tracking effort across cases). Importantly, a full third of the reporting agencies claimed to not collect any information at all regarding either employee effort on a case-by-case basis, basic administrative data regarding case-level expenses and effort, or any data related to client or administrative management. A majority (66.7%) of the agencies that responded to our requests for information *do not currently maintain modern digital case files*. This does not mean that they do not file records in a “digital” format. Many do, but it does mean that they do not have a data management system in place in which

a set of case identifiers could be matched easily through a basic database query. Following this pattern, it is not surprising that a similar number of agencies could not easily produce case-level information and in many instances, not at all. This theme continues throughout the rest of the measures listed in Table 3 above.

Although the main purpose of this study was not to focus on information management systems, we cannot ignore the major shortcomings illustrated above. The identification of such a dearth of contemporary or digitally accessible information management systems should be of great concern to law and policy makers and citizens of Oklahoma. The adoption of these types of systems would improve collaboration, communication, and coordination among agencies, and improve transparency, efficiency, and ultimately accountability in a system that seems to be lacking in all of these areas. Therefore, a key recommendation for immediate consideration is to systematically measure data collection and maintenance practice amongst criminal justice agencies, and where significant gaps exist, provide support for the adoption of contemporary systems, programs, and applications.

VI. Data Collection & Adjustment Strategy

The main first degree murder (including death penalty cases) data sets were circulated within the corresponding criminal justice agencies, where representatives were asked to match names and case numbers to their databases and provide financial information on a case-by-case basis. Each separate dataset was converted into a new file using IBM SPSS 23 software and was cleaned (checked for accuracy, recoded, etc.) and merged with the main aggravated murder and non-aggravated murder “seed” files. We tied costs to each particular case within general stages of the case process, and where possible, we triangulated costs using several sources of data. Because the cases, and therefore their costs, occur at different times across many years (not to mention forecasted costs for ODOC), the cost figures all needed to be adjusted for inflation. For all adjustments, the Organization for Economic Co-operation and Development (OECD), Main Economic Indicators (complete database, base year 2010, Consumer Price Index – Total All Items for the United States), were used to adjust nominal values into 2010 dollars. CPI figures were rounded to the ten thousandths and the annual CPI value for 2017 was provided using Sahr’s (2012) estimate.²¹

CASE-LEVEL FINDINGS

VII. Sample Descriptions

In Tables 4 through 7 below, we provide a basic descriptive analysis of the sample of cases selected for this study. We begin with presenting a crosstabulation of frequencies and percentages for race, sex, and whether there was a bill of particulars (BOP) filed in the case, by county. Next, we present a crosstabulation of race and sex by BOP. After that, we present selected crosstabulation of cases based on race, sex, and BOP by case categorization based on whether the case went to trial, pled, a combination of both trial and plea, or was dismissed. The average age of the defendants at offense by BOP was even at 29 years old, while at sentencing, transfer, or release the average age was about 31 years of age for non-BOP and about 32.5 for BOP cases (the BOP group was about 1.58 years older at sentencing than the non-BOP group).

²¹ Robert Sahr, Inflation Conversion Factors, COLL. OF LIBERAL ARTS – SCH. OF PUB. POLICY, OR. STATE UNIV. (September 10, 2016) <http://liberalarts.oregonstate.edu/sites/liberalarts.oregonstate.edu/files/polisci/faculty-research/sahr/inflation-conversion/pdf/cv2010.pdf> (“Consumer Price Index (CPI) Conversion Factors 1774 to estimated 2024 to convert to dollars of 2010. Estimates for 2014-2024 are re-based on the average of OMB and CBO estimates as early 2014. . . . Conversion factors for years before 1915 are re-based from data from the Historical Statistics of the United States Millennial Edition (Cambridge University Press, 2006). Calculation starting 1915 uses the CPI-U as the base, from the US Bureau of Labor Statistics. Monthly and annual CPI data are available at the BLS web site: <http://stats.bls.gov/cpi/home.htm#data> (CPI-U = all urban consumers”).

Table 4. Sample Descriptives: Race, Sex, and BOP Filed by County (N= 193).

Category		Oklahoma Co.	Tulsa Co.	Total
		f (%R) (%C)	f (%R) (%C)	f (%R) (%C)
Race/Eth				
	White	45 (72.6) (31.7)	17 (27.4) (33.3)	62 (100) (32.1)
	Black	71 (70.3) (50.0)	30 (29.7) (58.8)	101 (100) (52.3)
	Hisp.	17 (85.0) (12.0)	3 (15.0) (5.9)	20 (100) (10.4)
	Nat.Am.	9 (90.0) (6.3)	1 (10.0) (2.0)	10 (100) (5.2)
	Total	142 (73.6) (100)	51 (26.4) (100)	193 (100)
Sex				
	Female	12 (80.0) (8.5)	3 (20.0) (5.9)	15 (100) (7.8)
	Male	130 (73.0) (91.5)	48 (27.0) (94.1)	178 (100) (92.2)
	Total	142 (73.60) (100)	51 (26.4) (100)	193 (100)
BOP				
	No	110 (73.8) (77.5)	39 (26.2) (76.5)	149 (100) (77.2)
	Yes	32 (72.7) (22.5)	12 (27.3) (23.5)	44 (100) (22.8)
	Total	142 (73.6) (100)	51 (26.4) (100)	193 (100)

Notes: BOP = Bill of Particulars Filed in the Case. Hisp.= Hispanic. Nat. Am.= Native American. f = frequency; (%R) = percentages represent within ROW category; (%C) = percentages represent within COLUMN category.

In Table 4, above, we present a descriptive crosstabulation based on race, sex, and BOP by county. The largest race category was Black, which represented 101 cases, or just over half of the total sample, followed by White at 62 cases (32.1%). There were roughly the same proportions of cases across the two counties when examining race. As one would expect, the majority of the cases included male defendants (92.2%). Last, there was similar proportions in cases within each county (column %), which makes sense, as this reflects our sampling technique.

In Table 5, below, we present a crosstabulation of race and sex and by whether there was a BOP filed. There was a BOP filed in about 24 percent of the Black defendant's cases (row %) and in 21 percent of the White cases, although Black defendants made up over half of the cases within the BOP filed category. Again and as expected, the vast majority of BOP filings were for male defendants.

Table 5. Sample Descriptives: Race and Sex by BOP (N= 193).

Category		No-BOP Filed	Bop Filed	Total
		f (%R) (%C)	f (%R) (%C)	f (%R) (%C)
Race/Eth				
	White	49 (79.0) (32.9)	13 (21.0) (29.5)	62 (100) (32.1)
	Black	77 (76.2) (51.7)	24 (23.8) (54.5)	101 (100) (52.3)
	Hisp.	17 (85.0) (11.4)	3 (15.0) (6.8)	20 (100) (10.4)
	Nat.Am.	6 (60.0) (4.0)	4 (40.0) (9.1)	10 (100) (5.2)
	Total	149 (77.2) (100)	44 (22.8) (100)	193 (100)
Sex				
	Female	14 (93.3) (9.4)	1 (6.7) (2.3)	15 (100) (7.8)
	Male	135 (75.8) (90.6)	43 (24.2) (97.7)	178 (100) (92.2)
	Total	149 (77.2) (100)	44 (22.8) (100)	193 (100)

Notes: BOP = Bill of Particulars Filed in the Case. Hisp.= Hispanic. Nat. Am.= Native American. f = frequency; (%R) = percentages represent within ROW category; (%C) = percentages represent within COLUMN category.

In Table 6, below, we present race, sex, and BOP by category regarding whether a case ended in a guilty plea, went to trial, ended in a combination of both trial time and a plea, and case dismissal (most likely resulting in release of the defendant from supervision). In regard to racial category, 51.6 percent of the white defendants entered into a plea agreement, while 28.7 percent of the Black defendants did. More White defendants pled to a lesser sentence, although there was roughly the same proportion (within racial category) of White and Black defendants at trial, 40.5 percent to 44.6 percent, respectively. A much larger proportion—about four times more—of the Black defendants' cases were dismissed. There was a 14 percent difference between females and males in the proportion of cases in which a plea agreement was reached. Finally, just under half of the cases where a BOP was filed resulted in a plea agreement.

Table 6. Sample Descriptives: Race, Sex, and BOP by Plea/Trial Indicator (N=193).

Category		Plea	Trial	Dismissed	Trial/Plea	Total
		f (%R) (%C)	f (%R) (%C)	f (%R) (%C)	f (%R) (%C)	f (%R) (%C)
Race						
	White	32 (51.6) (41.0)	25 (40.3) (31.6)	3 (4.8) (11.1)	2 (3.2) (22.2)	62 (100) (32.1)
	Black	29 (28.7) (37.2)	45 (44.6) (57.0)	22 (21.8) (81.5)	5 (5.0) (55.6)	101 (100) (52.3)
	Hisp	11 (55.0) (14.1)	5 (25.0) (6.3)	2 (10.0) (7.4)	2 (10.0) (22.2)	20 (100) (10.4)
	Nat.Am	6 (60.0) (7.7)	4 (40.0) (5.1)	-	-	10 (100) (5.2)
	Total	78 (40.4) (100)	79 (40.9) (100)	27 (14.0) (100)	9 (4.7) (100)	193 (100)
Sex						
	Female	8 (53.3) (10.3)	5 (33.3) (6.3)	2 (13.3) (7.4)	-	15 (100) (7.8)
	Male	70 (39.3) (89.7)	74 (41.6) (93.7)	25 (14.0) (92.6)	9 (5.1) (100)	178 (100) (92.2)
	Total	78 (40.4) (100)	79 (40.9) (100)	27 (14.0) (100)	9 (4.7) (100)	193 (100)
BOP						
	No	57 (38.3) (73.1)	60 (40.3) (75.9)	26 (17.4) (96.3)	6 (4.0) (66.7)	149 (100) (77.2)
	Yes	21 (47.7) (26.9)	19 (43.2) (24.1)	1 (2.3) (3.7)	3 (6.8) (33.3)	44 (100) (22.8)
	Total	78 (40.4) (100)	79 (40.9) (100)	27 (14.0) (100)	9 (4.7) (100)	193 (100)

Notes: BOP = Bill of Particulars Filed in the Case. Hisp.= Hispanic. Nat. Am.= Native American. f = frequency; (%R) = percentages represent within ROW category; (%C) = percentages represent within COLUMN category.

In Table 7, below, we present a flow chart of the cases selected for this study. The flow chart should be read from left to right; it begins with the total sample of first degree murder defendants, N= 193. The first division occurs at the bill of particulars (BOP) filed decision point, where 44 cases (22.8%) contain a BOP and 149 cases (77.2%) continue as non-death penalty sought first degree murder cases. We provide two sets of percentages. The first provides the percentage using the total sample or 193 defendants. The second includes the percentage using the category BOP or non-BOP as the denominator, or 44 and 149, respectively. Note that the final categories under sentence represent the probability corresponding to the previous category, so as can be seen, there were two categories that resulted in a death sentence, the BOP to Trial to Death Penalty (n= 8) and the BOP to Combo (which is an indicator that a plea was entered at some point but may have been withdrawn or there may have been a retrial) to Death Penalty. Using the total N (193) as the denominator, there were a total of nine cases (4.6%) that resulted in a death sentence. These nine cases are all currently in some stage of direct appeal, post conviction appeal or federal habeas review. Importantly, there were a total of 572 capital-eligible (murder in the first degree) defendants spread over 439 unique cases from 2004-2010. Depending on which denominator is used, the percent of cases that result in a death sentence is either about 1.5 or 2 percent.

VIII. Agency-Specific Findings

A. Oklahoma Department of Corrections

The Oklahoma Department of Corrections (ODOC) worked hard to provide us with information regarding inmate transfers, past and current inmate location, and per inmate per day costs by facility. First and foremost, however, it is imperative to note that the information management system that the ODOC currently utilizes is extremely outdated. While resource needs for improving the working conditions for ODOC employees (salary and benefits) may outweigh costs for improving information management systems, both need to be addressed. It was clear from our conversations with the Director and through our research that the ODOC and ultimately the state of Oklahoma are putting ODOC employees, inmates, and citizens at risk of injury, inmate escape, and litigation by not addressing the vast shortcomings in the correctional system. In our interview with the Director, he stated that as a direct result of the Department's antiquated information management system, it runs the risk of releasing offenders either early or late and that tracking offenders through the system is difficult and time consuming. Moreover, there is a stated need for both capital repairs and improvements, which might also include technological upgrades. Recent reports also indicate that the prison population in Oklahoma continues to grow beyond the capacity of the system, putting even more strain on all employees and people incarcerated in the system.²²

Even given these shortcomings and through a great deal of time and effort, the ODOC staff was still able to provide us with some data. For those cases included in the study, we received: 1) date of reception; 2) date the sentence ended; 3) which facility each inmate was located at and transfer date(s) (for example Oklahoma State Penitentiary, H Unit) for the listed defendants and their associated cases; 4) average daily cost per inmate for facility(s) and locations(s) where defendants associated with cases in the attached list have been or are being held; and, 5) the Oklahoma Board of Corrections approved operating cost per inmate for fiscal years 1996 through 2015. The averages include all costs associated with incarceration, including medical and mental health care for defendants associated with cases in the attached list that have been or are being held.²⁵

Several factors distinguish the ODOC costs from the other costs categories, such as defense and prosecution, listed below. First, unlike the other data we obtained, which simply reflects past expenditures (i.e., retrospective data), the ODOC data is based on projections of future costs (i.e., prospective analysis). As a result, the actual costs incurred by the ODOC could vary from the estimates below due to unpredictable factors that may lead to a change in sentence. Such factors may include exonerations, commutations, or reversals by appellate courts. Second, we do not know the costs incurred by ODOC related to carrying out an execution. Last, ODOC costs are largely fixed—if the state had one fewer inmate on death row, it would still need to maintain the infrastructure of death row, so the ODOC would not necessarily realize opportunity cost savings from minor death row population fluctuations.

Therefore, the ODOC data and analysis in Table 8 below should be considered with care because there are costs that simply could not be captured as part of this study. For instance, the ODOC analysis is prospective, we do not know which death sentenced offenders will actually be executed and, for those who are executed, how long they will be on death row before their date of execution. We do know that historically, about half of those sentenced to death have their sentences reduced to life without parole, or, less frequently, are acquitted. With these caveats in mind we provide the following findings.

²² See The Oklahoman Article "Oklahoma ODOC budget request highlights agency's challenges" by the Editorial Board <http://newsok.com/article/5528129>.

²⁵ The following are the per diem rates by inmate classification: Maximum: \$87.20; Medium: \$42.85; Minimum: \$41.75; Community: \$47.07; Private Maximum: \$60.97; Private Medium: \$45.25; Private Halfway: \$44.46; County Jail: \$41.20.

Table 8. Projected ODOC Costs to House a Defendant Sentenced to LWOP or Death.

Years in ODOC	Cost to House Defendant Sentenced to Life	Cost to House Defendant Sentenced to Death	Difference in Costs	*Total Costs for Life Compared to Death at 5-year Increments
15	\$373,551	\$755,957	\$382,406	-\$240,179
20	\$498,068	\$928,633	\$430,565	-\$67,503
25	\$622,585	\$1,101,310	\$478,725	\$105,174
30	\$747,102	\$1,273,987	\$526,885	\$277,851
35	\$871,619	\$1,446,663	\$575,044	\$450,527
40	\$996,136	\$1,626,097	\$629,962	\$629,961

Note: These costs do not include any future movements between, in, or out of facilities, or execution. *A total estimated life sentence is 40 years. The final column compares that cost (\$996,136) to the costs for death sentenced offenders at each five-year increment.

Costs were calculated by location and per day costs per inmate for that location. All costs were adjusted for inflation and are presented in 2017 USD. As with past studies, we include costs for an assumed life sentence (Collins et al., 2015, 2016) in which no release or execution date is listed. A forecasted life sentence was assumed to be the greater of either 470 months or 65 years of age.²⁴ In Table 8, above, we provide the analysis on the ODOC data. On average, it costs almost twice as much per inmate per day to maintain death row compared to the other inmates in this sample of cases. These cost differentials are immediate and will continue while there is a death row in Oklahoma. Simply, the costs to incarcerate both death row inmates and life sentences offenders do not vary with the presence or absence of one offender. Because ODOC costs are considered marginal costs, the only way to realize savings and shift opportunity costs would be to close or downsize facilities and reduce staffing, which currently represents the greatest portion of expense for the ODOC.

B. Jails

Incarceration costs at the local jail level accrue from arrest to either release or shortly after sentencing, at which time the offender is transferred to a long-term prison facility. We collected dates from the Oklahoma State Courts Network (OSCN) for each case; dates include offense date, information date, other preliminary hearing date, as well as trial through either release (dismissal, acquittal, or NGRI transfer) or sentencing dates. We calculated jail costs by measuring days between the information date and either release or sentencing and then by multiplying the number of days by the average cost per day. We collected documents regarding the Oklahoma and Tulsa County Sheriff's Offices that detailed the average daily cost of incarceration in the jails, beginning with administrative orders²⁵ which detail the average daily cost on incarceration per inmate per calendar year, within our study date range for Oklahoma County. In correspondence with the Tulsa County Police Department, we received a document that detailed average daily costs based on actual expenditures. We also received a jail-related average daily rate from the Oklahoma Department of Corrections.

There were some issues with the reliability of the per-inmate per-day cost figures presented from Oklahoma County, and there was also variation from county to county and with the ODOC figures that were provided. Because of current and ongoing issues surrounding these cost estimates,²⁶ we used an adjusted average of all the

²⁴ For average life sentence, see: <https://www.bjs.gov/content/pub/pdf/mljsp0013st.pdf>; and, <http://www.uscc.gov/amendment-process/public-hearings-and-meetings/appendix-0>.

²⁵ Administrative Order AD7-2002-21 (Pursuant to decision in cases Ray Lamont Hubbard v. State of Oklahoma and Troy Don Cape v. State of Oklahoma, 2002 OK CR 8) by way of the OKC AOC and OKPD Ravitz.

²⁶ See: <http://kfor.com/2016/10/18/investigative-audit-of-oklahoma-county-sheriffs-office-shows-financial-mismanagement/> (visited 1/24/2017); and, see: The Marshall Report article regarding deaths in custody: <https://www.themarshallproject.org/2017/01/23/an-oklahoma-horror-story?ref=collections#.5kTepvdoY> (visited 1/24/2017).

figures that were provided, resulting in an estimated average daily cost of \$50.92 per inmate (in estimated 2017 USD). The findings are provided in Table 9, below. In cases that were designated death penalty or where a Bill of Particulars (BOP) was filed, defendants spent about 880 days in jail on average, while in non-capital sought first degree murder cases, defendants spent about 556 days in jail on average (ratio of 1.62). The average cost for BOP defendants was about \$44,800 total (2017 USD), while non-BOP cases averages about \$28,300 total, for an average difference of about \$16,500 (2017 USD). These differences were statistically significant ($p < .001$, (190) $t = 4.993$).

Table 9. Jail Supervision Costs: Information to Sentencing/Release Dates (N= 193).

	N	Average	Ratio	Difference
Jail Days				
No BOP	148	556.13	1.58	324.82*
BOP	44	880.95		
Costs per Case				
No BOP	148	\$28,320		
BOP	44	\$44,861	1.58	\$16,541**

Note: DP = Death Penalty Sought or Bill of Particulars. *($p < .001$, (df 190) $t = 4.993$) **($p < .001$, (df 190) $t = 4.993$).

C. Public Defenders

In recent times research on quality legal defense has established that public defenders should keep track of their hours, particularly in cases that are more complex and require more effort, such as murder cases.²⁷ We discovered that public defenders in Oklahoma do not track their hours on first degree murder cases. This limited our ability to have an exact measure of effort expended in each unique case. We were, however, able to obtain data regarding budgets and salary, and from each of the county district courts, were able to obtain ledgers that contained case-specific data on trial court attorney, witness, transcript, as well as other expenses related to many of the cases in our sample. We present those findings in Table 10, below. As discussed below, we also obtained narrative information about individual cases in which the defenders persuaded the district attorney not to seek the death penalty, after months of work by the defender mitigation specialist. As the offices do not keep track of the hours spent on their cases, it is difficult to compare with precision the costs of mitigation work in potential capital cases to the work required in cases deemed non-capital from the beginning.

²⁷ See, e.g., NAPD STATEMENT ON THE NECESSITY OF MEANINGFUL WORKLOAD STANDARDS FOR PUBLIC DEFENSE DELIVERY SYSTEMS, March 19, 2015: "NAPD believes that a lawyer's well-spent time is the single most important factor in a client receiving effective and meaningful representation, and as such, NAPD believes meaningful evidence-based standards for public defense workloads can best be derived and institutionalized through ongoing, contemporaneous timekeeping by public defense providers." http://www.publicdefenders.us/files/NAPD_workload_statement.pdf.

Table 10. Oklahoma County Public Defense Costs (n= 71; 2017 Dollars).

	Category	n	Mean	Ratio (Diff)
OKC PD by Designation	No BOP	49	\$3,730	
	BOP	22 [†]	\$36,467	9.78 (\$32,737)*
OKC PD By Sentence	Death Penalty	5	\$59,155	
	Life	41	\$12,729	4.65 (\$46,426)**

Notes: OKCDC ledger costs and OK Co. PD Budget details. *(p< .001, (df 21.164) t= 4.093); **(p< .001, (df 3,67)F= 7.548). [†] Note that two other categories are omitted here (n= 71) – cases that were dismissed (avg. cost = \$4,426) and cases that resulted in less than life (avg. cost = \$8,476).

The costs displayed in the table above and below were generated from two sources. The first, in Table 10, originated from the Oklahoma County District Court (OKCDC) and was in the form of a ledger document for billed work. The second source, resulting in the findings displayed in Table 11 below, also came from the OKCDC, but these were Oklahoma County Public Defender (OKCPD) budget documents. The defense costs listed in Table 10 (above), represent these cost categories: indigent witness expenses, trial court attorneys, transcripts (preliminary hearing, trial, and transcript appeals), and witness expenses (as well as miscellaneous expenses). These categories were aggregated and averages based on case designation (non-BOP/BOP) and sentence outcome (DP/Life) are presented below. Defense costs by case designation show an average and statistically significant difference of approximately \$32,700 – nearly ten-times the average cost when a bill of particulars is not filed. The average difference at current sentence status compared to BOP designation is greater on average (\$59,000 to \$36,500), but the ratio shrinks from about ten times (1:9.78) the costs to just below five times (1:4.65) the costs.

Although the OKCPD budgets may not be exactly the same today (for example the OKCPD no longer budgets for an outside conflict investigator, as they now have someone designated to take on those responsibilities internally), the OKCPD fiscal year budgets include line-items that were specifically designated for capital cases (Table 11, below). These line items include budgets for conflict counsel and conflict investigators for capital cases. It is important to note that these costs did not cover fringe benefits, as those were expected to be paid by the conflict subcontractors. On average, the OKCPD spent almost six percent, or \$357,590 of their total budget, on costs associated with conflict defense on capital cases. This averaged about \$50,000 per capital case over the study period. Another pattern worth noting is that the gradual decrease in the percentage of the total budget over time is due to the increased overall budget, but is also no doubt affected by the decreasing number of capital cases being sought per year.²⁸

²⁸ See Death Penalty Information Center 2016 Report: <http://deathpenaltyinfo.org/documents/2016YrEnd.pdf>.

Table 11. Oklahoma County DP Conflict Budget (2017 Dollars).

SFY	Total Conflict	Total Budget	% of Budget
2004	\$407,788	\$5,775,862	7.06
2005	\$397,148	\$6,169,498	6.44
2006	\$384,111	\$6,316,663	6.08
2007	\$434,121	\$6,453,873	6.73
2008	\$361,773	\$6,476,122	5.59
2009	\$348,400	\$6,300,503	5.53
2010	\$349,639	\$6,376,009	5.48
2011	\$177,739	\$5,873,471	3.03
Average	\$357,590	\$6,217,750	5.74
Avg./case	\$49,323		

Notes: Total conflict includes costs for conflict counsel and investigation.

D. Oklahoma Indigent Defense System

The Oklahoma Indigent Defense System (OIDS) provided the research team with information regarding cases to which the courts appointed OIDS before the Oklahoma Court of Criminal Appeals and that matched one of our selected cases. These cases were handled either by private retained counsel or staff attorneys, and were assigned to either the general appeals division, homicide direct appeals division, or capital post conviction division. The information included the attorney and investigator name, hours spent on the case, hourly rate for each attorney, total attorney cost, and expert costs, if any.

Table 12. Oklahoma Indigent Defense System Appeals Costs (n= 34).

Sentence Category		n	Mean	Diff	Ratio
	Out/Dismissed	3	\$11,744		
	Death Penalty	9	\$73,568	\$61,824*	6.26
	Life	20	\$11,744		
	Years/Other	2	\$4,625		
Bill of Particulars Filed					
	No BOP	20	\$9,770		
	BOP	14	\$53,020	\$43,250*	5.43

Notes:*p< .001.

The average costs per case listed in Table 12 above do not include costs for OIDS staff and capital construction or maintenance. Also, as is the case with subcontracted defense attorneys, some of the costs do not include benefits and indirect costs. There is a statistically significant difference in the cases by to-date sentence ($F=18.443$ (df 3,30), $p<.001$), as the death penalty appeals cost an average of about \$62,000, or over six times more, than the non-death penalty appeals. When sorting the cases from the BOP decision, there is also a statistically significant difference ($t=3.774$ (df 13.781), $p<.001$), as those cases seeking death cost about \$43,000, or about five and a half times more than non-death sought cases. Overall, the average cost for defense in direct and post-conviction appeals in death penalty cases is between five and six times more than in non-death penalty cases.

E. Additional Notes on Public Defense

Defending persons facing a possible death penalty is complex, requires a sophisticated understanding of substantive and procedural law and significant trial and sentencing practice experience. A team of lawyers, an investigator, and a mitigation specialist are required. Cases can last more than a year and require comprehensive investigation into both the facts of the alleged crime and into the life history of the defendant, including importantly his or her mental health history. The courts recognize this complexity, and are guided by the *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) (“ABA Guidelines”), a 173-page document that emphasizes “that, because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in a non-capital case.” Guidelines, 31 HOFSTRA LAW REVIEW 913, 921. The Guidelines state: “...death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.” *Id.*, at 923.

The ABA Guidelines, quoting a law professor, noted the emotional and intellectual demands on capital defense counsel:

The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.

Id., at 923.

Because the cases can take a long time and clients face possible execution, it is important to maintain frequent and in-depth communication with the clients. One mitigation specialist told us that her goal is to meet with the client weekly and spend an hour to two hours with the client on each visit, but she is not always able to do that because of the pressure of her other work.

The complexity of the work has increased, as this quote from a prosecutor affirms. Tulsa County District Attorney Steve Kunzweiler told us, “I am confident in saying that I spend an even greater amount of time on similar cases today due to the complexity of the litigation which has spawned over the past decade on death penalty qualified prosecutions.”

The true cost of representing people accused of capital crimes in Oklahoma is greater than the data we received indicates. State defenders often do not have the time and the resources to provide representation that complies with the standards outlined in the ABA Guidelines and expected by the appellate courts. Many issues are not adequately raised until they are represented by federal defenders in federal habeas review. Had the cases been fully prepared and litigated in the state courts, it is likely that fewer cases would go to federal habeas review. The inability of trial court defenders to provide fully effective representation in all their cases has contributed to a significant number of reversals and even exonerations of innocent people in Oklahoma.

The courts “apply a heightened concern for fairness..., where the state is prepared to take a man’s life.” *Douglas v. Workman*, 560 F.3d 1156, 1194 (10th Cir. 2009).

Appellate courts closely review the work of the defense attorney in preparing for and conducting the sentencing phase of a death penalty case. As the Tenth Circuit Court of Appeals emphasized, they apply “closer scrutiny when reviewing attorney performance during the sentencing phase of a capital case....” *Littlejohn v. Trammell*, 704 F.3d 817, 839 (10th Cir. 2013).

The Tenth Circuit Court has outlined “three important principles”:

First, the question is not whether counsel did *something*; counsel must conduct a full investigation and pursue reasonable leads when they become evident. Second, to determine what is reasonable investigation, courts must look first to the ABA guidelines, which serve as reference points for what is acceptable preparation for the mitigation phase of a capital case. Finally, because of the crucial mitigating role that evidence of a poor upbringing or *mental health problems* can have in the sentencing phase, defense counsel must pursue this avenue of investigation with due diligence.

Id., at 860, citation omitted.

The court has underscored the importance of evidence of organic brain injury, which courts “have found to have a powerful mitigating effect.... And for good reason—the involuntary physical alteration of brain structures, with its attendant effects on behavior, tends to diminish moral culpability, altering the causal relationship between impulse and action.” *Id.*, at 860.

The *Littlejohn* court reversed the death sentence in that case and remanded for an evidentiary hearing to determine whether trial counsel “was constitutionally deficient in failing to investigate and put on mitigating evidence concerning Mr. Littlejohn’s claimed physical brain injury.” *Id.*, at 867.

The case of *Fitzgerald v. Trammell*, 03-CV-531-GKF-TLW, 2013 WL 5537387, *Id.* at, 14 (N.D. Okla. Oct. 7, 2013), is an example of the complexity of death penalty litigation, the length of time required to adjudicate capital cases, and the challenges presented by the mental health and brain injury issues that are common among death penalty defendants.²⁹ The case began in 1994 and had various appeals. In 2013, the Court reversed the death sentence, finding, in part, that the defendant had “a disorganized defense team that was unable to cohere and formulate a plan for mitigation.” *Id.* at, 36. The Court found that trial counsel was ineffective for not calling an expert witness who could have explained:

... that the combination of Petitioner’s alcohol consumption, uncontrolled diabetes, and frontal lobe injury exacerbated Petitioner’s already diminished capacity and that each added factor had a negative multiplicative impact on Petitioner’s ability to control his behavior and anticipate consequences.

Id., at 42.

Another example of the complexity of death penalty law is the case of *Miller v. State*, 313 P.3d 934 (Okla. Crim. App. 2013). The appellate court reversed the death penalty on two counts of murder, one because the defendant had been previously acquitted of the death penalty. There were multiple opinions from the judges totaling 72 pages with more than 200 footnotes. Two years later, the re-sentencing had not been completed when the defendant sought relief by federal habeas petition. Because the case was still pending in state court, the federal judge said the defendant could bring a habeas petition later after his sentencing had been completed.³⁰

²⁹ The American Psychiatric Association in 2014 reaffirmed its “Position Statement on Death Sentences for Persons with Dementia or Traumatic Brain Injury”: Defendants should not be executed or sentenced to death if, at the time of the offense, they had significant limitations in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.
[https://www.google.com/url?sa=t&rc=jq&csrc=s&source=web&cd=7&ved=0ahUKEwiq5pWfoJ3RAhWGsFQKHsLzD5YQFgg_MAY&url=https%3A%2F%2Fwww.psychiatry.org%2FFile%2520Library%2FLearn%2FArchives%2FArchives%2FPosition-2014-Death-Sentence-Cognitive-Impairment.pdf&usq=AFQjCNHUdQ_cFjr99TMiygvBc49WnGnaqA&sig2=r5cAqg2XfZbOckYhO46i5w](https://www.google.com/url?sa=t&rc=jq&csrc=s&source=web&cd=7&ved=0ahUKEwiq5pWfoJ3RAhWGsFQKHsLzD5YQFgg_MAY&url=https%3A%2F%2Fwww.psychiatry.org%2FFile%2520Library%2FLearn%2FArchives%2FPosition-2014-Death-Sentence-Cognitive-Impairment.pdf&usq=AFQjCNHUdQ_cFjr99TMiygvBc49WnGnaqA&sig2=r5cAqg2XfZbOckYhO46i5w).

³⁰ *Miller v. Trammell*, 2015 WL 4666286, N.D. Oklahoma, No. 14-CV-541-JHP-TLW (2015).

The problems of ineffective assistance of counsel, inadequate expert witness resources, and prosecutorial misconduct have contributed to a high reversal rate of Oklahoma death verdicts. From 1973 to 2013, 333 people were sentenced to death in Oklahoma.⁵¹ Of these, either the sentence or the conviction was overturned in 176 cases, or 49.85 per cent.⁵² Since 2007, the federal courts have granted relief in 14 cases.⁵³

Most recently, the U.S. Supreme Court reversed a death penalty from the Oklahoma District Court because the Oklahoma Court of Criminal Appeals did not follow existing law that opinions from a victim's family members about the appropriate sentence are not admissible (*Bosse v. Oklahoma*, 196 L.Ed.2d 1 (2016)).

Trial counsel in Oklahoma state court death penalty cases are hampered by heavy caseloads, insufficient support staff, severe limits on funds for training, and limits on expert witness funding provided by the courts. Defenders in Oklahoma County average about four months' work on a capital case.⁵⁴ This situation, in which the defender resources are stretched, results in their spending less time on their cases than they think they should. It also results in a distorted perspective on the real costs of death penalty cases, because the amount of time the state defenders are able to spend on the cases is less than it should be. This is particularly true when defenders have to declare a conflict of interest and the cases go to assigned counsel. In the most recent Oklahoma County case, the judge approved compensation for the second chair lawyer of only approximately \$13,000. That level of funding makes it difficult to find qualified lawyers to work on the cases.

By contrast, the *federal* defender capital habeas unit (CHU) which handles the cases after the state appeals have been exhausted, assigns two attorneys, a lead investigator, and a paralegal to each new petition case that it receives, and the team spends more than half its time, sometimes as much as 90 per cent of its time, for approximately a year preparing the habeas petition for one client. The office has 25 open cases, and has six lawyers, four investigators, and three administrative staff. As compared with the more limited compensation for state defense teams, the CHU attorneys have salaries equivalent to salaries for Assistant U.S. Attorneys with similar experience.

While the state trial defender offices have teams of capital lawyers and mitigation specialists, when they have to declare a conflict of interest, defenders say that it can be difficult to find qualified lawyers willing to work for the meager compensation provided. The maximum compensation is \$20,000 per case for first chair lawyers, and in two cases we reviewed, the lawyers claimed approximately 500 hours of work, yielding an hourly payment of \$40. We were told that most second chair lawyers have been paid less than \$7,500. In one older Tulsa County case, an appointed lawyer moved to withdraw and filed a bill for more than \$8,000. He was paid \$500.

Experienced assistant district attorneys in Oklahoma are paid in the \$105,000 to \$128,000 per year range,⁵⁵ with benefits.⁵⁶ Conflict counsel have to pay their own overhead, including any support staff, and pay for their own benefits.

⁵¹ U.S. Department of Justice, Capital Punishment-2013, Statistical Tables, <http://www.bjs.gov/content/pub/pdf/cp13st.pdf>.

⁵² *Id.*

⁵³ Glenn Anderson: *Anderson v. Simmons*, 476 F.3d 1151 (10th Cir. 2007); Michael Browning: *Browning v. Trammell*, 717 F.3d 1092 (10th Cir. 2013); Rocky Dodd: *Dodd v. Trammell*, 750 F.3d 1177 (10th Cir. 2013); *Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009) (This includes opinion for Yancy Douglas and Paris Powell); James Fitzgerald: *Fitzgerald v. Trammell*, 2013 WL 5537387, N.D. Okla. (2013); Danny Hooks: *Hooks v. Workman*, 606 F.3d 715 (10th Cir. 2010); Victor Hooks: *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012); Emmanuel Littlejohn: *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013); David Magnan: *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013); Ernest Phillips: *Phillips v. Workman*, 604 F.3d 1202 (10th Cir. 2010); Lonnie Richie: *Richie v. Workman*, 599 F.3d 111 (10th Cir. 2010); Charles Taylor: *Taylor v. Workman*, 554 F.3d 875 (10th Cir. 2009); Sterling Williams: *Williams v. Trammell*, 559 Fed. Appx. 844 (10th Cir. Aug. 26, 2015) (unpublished).

⁵⁴ This and other statements about the practice in Oklahoma, if not otherwise indicated, are based on interviews with stakeholders conducted by Professor Boruchowitz and Alexa O'Brien from The Constitution Project.

⁵⁵ District Attorneys Council salary chart <http://oklahomawatchdata.org/state-salaries/220>.

⁵⁶ For an example of county benefits, see description of Clerk's office benefits at: <http://countyclerk.oklahomacounty.org/benefits>.

When counsel are appointed outside of the Federal Defender office to do capital habeas work, the hourly rates are determined by the court up to a maximum of \$183 per hour.³⁷ Funding for defender training is an issue, and we heard reports that some state defenders are able to go to training only with scholarships from community organizations.

The Tulsa County chief defender advised us that before he came to the office he was counsel on a federal case that was resolved with a life sentence, and his fee was approximately \$200,000. Expert witness costs were approximately \$100,000. Both of these categories are multiple times higher than what we found to be typical expenses in state capital cases. He said that the federal courts recognize the need for expert witness expenditures more than the state courts do. Although his office has not had a capital case in the two years he has been chief defender, he categorically says he does not have the resources he needs to provide effective representation in death penalty cases. He would assign two lawyers should his office have a capital case, but those lawyers would have to continue representing other felony clients, which he said is “almost impossible” to do.

He has had three cases in which his office was able to persuade the district attorney not to seek death. He said that “almost always” there is compelling mitigation evidence, and in his experience the district attorney when presented with it will often decide not to seek death. In those cases, the chief defender led the representation with the assistance of a mitigation specialist who also is a lawyer.

The mitigation specialist told us that to prepare for a presentation to the prosecutor, she prepares a citation to the records for every fact she provides. This takes a long time and sometimes the volume of records can be overwhelming. In one case, her client had been in state custody and care for 16 years and there were four boxes of records to digest. She worked on that case for approximately nine months, but because she could not obtain the records until close to the time they were to meet with the prosecutor, she worked 19 hour days for almost a week to prepare. While it is likely that some of that kind of preparation would be needed in a non-capital homicide case, the intensity and scope of the work in preparing a mitigation presentation to the prosecutor to avoid the death penalty are significantly greater. In addition to her mitigation work, the specialist also supervises three lawyers who are handling approximately 40 murder cases. She said she would like to have more staff.

The state appeals from capital cases are handled both by the trial defender offices and by the Oklahoma Indigent Defense System (OIDS), which also handles all capital state post-conviction cases as well as trial level cases in felony, misdemeanor, and juvenile levels in the 77 counties other than Tulsa and Oklahoma. Craig Sutter, the OIDS deputy executive director, told us, “The biggest problem we’ve got is the sheer numbers we are dealing with.” He added that his office had struggled with budget cuts and had asked for supplemental funding. He said, “If we don’t get funding, these cases are just going to come back because we won’t have the staff, investigators, etc. to provide adequate representation.” Mr. Sutter discussed the challenge of providing effective representation to all of his clients and the drain that capital cases cause.

³⁷ See, Chapter 6, § 630: Compensation of Appointed Counsel in Capital Cases

Guide to Judiciary Policy, Vol 7 Defender Services, Part A Guidelines for Administering the CJA and Related Statutes, Chapter 6: Federal Death Penalty and Capital Habeas Corpus Representations, <http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-6-ss-630-compensation-appointed-counsel>. There is no statutory case maximum. The policy also provides:

§ 630.20 Adequate Compensation of Counsel

In the interest of justice and judicial and fiscal economy, and in furtherance of relevant statutory provisions regarding qualifications of counsel in capital cases (see: Guide, Vol 7A, § 620.60), presiding judicial officers are urged to compensate counsel at a rate and in an amount sufficient to cover appointed counsel’s general office overhead and to ensure adequate compensation for representation provided.

In a FY 2017 budget document, OIDS submitted the following:

“What services are still provided but with a slower response rate? While the agency has been able to provide constitutionally-mandated services, budget reductions of recent years have resulted in fewer attorneys handling increasing caseloads, causing a slower response time and agency attorneys exceeding caseload recommendations of national defender organizations by 50%.”

The OIDS caseload increased from 38,000 in 2000 to 58,000 in 2015. Mr. Sutter described his office as being at a “breaking point” and said, “We have to triage everything.”

Oklahoma’s problems in this area are similar to those in other states. For example, the Florida Supreme Court called the practice of triage resulting from a public defender office’s high caseload “a damning indictment of the poor quality of trial representation that is being afforded indigent defendants by the Public Defender.” *Public Defender v. State*, 115 So. 3d 261, 274 (Fla. 2013) (footnotes omitted).

Patti Ghezzi, Assistant Federal Defender from the CHU in Oklahoma said that her office has the resources available to comply with ABA Guidelines. She said, “Frankly, Mr. Sutter doesn’t.” She said that her office’s attorneys have the time and the training to be up to speed with developments in the law. She said she had a state trial court case on federal habeas “where the time to trial was just 8 months. Just not enough time.” She said that lawyers cannot effectively prepare and try a capital case in that time.

The defender caseload is heavy as well in the state’s two largest counties, but the number of death penalty cases is vastly different between them. Oklahoma County Public Defender Bob Ravitz had 80 first degree murder cases open when he met with our team, and ten of those were death penalty cases. Tulsa County Public Defender Rob Nigh told us that he had 43 open murder cases, none of which were death penalty cases.⁵⁸

In 2015, the Tulsa County Defender had 22 felony lawyers who were appointed to 5,647 cases⁵⁹, an average caseload of 256 per lawyer, which is 70 per cent higher than nationally recommended maximum caseloads. When we met with Mr. Nigh in late 2016, he told us that his lawyers had 300 cases a year, double the nationally recommended maximum. He said, “To throw onto that a death penalty case? If you’re doing that, you shouldn’t do another case.”

There are major differences in how the courts handle murder cases from one county to the next. In Tulsa, the defenders are able to have the court issue juror questionnaires to help gather information for use in jury selection. In Oklahoma City, that is not the case.

Mr. Nigh said: “I will tell you we cannot afford to do it. Economically in my office I don’t have the funds. I truly believe that we cannot afford to do it.” He added, “Thank God we do not have any death penalty cases right now.” He noted what he called the arbitrary nature of the death penalty in Oklahoma, noting “the county boundary truly makes the difference.”

Mr. Ravitz added: “I don’t think there is any system that can make sure that innocent people can’t get executed.”

Oklahoma County District Attorney David Prater emphasized the need for defense counsel to have training

⁵⁸ The population of Oklahoma County is 776,864, and of Tulsa County, 639,242. See, Oklahoma Counties by Population, at http://www.oklahoma-demographics.com/counties_by_population.

⁵⁹ See, “Private attorneys take on cases assigned to Tulsa County public defender”, Tulsa World, June 20, 2016, http://www.tulsaworld.com/news/courts/private-at-torneys-take-on-cases-assigned-to-tulsa-county-public/article_885815c0-3fe2-576c-a367-455dca60b175.html.

and greater support. He noted what he called “horrific issues with underfunding of OIDS.”⁴⁰ He said, “I’d rather go up against the ‘biggest badass defense lawyer’ than someone not trained to do it. That is the scariest thing – every second of every day you are trying to make sure you are trying every side of that case – we have to adequately fund the public defender, OIDS, and their ability to hire experts.”⁴¹

Mr. Prater said that Defender Ravitz “has half the lawyers he should have.”⁴² Mr. Prater also emphasized the direct trauma that defense lawyers have in death penalty cases because they get close to their clients.

A case that raises a wide spectrum of issues relating to the effectiveness of trial counsel and the complexity of capital cases is *Williamson v. Reynolds*, 904 F. Supp. 1529 (E.D. Okla. 1995), *aff’d sub nom. Williamson v. Ward*, 110 F. 3d 1508(10th Cir. 1997), abrogated by *Nguyen v. Reynolds*, 131 F. 3d 1340 (10th Cir. 1997). On federal habeas corpus, the judge granted relief and ordered a new trial for a variety of reasons relating to ineffective assistance of counsel.

When the Tenth Circuit reviewed and affirmed the order for a new trial, it discussed how little time the appointed counsel spent on the case. The court reproduced part of what the lawyer had said at trial.

“Judge, I’ve got to make a living. I can’t spend all my time on this case.” Rec. vol. VIII at 12. Records reveal that Mr. Ward spent twenty-one and one-half hours preparing for the preliminary hearing, thirty-two hours at the preliminary hearing, fourteen hours on trial motions, forty-three and one-half hours preparing for trial and forty-five hours in trial, for which he was paid the maximum fee provided by law, \$5200. Rec. vol. IV, no. 3 at 369.

Williamson v. Ward, 110 F.3d 1508, 1512 (10th Cir. 1997).

The lawyer stated: “*I am a solo practitioner with a staff of only one secretary. As such I do not have the resources for extensive investigation.*” *Id* at 1517. He tried the case alone, with no investigation or expert services. The court noted that “we have pointed out that in a capital case, counsel’s duty to investigate all reasonable lines of defense is strictly observed.” *Id*, at 1514, citation omitted.

The court wrote of the compensation and lack of resources: “These factors make it economically unattractive, if not impossible in many circumstances, for appointed counsel to expend the time and effort required to adequately represent a client in a capital case.” *Id*, at 1522.

While the Oklahoma courts have since held that there should be reasonable compensation for appointed counsel,⁴³ the reality is that both defenders and appointed conflict counsel are not being paid adequately.

Our study of the cost of the death penalty in Oklahoma cannot ignore two dimensions related to the inadequate funding for public defense in capital cases. As outlined above, what the state is spending to provide defense services in death penalty cases is dramatically less than it should be to provide effective representation. This likely results in more cases having to be heard in federal habeas proceedings. And the human and social cost from undermining the fairness and integrity of the court process should be considered.

⁴⁰ Statement at Commission meeting October 26, 2016.

⁴¹ *Id*.

⁴² *Id*.

⁴³ See, *State v. Lynch*, 796 P2d 1150,1164(Okla. 1990).

F. Prosecutors

Similar to other state and local jurisdictions, we found that prosecutors, both local and state, did not systematically track time or effort on BOP and non-BOP first degree murder cases. To our benefit and for which we were very thankful, the Oklahoma County District Attorney took the time to talk to us (several times) in order to help describe his general process for capital cases and to highlight significant gaps in the system, namely the need for increased funding for public defense. We are also very thankful to the Tulsa County District Attorney who also took time out of his busy schedule to create a profile of time/effort spent on two first degree murder cases. These case profiles covered all main stages of each case, including pretrial proceedings, motions, hearings, and all other significant activities on a case. Not only did they provide line-item estimates for attorneys, but they also provided estimates for staff time on these cases as well as average salaries for both attorneys (\$80,000 per year) and staff (\$25,000). We used these time estimates to create basic cost per-unit profiles for each main line-item using the federal standards for full time employment (hours per year). We then combined these per-unit estimates with the OSCN docket data that we developed.

Table 13. Estimated Prosecution Costs Per Case: Trial Only.

Category		Mean	Diff	Ratio
All Other Activities	No BOP	\$5,037		
	BOP	\$20,876	\$15,839*	4.14
Trial Days	No BOP	\$3,811		
	BOP	\$5,702	\$1,891	1.50
	No BOP	\$8,848		
Total	BOP	\$26,577	\$17,729*	3.00
All Other Activities	Life	\$10,077		
	DP	\$27,395	\$17,318*	2.72
Trial Days	Life	\$3,990		
	DP	\$4,356	\$366	1.09
	Life	\$14,067		
Total	DP	\$31,752	\$17,684*	2.26

Notes: BOP= Bill of particulars. All other activities includes: hearings, motions, orders, and all other court filings and activities. * $p < .001$.

As is illustrated in Table 13 above, when assessing the cases from the front-end or at the BOP decision, the cases where a BOP was filed were approximately three times (\$17,684) more expensive than cases where no BOP was filed. When analyzing differences by sentence, the BOP cases are over two times more expensive than the non-BOP cases. We included the calculations for the actual trial separately from all other filings, research, and other activities, but also report total average costs here. Also, the original per-unit calculations for time “in-court” or any other activity that we were told involves more than one attorney or staff member includes that additional effort, so these numbers represent multiple attorneys and staff per case. Again, these figures do not account for effort that was not captured in the official court docket.

Separating trial costs from other activities allowed us to estimate costs for prosecution per case. It is important to state that we make the assumption here that line-item activities are measured one-to-one, meaning that we assume that the average motion in an average non-death penalty case is the same as the average motion in an average death penalty case (in terms of time and effort), for both counties. We believe that this is a very

conservative approach. Further, we purposefully underestimated values or used averages where a range of estimates were given. Therefore, we are confident in the statement that the following estimates are likely low and they do not capture the full range of effort (as with the defenders, prosecutors work on cases outside of their standard work hours) expended on each case.⁴⁴

Unfortunately, some prosecutors were uncooperative toward our efforts to measure fiscal impact or they stated that they could not help us because they “did not collect data” and lacked the ability or desire to help us estimate costs based on time and effort on particular cases. Some simply could not produce any helpful information. For example, the State Deputy Attorney General for Criminal Appeals stated that the office did not track any effort or time on any particular case, that the office did not track any financial data that would be identifiable at the case level, and that the office text-based information management system is outdated and is not able to be queried beyond looking at text entered in the case file (the same information could be found on OSCN). The Deputy Attorney General explained that they did not use any software to track attorney effort or performance on cases and that assignment decisions were made on an ad hoc basis based on caseload, in which each of the five death-qualified attorneys would carry six cases plus state capital work and certiorari petitions and that some of the appeals work was very good, while some was not. Asked whether the office was able to systematically measure performance of their attorneys, again, they responded that the office did nothing more systematic than monitor who was assigned to each case, although they had anecdotal knowledge that the office attorneys were working above and beyond their normal work hours.

The Deputy Attorney General also confirmed that since the annual frequency of death penalty cases has been decreasing, attorneys that would have previously only worked on capital cases (or spent a majority of their time on them) have shifted effort to help cover non-capital cases. The annual numbers of capital and non-capital cases (for state direct, post conviction, and federal habeas) in recent years, which the Deputy Attorney General could provide, are listed in Table 14, above. Although the office could not provide basic counts for the cases in our sample, there is a noticeable decrease in the number of both capital and non-capital cases over this time period.

Table 14. State Attorney General, Criminal Appeals Case Counts (2011-2016).

Year	State Cap	State Non-Cap	Fed Cap	Fed Non-Cap	ttl Cap (%)	ttl Non-Cap
2011	11	345	41	192	52 (9.68)	537
2012	7	361	42	142	49 (9.74)	503
2013	0	387	21	133	21(4.04)	520
2014	2	359	22	113	24 (5.08)	472
2015	9	367	19	119	28 (5.76)	486
2016	2	208	11	99	13 (4.23)	307

Notes: Cap= Capital Case; Non-Cap= Non-Capital Case; ttl= total. Average percentage of DP cases to non-DP cases All Years = 6.42%.

G. Courts

As with the other main sources of data, the courts (including county district courts and the Oklahoma Court of Criminal Appeals, which is the court of last resort for criminal cases at the state level) struggled to provide any case-level data beyond what is contained on the court docket. Furthermore, the Administrative Office of

⁴⁴ Federal standards regarding what generally constitutes full time employment were used to calculate costs for each category. According to the Office of Performance Management, a standard year used for civilian Federal employees is composed of 2,087 work hours. We use this divisor to calculate category costs for the prosecutors. For more information see: <https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/computing-hourly-rates-of-pay-using-the-2087-hour-divisor/>

the Courts lacked the ability to query and provide a matched database containing the cases that were selected for this study. Instead, they directed us to OSCN.net and said that we could look each case up, one at a time, and then copy the docket entries from there. Interestingly, the courts have attempted to update the existing case management system and integrate data and information across the state system. We were told that effort stretched over six years, at a cost of around six million dollars. Unfortunately, the courts broke off the contract with the IT design company, called American Cadastre (AmCad),⁴⁵ a month before that company apparently filed for bankruptcy. The courts are still attempting to move to a modern information management system, but it is a slow process.

Table 15. Counts of Significant Activities as Captured by Court Dockets (n= 79).

Category	BOP Y/N	Mean	Diff	Ratio
Court Administrative Fees	No	\$969		
	Yes	\$1,957	\$987	2.02
Court Admin Fee Counts	No	37.1		
	Yes	78.9	41.9	2.13
Court Appearance or Proceeding	No	5.6		
	Yes	13.2	7.6	2.37
Order or Ruling	No	17.1		
	Yes	38.6	21.5	2.26
Court Administration	No	17.8		
	Yes	29.5	11.7	1.66
Legal Filing	No	25.9		
	Yes	157.4	131.5	6.09
Free form text (MH)*	No	12.6		
	Yes	23.0	10.4	1.82
Separate free form text (MH)*	No	6.6		
	Yes	12.7	6.1	1.93
Total Averages**	No	122.6		
	Yes	353.4	230.8	2.88

Notes: *Both “free form” text entry variables consisted mainly of motions and hearings, amongst other activities. Because these were not consistent within the docket, we counted them separately from the official filing, appearance, or proceeding codes. Categories are mutually exclusive. **Total averages do not include the Court Administrative Fees category, as that is a dollar amount, rather than a count.

For the courts, the only option we were left with was to search and match the cases on OSCN.net. Fortunately, we partnered with a local software development firm called 9Tribe,⁴⁶ which was able to develop a script that pulled the unstructured data from OSCN, structured it, and converted it into a database. From there, we recoded every entry (there were 220 different types of codes/entries and over 16,000 observations) and created more general aggregated categories. These general categories include, those classified as: a court appearance or proceeding; a court administration fee; business that could be classified as general court administration; legal filings; and motions and hearings. Although we did not gain enough information regarding time per unit or activity from the courts to reliably extrapolate costs at this time, we do present the counts for each main category in Table 15, above.

⁴⁵ See: <http://newsok.com/article/feed/837615>

See also: <http://www.businesswire.com/news/home/20101202006522/en/Supreme-Court-Oklahoma-Awards-AMCAD-Integrated-Case>

⁴⁶ See: <http://www.9tribe.com/>

The average counts in each docket category were compared by whether there was a bill of particulars filed in the case. First, this provides clear evidence that the cases that proceed as death penalty-sought cases have greater average counts in every single category (which are mutually exclusive – meaning we did not double count any activities). Similar to the one-to-one assumption that we made with the prosecution data,⁴⁷ we expect about three times (1:2.88) the cost for death penalty cases compared to non-death penalty cases. Interpreted another way, if the court spent an average of \$15,000 on a non-capital case, we would expect that a capital case would spend about \$43,000 on average. These figures represent only activities recorded in the docket and do not account for any other normal activities by court personnel that may take place on the clock or outside of normal business hours.

Table 16. OCIS Court Docket Per-Case Counts (n= 103).

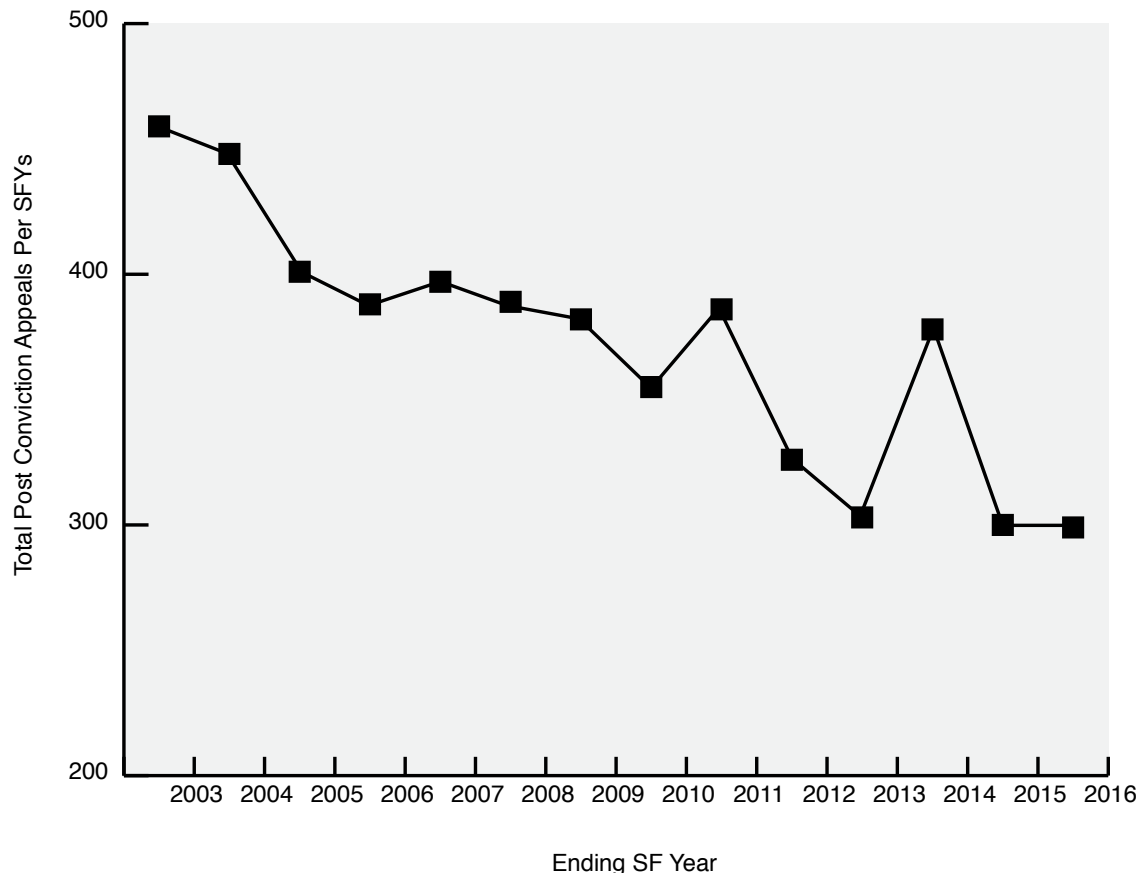
Category	N	Mean	Diff	Ratio
No BOP	50	122.6		
BOP	15	353.4	230.8	2.88
Total	79	168		
Dismissed	1	28		
Case	13	33		
Other Co-Def Not Selected for Study	18	110.6		
Agency	6	1		
Grand Total	103	108.1		

Notes: Agency= filing or billing to an outside agency – always a police department. Other and Case = both of these entries were for either co-defendants or an activity that could not be reliably linked to the defendant named in the particular case – these related to cases where there were codefendants.

Additionally, we were able to control for parties that were not named in the cases that were selected for this study. For example, if codefendants were mentioned as the party involved in the particular activity, those data were removed. Also, the code “case” represented entries in the docket that were not tied to a particular defendant. The bottom line was that if we could not match the entry to a defendant and that defendant to our case list, that defendant was excluded. These observations are presented in Table 16 above, which includes the omitted observations.

We asked for and received some information regarding the Oklahoma Court of Criminal Appeals (OCCA) workload. The court’s ability to provide comprehensive case-specific data is limited in two general ways. First, as with the entire system and as noted earlier, the OCCA is not much further along in terms of integrating a modern information management system or data repository. Second, all information pertaining to which judge is reviewing any case is kept secret. The process was explained to us by several past OCCA judges. Cases would get filed with the clerk, from there they would go to an administrator who would then assign each case, one to each judge (each judge receiving a fifth of the cases). The judges would then read the case briefs, make tentative conclusions, assign a clerk to draft the opinion (memorandum – cases resolved by summary), iron out any questions, then send the brief, memorandum, and summary to the other four judges along with a vote sheet. If all concur, the decision is handed down and if there are any separate opinions (special concur) or dissent, then they would discuss them again at conference. Once they reached an agreement, the case would be handed down (all DP opinions were published). This same judge said that back when capital punishment was sought more often, he felt that all he ever spent his time on were death penalty appeals; even into the late 2010s he felt that

⁴⁷ For example, we assume that the average motion in a non-death penalty case is on par (in terms of time and effort expended) with that of an average motion in a death penalty case.

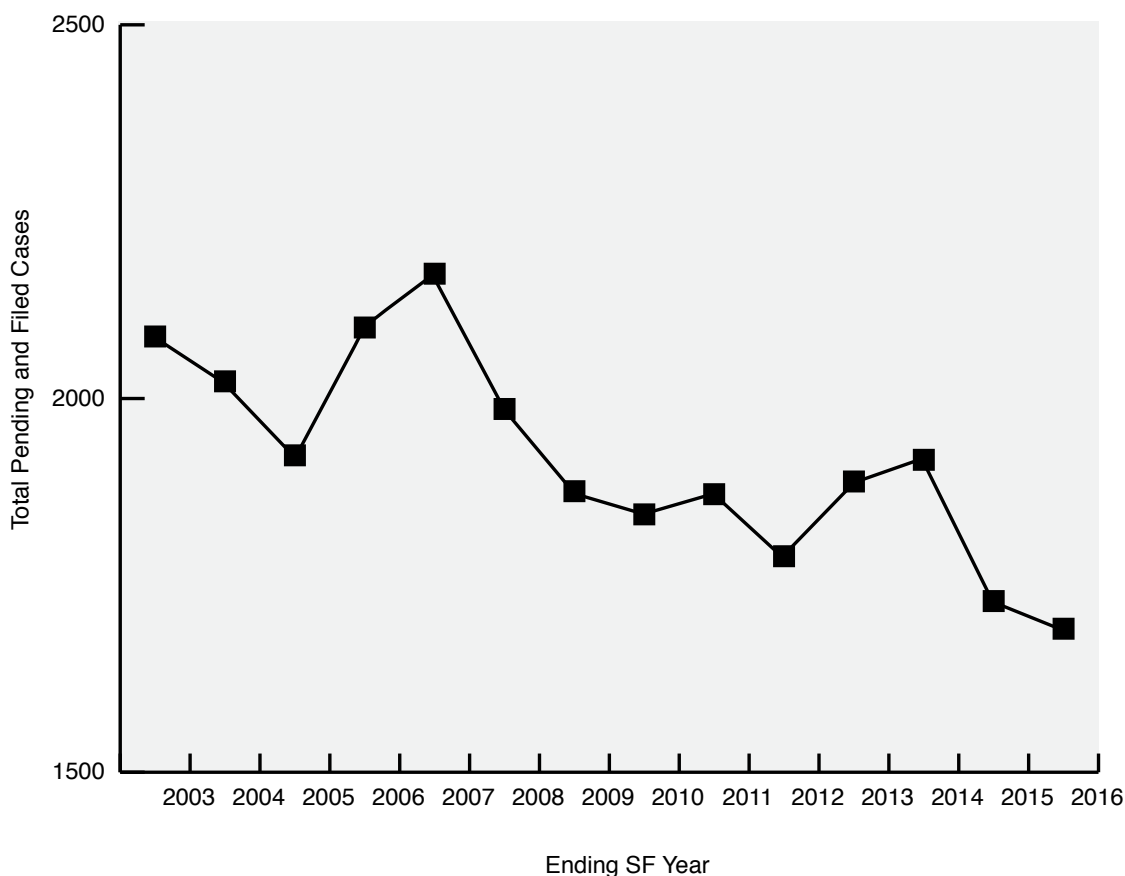
Post Conviction Appeals Disposed (OCCA) SFYs 2003-2016

he spent roughly 40 percent of his time on death penalty cases.

We were given what the Administrative Office of the Courts referred to as “caseload inventories.” These documents included state fiscal year (SFY) summaries of case that were carry-over pending, new filings that year, and disposed cases within that particular SFY.

The chart above shows the number of post-conviction appeals from the end of SFY 2005 (June 30th) to the end of SFY 2016. There is a significant decline in the number of post-conviction appeals over the study period ($r = -.889$, $p < .001$). This overall trend in the number of death penalty cases as well as post-conviction appeals in general was corroborated by the judge to whom we spoke and it is a general trend in many of the data that we have collected for this study (see Appendix for additional trends analysis). The chart, below, shows a similar and significant negative trend, but with all of the cases included ($r = -.801$, $p < .001$). Also, see the appendix for additional information on trends.

All Cases - Pending plus Filed (OCCA) SFYs 2003-2016



IX. Summary of Case-Level Findings

All known cases where a bill of particulars was filed, plus a stratified random sample of first degree murder defendants/cases that occurred from the beginning of 2004 to the end of 2010 were selected and included in the case-level study (N= 193). There were an estimated total of 439 first degree murder cases (372 defendants) that occurred during this same time. We collected what we assume to be all of the death penalty sought cases, while we took a random sample of the non-capital sought cases to construct a comparison group. The average age of the defendants at offense was 29 years old, while at sentencing the BOP group was about 1.38 years older at sentencing than the non-BOP group. Just over 92 percent of the sample was male. The largest race category was Black, which represented 101 cases, or just over half of the total sample, followed by White at 62 cases (32.1%).

For this study, White defendants entered into plea agreements at a higher rate than Black defendants (32% to 29%, respectively), while a greater number of the cases where the defendant was Black compared to White were dismissed (22% to 5%, respectively). There were a total of 44 cases that were identified as having a BOP filed during the years of the study, or 22.8 percent of the study sample. This number is artificially high, however, because the denominator is the random sample of cases and does not represent the total number of first degree murder cases identified by the Administrative Office of the Courts from 2004 to 2010. The total number is 420 cases. Therefore, the total number of BOP-filed cases occurring during the study period represents just 10.5 percent of the total. Additionally, only nine cases, or 2.14 percent, have resulted in a death sentence when

one takes the total number of first degree murder cases into account. Also, the defendants in these cases have not exhausted all of their appeals, are in various stages of either direct, post-conviction or habeas review. As we know from additional sources, the rate of reversal (from death to life) for death penalty cases in Oklahoma is about 50 percent.

The ODOC data and analysis must be considered with caution because there are costs that were not captured as part of this study as well as some other important methodological issues. For example, we do not know the extent of the costs surrounding an execution and we have little information on the costs surrounding exoneration. Additionally, the ODOC analysis is prospective, rather than retrospective and this presents issues with offender movement within the system, it presents issues with offenders who are released at some unknown point in the future, and we do not know which death sentenced offenders will actually be executed and for those who are, how long they will be on death row before they are executed. We do know that historically, about half of those sentenced to death end up either being released or their sentences are reduced to life without parole. On average, it costs almost twice as much per day to manage inmates on death row compared to the other inmate locations in this sample of cases.

On average, in cases that were designated death penalty or where a BOP was filed, defendants spent about 880 days in jail on average, while in non-capital sought first degree murder cases defendants spent about 556 days in jail on average (ratio of 1.62). The average cost for BOP defendants was about \$44,800 total, on average (2017 dollars), while non-BOP cases average about \$28,300 total, for an average difference of about \$16,500 (in 2017 USD).

Depending on what measure is considered, defense costs during pre-trial through trial show an average and statistically significant difference of about \$32,000 to \$50,000 more, or about five to ten-times the average cost when a BOP is not filed. For prosecutors, when assessing the cases from the BOP decision, the cases where a BOP was filed were about three times (\$17,684) more expensive than cases where no BOP was filed. When looking at differences by sentence, the death-sought cases are over two times more expensive than the non-death sought cases.

For appeals costs incurred by OIDS, the death penalty appeals cost an average of about \$62,000, or over six times more, than the non-death penalty appeals. When sorting the cases from the BOP decision, those cases where a death sentence was sought cost about \$43,000, or about five and a half times more than non-death sought cases. Overall, the average cost for defense in direct and post-conviction appeals in death penalty cases is between five and six times more than non-death penalty cases.

Although we did not receive enough information regarding time and effort expended on a per-case basis from the courts, we were able to calculate the average number of significant activities per case, as recorded in the docket. The average counts in each docket category were compared by whether there was a bill of particulars filed in the case. First, this provides clear evidence that the cases that proceed as death penalty sought cases have greater average counts in every single category (which are mutually exclusive – meaning we did not double count any activities). Similar to the one-to-one assumption that we made with the prosecution data, we expect about three times (1:2.88) the cost for death penalty cases compared to non-death penalty cases. Interpreted another way, *if* the court spent an average of \$15,000 on a non-capital case, we would expect that a capital case would cost about \$43,000 on average. These figures represent only activities recorded in the docket and do not account for any other normal activities by court personnel that may take place on the clock or outside of normal business hours. Finally, for the OCCA, there is a significant decline in the number of post conviction appeals over the study period. This overall trend in the number of death penalty cases as well as post conviction appeals in general was corroborated by the judge to whom we spoke and it is a general trend in much of the data that we have collected for this study.

The overall decrease in cases where prosecutors seek the death penalty in Oklahoma follows the average national trend of fewer capital cases. This trend was highlighted by the Death Penalty Information Center, in their recently released end of the year report (DPIC, 2016). Indeed, the peak number of sentences and executions occurred at the end of the 20th century and since then there has been an average decrease in both new death sentences and executions, with the total number of death sentences decreasing to the lowest annual rates since 1973 (DPIC, 2016, p.1). Although we assume that the costs listed in each category above are greatly underestimated, we can say with a great deal of confidence that on average, seeking the death penalty incurs significantly more time, effort, and costs, than when the death penalty is not sought in the first degree murder cases included in this study.

Table 17. Summary Ratios by Main Cost Category.

	Jail	Public Defense	OIDS*	Prosecutors	Courts	Total
Ratio(s)	1.58	4.65 to 9.78	5.43 to 6.26	2.26 to 3.00	2.88	3.36 to 4.7

Note: Ranges are given where there are multiple findings based on BOP or Sentence. OIDS* = Oklahoma Indigent Defense System.

The ratios listed in Table 17 above should be interpreted in the following way: “on average, for every one dollar spent on a non-death penalty first degree murder case, an average death penalty sought case costs _____ times more.” For example, District Attorneys spend about three times more on cases in which they seek the death penalty than for first degree murder cases where they do not seek the death penalty. Excluding post conviction incarceration costs and focusing just on the above categories, seeking the death penalty costs about three to four and a half times more on average than when it is not sought.

Table 18. Summary of Case-Level Findings: Main Cost Estimate Categories (2017 USD).

	Jail	Defense	Prosecutors	OIDS	Total All
Non-BOP	\$28,320	\$3,730	\$8,848	\$9,770	\$50,668
BOP	\$44,861	\$36,467	\$26,577	\$53,020	\$160,925
Diff (ratio)	\$16,541 (1.58)	\$32,737 (9.78)	\$17,729 (3.00)	\$43,250 (5.43)	\$110,257 (3.18)

Notes: OIDS= Oklahoma Indigent Defense System (direct and post-conviction appeals). Diff= Difference BOP minus non-BOP. Ratio= BOP/non-BOP. Conflict defense² average cost per BOP case = \$49,323.

In Oklahoma and Tulsa counties, we collected what we believe to be all of the cases where a BOP was filed and the death penalty was sought, while we took a random sample of the first degree murder cases where death was not sought to construct a comparison group. For those cases in which the death penalty is sought, the average total cost per case using only the data that we were able to collect, is \$161,000, while the average total for non-BOP cases is about \$51,000 per case. The estimated average per-case difference in total costs when the death penalty is sought is about \$110,000 (see Table 18 above). This includes some costs for incarceration (jail), defense, and prosecution during pre-trial and trial, some appeals costs from the defense side (Oklahoma Indigent Defense System, OIDS). Oklahoma Department of Corrections costs are provided as well and findings indicate that it costs about twice as much to maintain offenders on death row than off death row, on average. Many other costs, such as those incurred by the courts, costs associated with prosecution during appeals phases, federal defender habeas costs, and execution costs, to name a few, were not included because of lack of data.⁴⁸ Because of the noted lack of data regarding effort and costs, the figures in this report should be interpreted with care.

⁴⁸ Although data from the courts, prosecution, and other categories were not available, we were able to track case-level activities and calculate averages per case; ratios were also calculated and are presented below.

X. State-Level Approach

The analysis below was conducted in order to provide additional context to the economic costs surrounding the death penalty and to justice-related spending patterns throughout the criminal justice system in Oklahoma. Below, we assess how state-level factors, such as population size, demographics, rates of imprisonment, economic inequality, and the death penalty, among others, affect state-level justice spending over time. This is an important task, as it lends insight into what factors drive justice spending over time and it also provides some insight on where economic resource expenditures or shortages may arise in the system—for example, how the prison rate affects overall spending. It is important to note that any state, including Oklahoma, may spend less on the criminal justice system as a proportion of total state gross domestic product (GDP), but will still spend more on capital punishment at the case level on average. Again, all case-level studies, including the present study, have shown that pursuing the death penalty costs more on average than when it is not pursued in similar cases. What this multi-level analysis provides us, then, is context to further understand what factors might affect justice-related spending throughout the selected state system, why overlap or gaps in economic spending might appear, and how each state compares to the other and to national averages.

A. Background & Measures

In a recent study out of the state of Nebraska by Goss et al. (2016), the authors used multiple regression to estimate state-level justice spending and then, while controlling for several additional variables, estimated the differences in costs between whether or not a particular state had the death penalty. We were interested in exploring this technique and through contacting the author of the Nebraska study discovered that we ought to expand on their methodology. We improved on those methods in two distinct ways; first we collected data over a longer period of time, from 2007-2013. Second, we employed multilevel modeling techniques that allow for more robust estimates and allow us to control for factors for both state level spending and spending over time. Hierarchical Linear Models (HLM) is an OLS regression-based technique that is used when data are “nested,” meaning individual units form clustered groups within larger groups (Luke, 2004). An easy example of nested data would be groups of students within classrooms and then classrooms within schools. One could even go further and nest schools within school districts and so on. Given the issues surrounding the case-level data collection we were experiencing, we felt that employing these techniques for the present study might provide some additional context and another point of view on a complex set of issues.

B. Justice Spending

Similar to the Goss et al. (2016) study, our dependent variable in the model below is state-level justice spending per \$1,000 Gross Domestic Product (GDP). This is interpreted as simply how much money each state invests or spends on criminal justice-related activities per year. This technique and research question is much different than the case-level approach, where administrative data are collected as they relate to unique cases and average costs per case are calculated. To compare findings from the case-level approach to the multilevel approach would be illogical and is not methodologically appropriate. They should be seen as separate analytical frameworks. Here, justice spending represents annual expenditures for corrections (capital and operations), judicial, and legal spending per state GDP. Rather than searching for a ratio or percentage of spending per case, this technique allows us to develop an understanding of what factors significantly contribute to differences in justice spending at the state level and over time.

Justice spending as a proportion of state GDP should be understood here as a measure of the levels of socio-legal support and due process. Another way to think about this is the larger the proportion of state-level justice spending, the more invested a state is to social support, the rule of law, and to due process. To be clear, we are

suggesting smarter spending, not more, as large increases in spending may prove impossible given state budget shortfalls. The patterns and relationships revealed by the multi-level analysis support concerns voiced by many of the policy makers and practitioners to whom we spoke: that there are major gaps in support, especially for public defense, and that these gaps are even more prevalent in regard to capital cases, where people and budgets are stretched thin.

Our independent variable is whether the state had the death penalty at level one and the number of executions per year at level two. Because of the significant decrease of the use of the death penalty over the study period, including legal changes such as moratoria and abolition, we wanted to most accurately measure policy by the actual use of the penalty, rather than sentences or simply whether the state had the penalty or not. We did, however, run each variation and although executions remained the best fit in the model, all patterns were similar and remained significant.

We include several additional measures that had an *a priori* theoretical impact on justice spending. These include the proportion of state residents who are nonwhite, based on census data. Instead of employment rate, we adopted a more comprehensive measure of income inequality called the Gini⁴⁹ coefficient. We include the imprisonment rate⁵⁰ for each state (prisoners per 1,000 residents), collected by the Bureau of Justice Statistics and population data collected and maintained by the census. We include a measure on policy liberalism, which is an index relating to the annual policy outputs of state legislatures, higher values indicate more liberal policy outputs. We include time, measured in years from 2007-2013. We also include census regions at level two, so states are nested within the census regions of the West, Midwest, and South, with the reference category set at the Northeast.

Again, we include this analysis here because we wanted to understand what factors, if any, influence justice spending at the state level. These findings are provided in addition to the case-level findings and the systematic review of the literature that were provided above. As with the review of the previous studies, we hope that the findings presented below provide another data point for our understanding of the highly complex issue of the death penalty and that these findings provide some additional context within which we can not only understand spending in Oklahoma, but also how Oklahoma compares to other states that do and do not share the same policy.

C. Multi-Level Findings

Over the time-period studied (2007-2013), we observed that justice expenditures per \$1,000 GDP among the states generally increased from 2007-2009 and then declined to 2013. Summing expenditures across states, we see that overall justice expenditures increased from \$744 per \$1,000 GDP in 2007 to \$8.26 in 2009 (see the figure, below). Justice expenditures then declined to \$704 per \$1,000 GDP over the next four years. We utilized trajectory analysis and fit a quadratic model to account for this time dependence. We modeled the effects of several covariates that would explain variation in the average level, rate of increase, and rate of decrease in justice expenditures per \$1,000 GDP within and across states.⁵¹ Of particular interest was the presence of the death penalty in a state and its effect on justice expenditures.

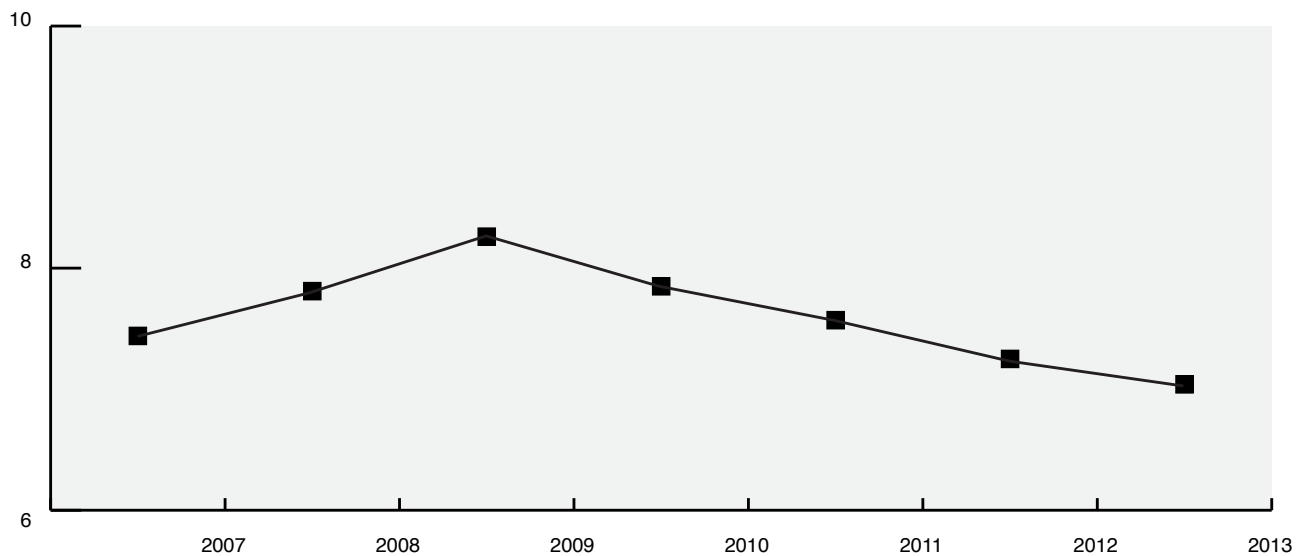
⁴⁹ Posey (2016, p. 1) explains the Gini coefficient as a: "Summary measure of income inequality. The Gini index varies from 0 to 1, with a 0 indicating perfect equality, where there is a proportional distribution of income. A Gini index of 1 indicates perfect inequality, where one household has all the income and all others have no income."

See also: http://www.shsu.edu/eco_mwf/inequality.html; http://www.shsu.edu/eco_mwf/usstatesWTID.pdf;

⁵⁰ Bureau of Justice Statistics, Prisoners Series: <https://www.bjs.gov/index.cfm?ty=pbs&sid=40>.

⁵¹ For readers who are interested, the detailed multi-level statistical analysis—including formulas and statistical models—to support these findings are on file with the authors.

Justice Expenditures per \$1,000 GDP



We found that states having the death penalty tended to have lower justice expenditures per \$1,000 GDP over time when controlling for other time-varying explanatory and control variables, and that states actually executing individuals also had lower average justice expenditures. Expenditures among states that executed more individuals during the time period tended to increase faster and decrease faster than in other states.

The pattern revealed by the model suggests that states with higher percentages of minority residents, higher degrees of economic inequality, and the death penalty, expended less money on justice-related costs as a share of their total GDP, over time. Alternatively said, states characterized by these traits tended to invest proportionally less on their justice systems over time. Additionally, states that reported a higher imprisonment rates, also spent more on average. States whose legislatures had more liberal policy outputs tended to invest proportionally more on their justice systems over time.

In addition, while average justice related expenditures per \$1,000 GDP were lower among states that executed greater numbers of individuals, justice related expenditures increased faster and decreased faster among states executing greater numbers of individuals. Alternatively said, states executing more individuals tended to invest proportionally less on their justice system on average, but their expenditures increased and decreased at higher rates than states executing fewer or no individuals.

In Table 25 below, we present the seven year averages in score and rank among states on several key variables. The variables included are average justice spending per \$1,000 GDP, the proportion of non-White residents, the average Gini score, the average imprisonment rate, and the average policy liberalism score. The states are presented in alphabetical order, with the total for all states listed first; Oklahoma is bolded, below.

In comparing categories from left to right, Oklahoma spends less on justice than the national average per GDP and is ranked 32nd nationally for this time period. This means that 18 states spent less and 31 states spent more on justice per \$1,000 GDP. Oklahoma ranked 19th in proportion to non-White residents, 18 states had higher proportions of people of color, while 32 states had less. In comparing income inequality, Oklahoma ranked 19th nationally (Gini coefficient: where a higher score [between 0 and 1] indicates higher levels of income inequality). Oklahoma's imprisonment rate was ranked 5th in the nation, with a rate of about 7 per 1,000 residents incarcerated, on average. Last, Oklahoma ranked 40th in policy liberalism, indicating much more conservative policy-making at the state level.

Table 23. Seven-Year Average Score (2007-2013) & Rank, Selected Variables.

	Justice expenditures per \$1,000 GDP		Proportion residents non-white		Gini coefficient		Imprisonment Rate		Policy Liberalism	
State	Avg.	Rank	Avg.	Rank	Avg.	Rank	Avg.	Rank	Avg.	Rank
All states	\$7.16	--	0.218	--	0.608	--	4.36	--	0.06	--
Alabama	\$6.37	33	0.304	11	0.609	22	6.64	7	-1.85	48
Alaska	\$9.26	6	0.325	9	0.565	48	7.48	3	0.12	23
Arizona	\$9.90	3	0.210	24	0.614	21	6.14	8	-0.75	32
Arkansas	\$6.65	31	0.217	21	0.624	13	5.33	12	-1.76	46
California	\$10.96	1	0.379	5	0.656	5	4.23	26	2.44	1
Colorado	\$6.90	28	0.159	32	0.606	25	4.37	23	-0.05	25
Connecticut	\$5.82	41	0.214	23	0.660	4	5.39	11	1.99	6
Delaware	\$7.57	20	0.291	14	0.564	49	7.72	2	0.73	16
Florida	\$8.75	8	0.234	20	0.689	1	5.44	10	-0.84	34
Georgia	\$7.85	17	0.389	4	0.637	8	5.63	9	-1.86	49
Hawaii	\$7.18	23	0.742	1	0.569	47	4.39	22	2.00	5
Idaho	\$8.58	10	0.078	46	0.633	10	4.82	16	-1.19	43
Illinois	\$5.11	48	0.277	15	0.623	14	3.67	33	0.65	19
Indiana	\$5.28	47	0.150	33	0.584	39	4.42	21	-0.49	29
Iowa	\$5.41	44	0.081	45	0.560	50	2.93	41	0.71	17
Kansas	\$5.87	40	0.144	35	0.598	29	3.20	39	-0.80	33
Kentucky	\$7.19	22	0.116	39	0.594	31	4.98	15	-0.70	31
Louisiana	\$8.78	7	0.367	6	0.635	9	8.70	1	-0.91	36
Maine	\$5.89	38	0.048	49	0.572	45	1.63	50	1.43	10
Maryland	\$8.04	14	0.407	2	0.570	46	3.89	30	1.70	9
Massachusetts	\$5.40	45	0.187	27	0.621	15	1.72	49	2.04	4
Michigan	\$8.64	9	0.206	26	0.608	23	4.58	19	0.35	21
Minnesota	\$5.56	42	0.135	37	0.585	38	1.86	48	1.15	13
Mississippi	\$7.73	19	0.405	3	0.632	12	7.40	4	-2.32	50
Missouri	\$5.29	46	0.166	31	0.606	24	5.13	13	-0.65	30
Montana	\$9.47	4	0.106	42	0.632	11	3.66	34	0.31	22
Nebraska	\$5.53	43	0.115	40	0.591	33	2.54	44	-0.30	28
Nevada	\$9.32	5	0.272	17	0.664	3	4.80	17	-0.21	27
NHampshire	\$4.88	49	0.057	48	0.578	42	2.12	47	0.71	18
New Jersey	\$7.16	24	0.305	10	0.617	17	2.81	42	2.41	2
New Mexico	\$10.38	2	0.275	16	0.614	20	3.26	38	1.02	14
New York	\$8.24	11	0.341	7	0.681	2	2.94	40	2.39	3
N. Carolina	\$6.13	35	0.300	13	0.600	28	4.09	27	-1.50	45
North Dakota	\$4.65	50	0.100	43	0.592	32	2.19	46	-1.44	44

State	Justice expenditures per \$1,000 GDP		Proportion residents non-white		Gini coefficient		Imprisonment Rate		Policy Liberalism	
	Avg.	Rank	Avg.	Rank	Avg.	Rank	Avg.	Rank	Avg.	Rank
Ohio	\$6.98	26	0.167	30	0.575	44	4.45	20	-0.01	24
Oklahoma	\$6.45	32	0.257	19	0.616	19	7.00	5	-1.10	40
Oregon	\$8.01	15	0.145	34	0.590	34	3.76	32	1.33	11
Pennsylvania	\$8.15	12	0.172	29	0.601	27	3.97	29	0.45	20
Rhode Island	\$6.65	30	0.180	28	0.588	37	3.41	36	1.88	7
S. Carolina	\$6.12	37	0.327	8	0.605	26	5.09	14	-1.78	47
South Dakota	\$5.87	39	0.138	36	0.619	16	4.25	25	-1.15	42
Tennessee	\$6.25	34	0.215	22	0.617	18	4.36	24	-1.00	38
Texas	\$6.12	36	0.262	18	0.642	7	6.79	6	-0.92	37
Utah	\$6.94	27	0.110	41	0.595	30	2.43	45	-1.12	41
Vermont	\$7.21	21	0.045	50	0.589	35	3.37	37	1.81	8
Virginia	\$7.01	25	0.302	12	0.583	40	4.72	18	-0.85	35
Washington	\$6.71	29	0.208	25	0.589	36	2.66	43	1.28	12
West Virginia	\$7.75	18	0.060	47	0.576	43	3.56	35	-0.11	26
Wisconsin	\$8.09	13	0.126	38	0.581	41	4.04	28	0.80	15
Wyoming	\$8.01	16	0.088	44	0.642	6	3.87	31	-1.08	39

CONCLUSIONS

The purpose of this study was to provide empirical evidence to the Commission regarding the economic costs of seeking and imposing the death penalty in Oklahoma. The main objective of the study was to estimate the difference in enumerated costs between first degree murder cases where the prosecutor sought the death penalty and similar first degree murder cases in which the death penalty was not sought.

The estimation of costs associated with seeking and imposing the death penalty and the extrapolation of those trends is complex. Despite using the most conservative estimates—in other words, likely underestimating costs, this study finds that seeking the death penalty in Oklahoma incurs significantly more time, effort, and costs on average, as compared to when the death penalty is not sought in first degree murder cases. These findings are consistent with all previous research on death penalty costs, which have found that in comparing similar cases, seeking and imposing the death penalty is more expensive than not seeking it.

At the case-level, we found a significant difference in spending patterns when comparing first degree murder cases in which the state sought the death penalty compared to similar cases in which the death penalty was not sought. The estimated average per case difference when the death penalty is sought is about \$110,000, or about three times more than when the death penalty is not sought. This is an extremely conservative figure, as we purposely underestimated costs where appropriate and this figure lacks many costs incurred by the system, especially by the courts and appeals costs linked to the prosecution.

We systematically reviewed 15 state-level studies that were conducted between 2000 and 2016. On average it cost about \$700,000 more in case-level costs to seek the death penalty than to not. While the Oklahoma estimate fell below this average, we believe the cost patterns and findings reported here are consistent with the

findings from other research studies.

We created a national model that focuses on justice spending as a proportion of state GDP, controlling for several state-level variables. This analysis was conducted in an effort to better understand how justice spending in Oklahoma compares nationally as well as how justice spending is shaped by other factors such as race, economic inequality, state prison rates, and the death penalty. Overall, Oklahoma invests less in their justice system compared to the national average and much of that spending is due to higher rates of incarceration.

We recognize that a focus on the economic costs incurred by the justice system, and ultimately tax-payers, addresses only one facet of the death penalty debate. Our focus within this study rests on economic impacts within an economic and systems context. Additional and extremely important questions related to the purpose, role, and impact of the death penalty (such as Eighth Amendment concerns, proportionality and racial disparity, those surrounding deterrence, the philosophical goals of punishment, and differences in prosecutorial/defense approaches) must also be considered when weighing any significant policy changes and impacts.

XI. Limitations

As noted throughout the above text and as with any such research endeavor, this study is not without its limitations. The biggest issue presented for this study was the lack of case-specific financial data. In many cases we were able to reliably extrapolate either real costs or create an effort/activity ratio. The overall costs, however, should be interpreted with caution, as the final figures lack many costs associated with the courts and many details from other stages of the process, including costs surrounding the execution and any costs related to exoneration settlements. Additionally, when presented with multiple cost estimates on the same measure, we selected the lesser value and always underestimated so to present the most conservative estimate possible. Given these limitations, we recommend further efforts to measure costs, especially if and when the below recommendations are acted upon.

XII. Recommendations

We understand that a focus on the economic costs incurred by the justice system, and ultimately tax-payers, addresses only one facet of discussions about the death penalty. Our focus within this study rests on economic impacts within an economic and systems context. Additional and extremely important questions related to the purpose, role, and impact of the death penalty (such as Eighth Amendment concerns, proportionality and racial disparity, those surrounding deterrence, the philosophical goals of punishment, and differences in prosecutorial/defense approaches) should also be considered when weighing any significant policy changes and impacts.

It is unclear whether Oklahoma stakeholders are able to implement the recommendations in this study, particularly given the state's budget constraints and the overall economic climate regarding its criminal justice system. We have documented the differential in costs between capital and non-capital first degree murder cases in the state. To calculate these costs, we attempted to capture costs for as many components of our sample cases as possible (e.g. incarceration costs, defense costs, prosecution costs, etc.).

However, it is quite clear that a great deal of unaccounted effort is occurring regularly in every agency included in our analysis. As researchers who have conducted similar cost studies in other states, we know and understand that, for example, prosecutors do not bill their time in a way that makes it easy to track exactly how much time—and therefore, attributable costs—is spent on any particular case. However, it is also clear that just about every agency or organization is far behind in the employment of a modern information management system that may easily allow for critical information to be collected, stored, and tracked. Such information management

provides for increased overall efficiency within the system, as well as more public awareness of how the justice system operates. Indeed, these are just some of the many important issues that arose during our efforts to collect information. We believe, however, that tenable solutions currently exist for these issues and that because they are interconnected, progress in one area should also have a positive collateral impact in another. To that end, we provide the following recommendations:⁵²

Increase accountability, transparency, consistency, and decrease risk through the following efforts:

- 1) Conduct a systematic review of justice system information gathering, sharing, and managing capabilities;
- 2) Leverage partnerships with local and state researchers and practitioners for the distinct purpose of developing and/or adopting best practices;
- 3) Openly share results with stakeholders and the community and form a short and long-term action plan for the improvement of data management, information and data dissemination, and data sharing practices;
- 4) State agencies and officials should work to install systems of accountability and transparency surrounding the death penalty specifically, as there are some very serious gaps. Addressing these gaps will only increase the likelihood of just outcomes for both victims and offenders and will decrease liability to the system; and,
- 5) Provide adequate support and training to counsel that reflects the current standards of the American Bar Association, the National District Attorneys Association, the National Legal Aid and Defender Association, and other professionally recognized resources.

We recognize that these are very broad and far-reaching recommendations. We believe, however, that these general recommendations must be met first, in order to boost the capacity for agencies to focus on any fine-tuned recommendations. For example, how would a defender's or prosecutor's office properly measure expended effort if neither collects any case-level data? Broad strokes are needed at present to produce a foundation upon which finer details may be applied with confidence.

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⁵² These recommendations do not necessarily reflect the views of the Oklahoma Death Penalty Review Commission, but are simply provided to supplement the results of this independent cost study.

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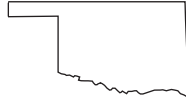
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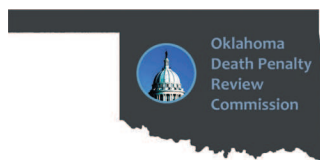
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